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**Assembly
California Legislature**



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PUBLIC SAFETY**
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GABRIEL CASWELL
STELLA Y. CHOE
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AGENDA

9:00 a.m. – July 14, 2015
State Capitol, Room 126

<u>Item</u>	<u>Bill No. & Author</u>	<u>Counsel/ Consultant</u>	<u>Summary</u>
1.	SB 11 (Beall)	Mr. Billingsley	Peace officer training: mental health.
2.	SB 29 (Beall)	Mr. Billingsley	Peace officer training: mental health.
3.	SB 170 (Gaines)	Mr. Pagan	Unmanned aircraft systems: correctional facilities.
4.	SB 178 (Leno)	Ms. Uribe	Privacy: electronic communications: search warrant.
5.	SB 213 (Block)	Mr. Caswell	Juries: criminal trials: peremptory challenges.
6.	SB 413 (Wieckowski)	Mr. Caswell	Public transit: prohibited conduct.
7.	SB 443 (Mitchell)	Mr. Billingsley	Forfeiture: controlled substances.
8.	SB 507 (Pavley)	Ms. Uribe	Sexually violent predators.
9.	SB 519 (Hancock)	Ms. Uribe	Victims of crime.

10.	SB 541 (Hill)	Mr. Billingsley	Public Utilities Commission: for-hire transportation carriers: enforcement.
11.	SB 635 (Nielsen)	Mr. Pagan	Erroneous conviction and imprisonment: compensation.
12.	SB 674 (De León)	Ms. Choe	Victims of crime: nonimmigrant status.
13.	SB 694 (Leno)	Mr. Caswell	New evidence: habeas corpus: motion to vacate judgment: indemnity.
14.	SB 707 (Wolk)	Mr. Caswell	Firearms: gun-free school zone.
15.	SB 722 (Bates)	Ms. Choe	Sex offenders: GPS monitoring: removal.
16.	SB 795 (PUB. S.)	Mr. Pagan	Public Safety Omnibus.

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Date of Hearing: July 14, 2015
Counsel: David Billingsley

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Bill Quirk, Chair

SB 11 (Beall) – As Amended July 8, 2015

SUMMARY: Requires The Commission on Peace Officer Standards and Training (POST) to establish a training course on law enforcement interaction with persons with mental illness as part of its basic training course, that is at least 15 hours. Requires POST to have a three hour continuing education course on the same subject matter. Specifically, **this bill:**

- 1) Requires POST to review the training module in the regular basic course relating to persons with a mental illness, intellectual disability, or substance use disorder, and analyze existing training curricula in order to identify areas where additional training is needed to better prepare law enforcement to effectively address incidents involving mentally disabled persons.
- 2) Specifies that upon identifying what additional training is needed, the commission shall update the training in consultation with appropriate community, local, and state organizations, and agencies that have expertise in the area of mental illness, intellectual disability, and substance use disorders, and with appropriate consumer and family advocate groups.
- 3) States that the training shall address issues related to stigma, shall be culturally relevant and appropriate, and shall include all of the following topics:
 - a) Recognizing indicators of mental illness, intellectual disability, and substance use disorders;
 - b) Conflict resolution and de-escalation techniques for potentially dangerous situations;
 - c) Use of force options and alternatives;
 - d) The perspective of individuals and/or families with lived experiences with persons with mental illness, intellectual disability, and substance use disorders; and,
 - e) Mental health resources available to the first responders of events that involve mentally disabled persons.
- 4) Requires the course of instruction to be at least 15 hours, and shall include training scenarios and facilitated learning activities relating to law enforcement interaction with persons with mental illness, intellectual disability, and substance use disorders.

- 5) Specifies that the course shall be presented within the existing hours allotted for the regular basic law enforcement training course.
- 6) States that POST shall implement this course on, or before, August 1, 2016.
- 7) Specifies that POST shall establish and keep updated a promising or evidence-based behavioral health continuing training course relating to law enforcement interaction with persons with mental illness.
- 8) Requires that the continuing training course be three consecutive hours and address issues related to stigma, shall be culturally relevant and appropriate, and shall include all of the following topics:
 - a) The cause and nature of mental illness, intellectual disability, and substance use disorders;
 - b) How to identify indicators of mental illness, intellectual disability, and substance use disorders;
 - c) How to distinguish between mental illness, intellectual disability, and substance use disorders;
 - d) How to respond appropriately in a variety of situations involving persons with mental illness, intellectual disability, and substance use disorders;
 - e) Conflict resolution and de-escalation techniques for potentially dangerous situations;
 - f) Appropriate language usage when interacting with potentially emotionally distressed persons;
 - g) Community and state resources available to serve persons with mental illness or intellectual disability, and how these resources can be best utilized by law enforcement; and,
 - h) The perspective of individuals and families with lived experiences with persons with mental illness, intellectual disability, and substance use disorders.
- 9) Requires each law enforcement officer with a rank of supervisor or below and who is assigned to patrol duties or to supervise officers who are assigned to patrol duties to complete the continuing training course every four years.

EXISTING LAW:

- 1) Establishes the Commission on Peace Officer Training and Standards. (Pen. Code, § 13500.)
- 2) Requires all peace officers to complete an introductory course of training prescribed by POST, demonstrated by passage of an appropriate examination developed by POST. (Pen. Code, § 832, subd. (a).)

- 3) Empowers POST to develop and implement programs to increase the effectiveness of law enforcement. (Pen. Code, §13503.)
- 4) Authorizes POST, for the purpose of raising the level of competence of local law enforcement officers, to adopt rules establishing minimum standards related to physical, mental and moral fitness and training that shall govern the recruitment of any peace officers in California. (Pen. Code, § 13510, subd. (a).)
- 5) Requires POST to conduct research concerning job-related educational standards and job-related selection standards to include vision, hearing, physical ability, and emotional stability and adopt standards supported by this research. (Pen. Code, § 13510, subd. (b).)
- 6) Requires POST to establish a certification program for peace officers, which shall be considered professional certificates. (Pen. Code, § 13510.1, subd. (a).)
- 7) Requires POST to prepare guidelines establishing standard procedures which may be followed by police agencies in the detection, investigation, and response to cases in which a minor is a victim of an act of abuse or neglect prohibited by this code. POST is additionally required to include adequate instruction in these procedures in the course of training leading to the basic certificate issued by POST. (Pen. Code, § 13517.)
- 8) States that POST shall include in the basic training course for law enforcement officers, adequate instruction in the handling of persons with developmental disabilities or mental illness, or both. In addition to providing instruction on the handling of these persons, the course must also include information on the cause and nature of developmental disabilities and mental illness, as well as the community resources available to serve these persons. (Pen. Code, § 13519.2)
- 9) Specifies that POST implement a course or courses of instruction for the training of law enforcement officers, as specified, in California in the handling of domestic violence complaints. The course or courses of instruction must stress enforcement of criminal laws in domestic violence situations, availability of civil remedies and community resources, and protection of the victim. (Pen. Code, § 13519.)
- 10) Requires POST to develop guidelines and a course of instruction and training for law enforcement officers who are employed as peace officers, or who are not yet employed as a peace officer but are enrolled in a training academy for law enforcement officers, addressing hate crimes. (Pen. Code, § 13519.6.)
- 11) States that POST to develop and disseminate guidelines and training for all law enforcement officers, as specified, on the racial and cultural differences among the residents of this state. The course or courses of instruction and the guidelines are required to stress understanding and respect for racial and cultural differences, and development of effective, noncombative methods of carrying out law enforcement duties in a racially and culturally diverse environment. (Pen. Code, § 13519.4.)
- 12) Requires POST to prepare guidelines establishing standard procedures which may be followed by police agencies in the investigation of sexual assault cases, and cases involving the sexual exploitation or sexual abuse of children, including, police response to, and

treatment of, victims of these crimes. The course of training leading to the basic certificate issued by the commission must include adequate instruction in these procedures. (Pen. Code, § 13516.)

- 13) Requires POST to establish and keep updated a continuing education classroom training course relating to law enforcement interaction with mentally disabled persons. The training course is required to be developed in consultation with appropriate community, local, and state organizations and agencies that have expertise in the area of mental illness and developmental disability, and with appropriate consumer and family advocate groups. POST is required to make the course available to law enforcement agencies in California. This course must consist of classroom instruction and utilize interactive training methods to ensure that the training is as realistic as possible. The course must include, at a minimum, core instruction in the following:
 - a) The cause and nature of mental illnesses and developmental disabilities; (Pen.Code, § 13515.25.)
 - b) How to identify indicators of mental disability and how to respond appropriately in a variety of common situations; (Pen.Code, § 13515.25.)
 - c) Conflict resolution and de-escalation techniques for potentially dangerous situations involving mentally disabled persons; (Pen.Code, § 13515.25.)
 - d) Appropriate language usage when interacting with mentally disabled persons; (Pen.Code, § 13515.25.)
 - e) Alternatives to lethal force when interacting with potentially dangerous mentally disabled persons; (Pen.Code, § 13515.25.)
 - f) Community and state resources available to serve mentally disabled persons and how these resources can be best utilized by law enforcement to benefit the mentally disabled community; and, (Pen.Code, § 13515.25.)
 - g) The fact that a crime committed in whole or in part because of an actual or perceived disability of the victim is a hate crime. (Pen.Code, § 13515.25.)

FISCAL EFFECT: Unknown.

COMMENTS:

- 1) **Author's Statement:** According to the author, "People with mental illnesses or intellectual disabilities are involved in nearly half of all police shootings. Yet the California Peace Officer Standard and Training Curriculum mandates only six hours of mental health training; and there is no requirement to include mental health training in an officer's continuing education. SB 11 responds to the public's demand to increase safety by mandating stronger evidence-based behavioral health training that has proven to reduce volatile confrontations between peace officers and people with mental illnesses or intellectual disabilities. Equally important, SB 11 acknowledges California's diverse populations by requiring training to be

culturally appropriate.”

- 2) **POST Training Requirements:** POST was created by the legislature in 1959 to set minimum selection and training standards for California law enforcement. (Pen. Code, § 13500, subd. (a).) Their mandate includes establishing minimum standards for training of peace officers in California. (Pen. Code § 13510, subd. (a).) As of 1989, all peace officers in California are required to complete an introductory course of training prescribed by POST, and demonstrate completion of that course by passing an examination. (Pen. Code, § 832, subd. (a).)

According to the POST Web site, the Regular Basic Course Training includes 42 separate topics, ranging from juvenile law and procedure to search and seizure. (POST, *Regular Basic Course Training Specifications*; <http://post.ca.gov/regular-basic-course-training-specifications.aspx>.) These topics are taught during a minimum of 664 hours of training. [POST, *Regular Basic Course, Course Formats*, available at: (<http://post.ca.gov/regular-basic-course.aspx>.) Over the course of the training, individuals are trained not only on policing skills such as crowd control, evidence collection and patrol techniques, they are also required to recall the basic definition of a crime and know the elements of major crimes. This requires knowledge of the California Penal code specifically

- 3) **Current Mandatory POST Instruction Related to Mental Health Issues:** POST introductory training includes a section called, Individuals with Disabilities. It is the segment of academy training focused on police officers’ interactions with people with disabilities. These six hours of instruction (less than ten percent of academy training hours) cover a wide spectrum of disability-related topics, including understanding and identifying various types of disabilities (developmental, physical and psychiatric) and reviewing state and federal disability laws and individuals rights protections. Also included in the six hours is instruction on interacting with people with mental health disabilities and the involuntary commitment process. Aside from the material contained in this six hours of instruction, there is no requirement in California law or by POST that officers receive any additional or periodic refresher training in interacting with individuals with a mental health disability. (*An Ounce of Prevention: Law Enforcement Training Mental Health Crisis Intervention*, (2014) Disability Rights California, p. 7.) <http://www.disabilityrightsca.org/pubs/CM5101.pdf>

This training in Individuals with Disabilities is not narrowly focused on matters pertaining to individuals with mental health disabilities. It covers all types of disabilities (physical, sensory, cognitive, developmental and mental) and includes an overview of federal and state disability laws. This is a daunting amount of material that does not include a mandate for instruction of best practice training techniques like de-escalation techniques and crisis intervention.

- 4) **Discretionary POST Instruction Related to Mental Health Issues:** According to POST representatives, there are currently 38 mental health training courses that have been certified by POST available statewide to law enforcement officers and dispatchers. Although training resources exists, there is no standardized mental health training curriculum statewide other than the mandatory 6 hours in the Academy. The lack of uniformity creates a patchwork of training programs offered by California law enforcement agencies. Some agencies offer robust training programs while others offer far less. Every officer, from Susanville to San Diego,

needs to be provided with the most current effective tools to interact safely with people with mental illnesses especially given the frequency of contacts with people with a mental illness (POST estimates 10-15%).

- 5) **Frequency of Law Enforcement Contacts Involving Mental Health Issues:** Law enforcement officers are often the first responders to mental health crisis calls; they respond to 911 calls ranging from suicide attempts to individuals potentially endangering themselves or others. Studies confirm that the volume of calls to law enforcement involving crisis mental health concerns have been increasing in the past decade. Mental health crisis calls also take more officer time to resolve. More than eighty percent of the agencies that Disability Rights California surveyed report that officers spend more time on these calls. Nearly 4 out of 10 agencies estimated that officers spend two hours or more on mental health calls. This means that on a typical day, officers can spend 1/3 of their time in interactions which would necessitate skills in crisis intervention and de-escalation. Beyond crisis calls, officers routinely respond to calls where they are required to determine whether a person meets the criteria for involuntary detention for psychiatric assessment and treatment (otherwise known as 5150). Even standard crime scene calls require officers to use skills to de-escalate potentially volatile situations when interacting with members of the public. (*An Ounce of Prevention: Law Enforcement Training Mental Health Crisis Intervention*, (2014) Disability Rights California, p. 37.)

Recognizing the inadequacy of academy training requirements, many law enforcement agencies throughout the state have augmented their training programs to provide officers with additional training after the academy in responding to people with mental health disabilities in crisis. Augmented training varies widely but generally includes information on recognizing the symptoms of a psychiatric disability and methods for how to interact with an individual in crisis, including specific de-escalation techniques. Topics covered in a typical Crisis Intervention Training (CIT) training program are not otherwise mandated in California or required at any level of officer training. Police chiefs and senior officers consistently report that their personnel are better equipped at handling mental health crisis calls after participating in CIT training. Furthermore, jurisdictions in which officers receive CIT training report fewer injuries, fewer incidents requiring use of force, and better outcomes for their officers and community members. (*An Ounce of Prevention: Law Enforcement Training Mental Health Crisis Intervention*, (2014) Disability Rights California, p. 38-39.)

- 6) **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 county 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. Following is the Task Force's recommendation on Crisis Intervention Training:

5.6 RECOMMENDATION: POSTs should make Crisis Intervention Training (CIT) a part of both basic recruit and in-service officer training. Crisis intervention training (CIT) was

developed in Memphis, Tennessee, in 1988 and has been shown to improve police ability to recognize symptoms of a mental health crisis, enhance their confidence in addressing such an emergency, and reduce inaccurate beliefs about mental illness. It has been found that after completing CIT orientation, officers felt encouraged to interact with people suffering a mental health crisis and to delay their “rush to resolution.” Dr. Randolph Dupont, Chair of the Department of Criminology and Criminal Justice at the University of Memphis, spoke to the task force about the effectiveness of the Memphis Crisis Intervention Team (CIT), which stresses verbal intervention and other de-escalation techniques. Noting that empathy training is an important component, Dr. Dupont said the Memphis CIT includes personal interaction between officers and individuals with mental health problems. Officers who had contact with these individuals felt more comfortable with them, and hospital mental health staff who participated with the officers had more positive views of law enforcement. CIT also provides a unique opportunity to develop cross-disciplinary training and partnerships. (*Interim Report of the President’s Task Force on 21st Century Policing* (2015), p. 56.)

- 7) **Amendments:** The amendments of July 8, 2015, reduced the mental health training requirement to a minimum of 15 hours for new law enforcement officers. The amendments also reduced the length of the continuing education course to three hours.
- 8) **Argument in Support:** According to *California Coalition for Mental Health (CCMH)*, “As you know, in the course of their duties, law enforcement officers often encounter persons living with a mental health condition. Unfortunately, new officers are sent into the field with a very little training on how best to interact with persons who may be experiencing issues related to their mental health. Of similar concern is the fact that existing officers receive little if any ongoing training in this important skill set after they leave their academies. CCMH believes that mandating increased training for officers is an essential part of a broader strategy to reduce the likelihood of tragic encounters between law enforcement and persons experiencing mental health issues.”
- 9) **Argument in Opposition:** According to *California State Sheriffs’ Association*, “Currently, Significant training on mental health issues is required of prospective and employed peace officers. The basic POST academy includes mandatory training on mental health issues and includes a scenario-based test that must be passed in order to graduate from academy. Additionally, law enforcement agencies around the state offer ongoing POST-certified crisis intervention training on mental health and require their officers to complete additional mental health training in addition to the state-mandated minimums.

“SB 11 would require 20 additional hours of training as part of basic peace officer education and four additional hours of perishable skills training on mental health issues. While CSSA does not necessarily oppose alterations to training requirements, this bill simply adds a time-based requirement without the benefit of knowing where gaps and deficiencies in existing training mandates may exist. More training for the sake of more training may not be beneficial and may come at the expense of other, more necessary training.

“POST, in conjunction with law enforcement, is in the process of examining mental health training courses and requirements to ascertain if there are issues that need to be addressed. Although we appreciate the desire to improve interactions between law enforcement and persons with mental health issues, SB 29 represents a premature, unfunded mandate that

offers no guarantee of providing the appropriate training to the right officers.”

10) **Related Legislation:** SB 29 (Beal), of the 2015-16 Legislative Session, would require 20 hours of POST training for field in to deal the individuals with mental health issues. SB 29 will be heard in this committee today.

11) **Prior Legislation:** AB 1718 (Hertzberg), Chapter 95, Statutes of 2000, required that POST establish, and keep updated, a continuing education classroom training course related to law enforcement intervention with developmentally disabled and mentally ill persons and that the course be developed in consultation with specified groups and entities.

REGISTERED SUPPORT / OPPOSITION:

Support

United Domestic Workers of America/AFSCME Local 3930 (Co-Sponsor)
America Association for Marriage and Family Therapy, California Division
American Civil Liberties Union of California
AFSCME
Association for Los Angeles Deputy Sheriffs
Association of Regional Center Agencies
The Arc and United Cerebral Palsy California Collaboration
California Association of Code Enforcement Officers
California Association of Highway Patrolmen
California Attorneys for Criminal Justice
California College and University Police Chiefs Association
California Council of Community Mental Health Agencies
California Coalition for Mental Health
California Correctional Supervisors Organization
California Crisis Intervention Training Association
California Long-Term Care Ombudsman Association
California Medical Association
California Narcotics Officers Association
California Public Defenders Association
California State Lodge, Fraternal Order of Police
City of San Jose
Contra Costa County Board of Supervisors
County Behavioral Health Directors Association
Deputy Sheriffs' Association
Disability Action Coalition
Disability Rights California
Long Beach Police Officers Association
Los Angeles County Professional Peace Officers Association
Los Angeles Police Protective League
Mental Health America of California
National Alliance on Mental Illness – California
National Alliance on Mental Illness – San Fernando Valley
National Alliance on Mental Illness – Santa Clara
National Alliance on Mental Illness – Ventura County

National Association of Social Workers
Donald Rocha, San Jose City Councilmember, District 9
Riverside Sheriffs Association
Steinberg Institute
Sacramento County Deputy Sheriffs' Association
Santa Ana Police Officers Association
Santa Clara County District Attorney
Steinberg Institute
2 Private Individuals

Opposition

California State Sheriffs' Association

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

Date of Hearing: July 14, 2015
Counsel: David Billingsley

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Bill Quirk, Chair

SB 29 (Beall) – As Amended July 8, 2015

SUMMARY: Requires law enforcement field training officers to have training from the Commission on Police Officer Standards and Training (POST) regarding law enforcement interaction with persons with mental illness or intellectual disability. Specifically, **this bill:**

- 1) Requires field training officers who provide instruction in the field training program to have at least eight hours of crisis intervention classroom training and instructor-led active learning relating to behavioral health to better train new peace officers how to effectively interact with persons with mental illness or intellectual disability. Training should be taught segments that are at least four hours long.
- 2) Excludes a field training officer who has completed 8 hours of crisis intervention behavioral health training within the past 24 months, from the training requirement.
- 3) Specifies that field training officers assigned or appointed before January 1, 2017, shall complete the crisis intervention course by June 30, 2017. Field training officers assigned or appointed on or after January 1, 2017, shall complete the crisis intervention course within 180 days of assignment or appointment.
- 4) States that nothing shall prevent an agency from requiring its field training officers from completing a crisis intervention course with a greater amount of hours or sooner than the time limits in this section.
- 5) Requires POST to establish and keep updated a field training officer course relating to competencies of the field training program and police training program that addresses how to interact with persons with mental illness or intellectual disability. This course shall be at least four hours of classroom instruction and instructor-led active learning.
- 6) Requires all prospective field training officers to complete the course as part of the field training officer program.
- 7) Requires POST to implement the provisions of this section on or before August 1, 2016.
- 8) Specifies that POST shall, by May 1, 2016, conduct a review and evaluation of the field training program and police training program to identify areas where additional training is necessary to better prepare law enforcement officers to effectively address incidents involving persons with a mental illness or an intellectual disability.
- 9) Directs that POST shall update the training in consultation with appropriate community, local, and state organizations, and agencies that have expertise in the area of mental illness,

intellectual disabilities, and substance abuse disorders, and with appropriate consumer and family advocate groups.

- 10) States that the training shall address issues related to stigma, shall be culturally relevant and appropriate, and shall include all of the following topics:
 - a) How to identify indicators of mental illness, intellectual disability, substance use disorders, neurological disorders, traumatic brain injury, post-traumatic stress disorder, and dementia;
 - b) Autism spectrum disorder;
 - c) Down syndrome;
 - d) Conflict resolution and de-escalation techniques for potentially dangerous situations;
 - e) Alternatives to use of force when interacting with potentially dangerous persons with mental illness or intellectual disabilities;
 - f) The perspective of individuals and/or families with lived experiences with persons with mental illness, intellectual disability, and substance use disorders;
 - g) Involuntary holds; and,
 - h) Community and state resources available to serve persons with mental illness or intellectual disability, and how these resources can be best utilized by law enforcement.

EXISTING LAW:

- 1) Requires any department which employs peace officers to have a POST-approved Field Training Program. Requests for approval of a department's Field Training Program must be submitted to POST and signed by the department head attesting to the adherence of the following program requirements (Cal. Code Regs., tit. 11, § 1005.):
 - a) The Field Training Program is to be delivered over a minimum of 10 weeks and based upon the structured learning content as specified in the POST manual;
 - b) A trainee must have successfully completed the Regular Basic Course before participating in the Field Training Program;
 - c) The Field Training Program must have a Field Training Supervisor/Administrator/Coordinator (SAC) who:
 - i) Has been awarded or is eligible for the award of a POST Supervisory Certificate, or has been appointed by the department head (or his/her designate); and
 - ii) Every peace officer promoted, appointed, or transferred to a supervisory or management position overseeing a field training program shall successfully complete a POST-certified Field Training Supervisor/Administrator/Coordinator Course prior

to or within 12 months of the initial promotion, appointment, or transfer to such a position.

- d) The Field Training Program must have Field Training Officers (FTOs) who:
 - i) Have been awarded a POST Basic Certificate (not Specialized);
 - ii) Have a minimum of one year general law enforcement uniformed patrol experience;
 - iii) Have been selected based upon a department-specific selection process; and,
 - iv) Meet the following training requirements:
 - (1) Successfully complete a POST-certified Field Training Officer Course prior to training new officers; and,
 - (2) Complete 24-hours of update training every three years following completion of the Field Training Officer Course.
- 2) Trainees must be supervised depending upon their assignment (Cal. Code Regs., tit. 11, § 1005.):
 - a) A trainee assigned to general law enforcement uniformed patrol duties must be under the direct and immediate supervision (physical presence) of a qualified Field Training Officer;
 - b) A trainee temporarily assigned to non-enforcement, specialized function(s) for the purpose of specialized training or orientation is not required to be in the immediate presence of a qualified Field Training Officer while performing the specialized function(s).
- 3) Trainee performance must be (Cal. Code Regs., tit. 11, § 1005.):
 - a) Documented daily through journaling, daily training notes, or Daily Observation Reports (DORs) and shall be reviewed with the trainee by the Field Training Officer; and,
 - b) Monitored by a Field Training Program SAC, or designee, by review and signing of the DORs or, by completing and/or signing weekly written summaries of performance (e.g., Supervisor's Weekly Report, Coaching and Training Reports) that are reviewed with the trainee.
- 4) The Field Training Officer's attestation of each trainee's competence and successful completion of the Field Training Program and a statement that releases the trainee from the program, along with the signed concurrence of the department head, or his or her designate, must be retained in department records. (Cal. Code Regs., tit. 11, § 1005.)
- 5) Allows a department to request an exemption of the Field Training Program requirement if (Cal. Code Regs., tit. 11, § 1005.):

- a) The department does not provide general law enforcement uniformed patrol services; or
 - b) The department hires only lateral entry officers possessing a POST Basic Certificate and who have either:
 - i) Completed a POST-approved Field Training Program, or
 - ii) One year previous experience performing general law enforcement uniformed patrol duties.
- 6) Requires a POST-Approved Field Training Program to minimally include the following topics: (1) Agency Orientation and Department Polices; (2) Officer Safety; (3) Ethics; (4) Use of Force; (5) Patrol Vehicle Operations; (6) Community Relations/Professional Demeanor (including Cultural Diversity, Community Policing, and Problem Solving; (7) Radio Communications; (8) Leadership; (9) California Codes and Law; (10) Search and Seizure; (11) Report Writing; (12) Control of Persons, Prisoners, and Mentally Ill; (13) Patrol Procedures (including Domestic Violence and Pedestrian and Vehicle Stops); (14) Investigations/Evidence; (15) Tactical Communications/Conflict Resolution; (16) Traffic (including DUI); (17) Self-Initiated Activity; (18) Additional Agency-Specific Topics (may include Community Specific Problems, Special Needs Groups, etc.). (POST Administrative Manual, Procedure D-13-3, incorporated in Cal. Code Regs., tit. 11, § 1005.)
- 7) Specifies that the POST-certified Field Training Officer Course be a minimum of 40 hours. In order to meet local needs, flexibility to present additional curriculum may be authorized with prior POST approval. Instructional methodology is at the discretion of individual course presenters unless specified otherwise in a training specification document developed for the course. The Field Training Officer Course curriculum must include the following topics: (1) Field Training Program Goals and Objectives; (2) Keys to Successful Field Training Programs; (3) Field Training Program Management/Roles of Program Personnel; (4) Teaching and Training Skills Development; (5) The Professional Relationship between the FTO and the Trainee; (6) Evaluation/Documentation; (7) Expectations and Roles of the FTO; (8) Driver Safety; (9) Officer Safety; (10) Intervention; (11) Remediation/Testing/Scenarios; (12) Trainee Termination; (13) Legal Issues and Liabilities; (14) Review of the Regular Basic Course Training; and, (15) Competency Expectations. (POST Administrative Manual, Procedure D-13-4, incorporated in Cal. Code Regs., tit. 11, § 1005.)
- 8) Requires POST to establish and keep updated a continuing education classroom training course relating to law enforcement interaction with mentally disabled persons. The training course is required to be developed in consultation with appropriate community, local, and state organizations and agencies that have expertise in the area of mental illness and developmental disability, and with appropriate consumer and family advocate groups. POST is required to make the course available to law enforcement agencies in California. This course must consist of classroom instruction and utilize interactive training methods to ensure that the training is as realistic as possible. The course must include, at a minimum, core instruction in the following:

- a) The cause and nature of mental illnesses and developmental disabilities; (Pen.Code, § 13515.25.)
- b) How to identify indicators of mental disability and how to respond appropriately in a variety of common situations; (Pen.Code, § 13515.25.)
- c) Conflict resolution and de-escalation techniques for potentially dangerous situations involving mentally disabled persons; (Pen.Code, § 13515.25.)
- d) Appropriate language usage when interacting with mentally disabled persons; (Pen.Code, § 13515.25.)
- e) Alternatives to lethal force when interacting with potentially dangerous mentally disabled persons; (Pen.Code, § 13515.25.)
- f) Community and state resources available to serve mentally disabled persons and how these resources can be best utilized by law enforcement to benefit the mentally disabled community; and, (Pen.Code, § 13515.25.)
- g) The fact that a crime committed in whole or in part because of an actual or perceived disability of the victim is a hate. (Pen.Code, § 13515.25.)

FISCAL EFFECT: Unknown.

COMMENTS:

- 1) **Author's Statement:** According to the author, " People with mental illnesses or intellectual disabilities are involved in nearly half of all police shootings. Yet the California Peace Officer Standard and Training Curriculum mandates only six hours of mental health training; and there is no requirement to include mental health training for new officers in the Field Training Program. SB 29 increases training for new officers in field training while increasing training of existing officers who supervise them. The bill responds to the public's demand to increase safety by mandating stronger evidence-based behavioral health training that has proven to reduce volatile confrontations between peace officers and people with mental illnesses or intellectual disabilities. Equally important, SB 29 acknowledges California's diverse populations by requiring training to be culturally appropriate."
- 2) **Current Mandatory POST Instruction Related to Mental Health Issues:** POST introductory training includes a section called, Individuals with Disabilities. It is the segment of academy training focused on police officers' interactions with people with disabilities. These six hours of instruction (less than ten percent of academy training hours) cover a wide spectrum of disability-related topics, including understanding and identifying various types of disabilities (developmental, physical and psychiatric) and reviewing state and federal disability laws and individuals rights protections. Also included in the six hours is instruction on interacting with people with mental health disabilities and the involuntary commitment process. Aside from the material contained in this six hours of instruction, there is no requirement in California law or by POST that officers receive any additional or periodic refresher training in interacting with individuals with a mental health disability. (*An Ounce of Prevention: Law Enforcement Training Mental Health Crisis Intervention*, (2014) Disability

Rights California, p. 7.) <http://www.disabilityrightsca.org/pubs/CM5101.pdf>

This training in Individuals with Disabilities is not narrowly focused on matters pertaining to individuals with mental health disabilities but covers all types of disabilities (physical, sensory, cognitive, developmental and mental) and includes an overview of federal and state disability laws. This is a daunting amount of material that does not include a mandate for instruction of best practice training techniques like de-escalation techniques and crisis intervention.

- 3) **Discretionary POST Instruction Related to Mental Health Issues:** According to POST representatives, there are currently 38 mental health training courses that have been certified by POST available statewide to law enforcement officers and dispatchers. Although training resources exist, there is no standardized mental health training curriculum statewide other than the mandatory 6 hours in the Academy. The lack of uniformity creates a patchwork of training programs offered by California law enforcement agencies. Some agencies offer robust training programs while others offer far less. Every officer, from Susanville to San Diego, needs to be provided with the most current effective tools to interact safely with people with mental illnesses especially given the frequency of contacts with people with a mental illness (POST estimates 10-15%).
- 4) **Frequency of Law Enforcement Contacts Involving Mental Health Issues:** Law enforcement officers are often the first responders to mental health crisis calls; they respond to 911 calls ranging from suicide attempts to individuals potentially endangering themselves or others. Studies confirm that the volume of calls to law enforcement involving crisis mental health concerns have been increasing in the past decade. Mental health crisis calls also take more officer time to resolve. More than eighty percent of the agencies that Disability Rights California surveyed report that officers spend more time on these calls. Nearly 4 out of 10 agencies estimated that officers spend two hours or more on mental health calls. This means that on a typical day, officers can spend 1/3 of their time in interactions which would necessitate skills in crisis intervention and de-escalation. Beyond crisis calls, officers routinely respond to calls where they are required to determine whether a person meets the criteria for involuntary detention for psychiatric assessment and treatment (otherwise known as 5150). Even standard crime scene calls require officers to use skills to de-escalate potentially volatile situations when interacting with members of the public. (*An Ounce of Prevention: Law Enforcement Training Mental Health Crisis Intervention*, (2014) Disability Rights California, p. 37.)

Recognizing the inadequacy of academy training requirements, many law enforcement agencies throughout the state have augmented their training programs to provide officers with additional training after the academy in responding to people with mental health disabilities in crisis. Augmented training varies widely but generally includes information on recognizing the symptoms of a psychiatric disability and methods for how to interact with an individual in crisis, including specific de-escalation techniques. Topics covered in a typical CIT training program are not otherwise mandated in California or required at any level of officer training. Police chiefs and senior officers consistently report that their personnel are better equipped at handling mental health crisis calls after participating in CIT training. Furthermore, jurisdictions in which officers receive CIT training report fewer injuries, fewer incidents requiring use of force, and better outcomes for their officers and community members. (*An Ounce of Prevention: Law Enforcement Training Mental Health Crisis*

Intervention, (2014) Disability Rights California, p. 38-39.)

- 5) **Current Field Training Requirements Related to Mental Health:** All field training requirements are regulatory. POST requires an officer be provided a minimum of 10 weeks of field training. This training must cover 18 different competency requirements, including a component relating to “Control of Persons, Prisoners, and Mentally Ill.” Under POST’s Field Training Model, trainees are required, for example, to demonstrate competency in the following (*POST Field Training Guide, Volume 2* (2014).):

12.6.02. Behavior Due to Disabilities. The trainee shall acknowledge that some disabilities (including intellectual disabilities, cerebral palsy, epilepsy, autism and other neurological conditions) are not readily apparent and that sometimes people with developmental or cognitive disabilities may have little or no conscious ability to control their behavior.

12.6.03. Dealing with Cognitive Impairment. The trainee shall recognize and demonstrate effective communications for person with cognitive impairments, with specified communication directives.

12.7.03. Mental Health Facility or Regional Center. The trainee shall identify the appropriate mental health facility or regional center within the agency’s jurisdiction to be used for evaluation, treatment, counseling, or referral.

12.7.08. Demonstrating Knowledge of Proper Procedure. Given a scenario or an actual incident involving a mentally ill or emotionally disturbed person, the trainee shall take all necessary precautions in dealing with the person, safely that the person into custody (if necessary), assure safe transportation of the person, and properly complete all necessary forms and reports.

A trainee can demonstrate competency by performing these functions in the field, through role playing, or by taking a verbal or written test. Both the Field Training Officer and the trainee have to sign a form stating that training was received and competency was demonstrated for each of the training components.

While behavioral health training is included in field training, there is currently no hour requirement. This legislation would specify how many hours of behavioral health training an officer must have by requiring the field training program include a 20-hour evidence-based behavioral health training course relating to law enforcement interaction with persons with mental illness or intellectual disability.

- 6) **Amendments:** The amendments of July 8, 2015, reduced the amount of required training for field training officers to 8 hours.
- 7) **Argument in Support:** According to *AFSCME*, “SB 29 will mandate additional evidence-based behavioral training that is proven to reduce the negative interactions between peace officers and those suffering from a mental illness or intellectual disability. This bill is needed because there is no standardized statewide mental health training curriculum for California’s peace officers. In California, there are still vast discrepancies between the quality of training programs, where some departments offer excellent training programs while other programs are sub-par. *AFSCME* supports SB 29 to create a uniform standard for peace officer mental

health training.”

- 8) **Argument in Opposition:** According to *California State Sheriffs' Association*, “Currently, Significant training on mental health issues is required of prospective and employed peace officers. The basic POST academy includes mandatory training on mental health issues and includes a scenario-based test that must be passed in order to graduate from academy. Additionally, law enforcement agencies around the state offer ongoing POST-certified crisis intervention training on mental health and require their officers to complete additional mental health training in addition to the state-mandated minimums.

“SB 29 would require 40 hours of training on mental health issues for field training officers and 20 additional hours of training on mental health issues for new officers during their field training period. While CSSA does not necessarily oppose alterations to training requirements, this bill simply adds a time-based requirement without the benefit of knowing where gaps and deficiencies in existing training mandates may exist. More training for the sake of more training may not be beneficial and may come at the expense of other, more necessary training.

“POST, in conjunction with law enforcement, is in the process of examining mental health training courses and requirements to ascertain if there are issues that need to be addressed. Although we appreciate the desire to improve interactions between law enforcement and persons with mental health issues, SB 29 represents a premature, unfunded mandate that offers no guarantee of providing the appropriate training to the right officers.”

- 9) **Related Legislation:** SB 11 (Beal), of the 2015-16 Legislative Session, would Requires The Commission on Peace Officer Standards and Training (POST) to establish training course relating to law enforcement interaction with persons with mental illness as part of its basic training course for law enforcement officers. SB 11 will be heard in this committee today.
- 10) **Prior Legislation:** AB 1718 (Hertzberg), Chapter 95, Statutes of 2000, Required that POST establish and keep updated a continuing education classroom training course relating to law enforcement intervention with developmentally disabled and mentally ill persons and that the course be developed in consultation with specified groups and entities.

REGISTERED SUPPORT / OPPOSITION:

Support

United Domestic Workers of America/AFSCME Local 3930 (Co-Sponsor)
American Civil Liberties Union of California
AFSCME
The Arc and United Cerebral Palsy California Collaboration
Association of Los Angeles Deputy Sheriffs
Association of Regional Center Agencies
California Association of Code Enforcement Officers
California Association of Highway Patrolmen
California Attorneys for Criminal Justice
California College and University Police Chiefs Association
California Council of Community Mental Health Agencies

California Crisis Intervention Training Association
California Medical Association
California Public Defenders Association
California State Lodge, Fraternal Order of Police
City of San Jose
Community Health Awareness Council
County Behavioral Health Directors Association
Disability Action Coalition
Disability Rights California
Long Beach Police Officers Association
Los Angeles County Professional Peace Officers Association
Los Angeles Police Protective League
Mental Health America of California
National Alliance on Mental Illness – California
National Alliance on Mental Illness – Santa Clara County
National Association of Social Workers
Riverside Sheriffs Association
Donald Rocha, San Jose City Councilmember, District 9
Sacramento County Deputy Sheriffs' Association
Santa Clara County District Attorney
Santa Ana Police Officers Association
State Council on Developmental Disabilities
Steinberg Institute
3 Private Individuals

Opposition

California State Sheriffs' Association

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

Date of Hearing: July 14, 2015
Chief Counsel: Gregory Pagan

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Bill Quirk, Chair

SB 170 (Gaines) – As Amended June 29, 2015

SUMMARY: Makes it a misdemeanor to operate an unmanned aircraft system on or above the grounds of a state prison or jail, except as specified. Specifically, **this bill:**

- 1) Provides that any person who knowingly and intentionally operates an unmanned aircraft system on or above the grounds of a state prison is guilty of a misdemeanor punishable by a term of imprisonment not to exceed six month, by a fine not to exceed \$1,000, or by both.
- 2) Exempts a person employed by the prison who operates an unmanned aircraft system within the scope of his or her employment, or a person who receives prior permission from the California Department of Corrections (CDCR) to operate the unmanned aircraft system over the prison.
- 3) Exempts a person employed by the jail who operates an unmanned aircraft system within the scope of his or her employment, or a person who receives prior permission from the sheriff to operate the unmanned aircraft system over the jail.
- 4) Defines "unmanned aircraft" as an aircraft that is operated without the possibility of direct human intervention from within or on the aircraft.
- 5) Defines "unmanned aircraft system" to mean an unmanned aircraft and associated elements including, but not limited to, communications links and the components that control the unmanned aircraft that are required for the pilot in command to operate safely and efficiently in the national airspace system.

EXISTING LAW:

- 1) Establishes the Aviation Administration Modernization Reform Act of 2012 which requires the Secretary of Transportation to develop a comprehensive plan to safely accelerate the integration of civil unmanned aircraft systems into the national airspace system. The plan is required to provide for safe integration of civil unmanned aircraft into national airspace as soon as practicable, but not later than September 30, 2015. (112 P.L. 95, 332.)
- 2) Provides that any person in a local correctional facility who possesses a wireless communication device, including, but not limited to, a cellular telephone, pager, or wireless Internet device, who is not authorized to possess that item is guilty of a misdemeanor, punishable by a fine of not more than \$1,000. (Pen. Code, § 4575, subd. (a).)
- 3) States that it is a misdemeanor, punishable by imprisonment in the county jail not exceeding six months, a fine not to exceed \$5,000 for each device, or both that fine and imprisonment,

for a person who possesses with the intent to deliver, or delivers, to an inmate or ward in the custody of the California Department of Corrections and Rehabilitation (CDCR) any cellular telephone or other wireless communication device or any component thereof, except as specified. (Pen. Code, § 4576, subd. (a).)

- 4) States if a person visiting an inmate or ward in the custody of CDCR, upon being searched or subjected to a metal detector, is found to be in possession of a cellular telephone or other wireless communication device or any component thereof, that device or component shall be subject to confiscation but shall be returned on the same day the person visits the inmate or ward, unless the cellular telephone or other wireless communication device or any component thereof is held as evidence in a case where the person is cited for a violation of the above provision. (Pen. Code, § 4576, subd. (b)(1).)
- 5) Provides, if, upon investigation, it is determined that no prosecution will take place, the cellular telephone or other wireless communication device or any component thereof shall be returned to the owner at the owner's expense. (Pen. Code, § 4576, subd. (b)(2).)
- 6) Requires notice of this provision shall be posted in all areas where visitors are searched prior to visitation with an inmate or ward in the custody of CDCR. (Pen. Code, § 4576, subd. (b)(3).)
- 7) States any inmate who is found to be in possession of a wireless communication device shall be subject to time credit denial or loss of up to 90 days. (Pen. Code, § 4576, subd. (c).)
- 8) Provides that a person who brings, without authorization, a wireless communication device within the secure perimeter of any prison or institution housing offenders under the jurisdiction of CDCR is deemed to have given his or her consent to CDCR using available technology to prevent that wireless device from sending or receiving telephone calls or other forms of electronic communication. Notice of this provision shall be posted at all public entry gates of the prison or institution. (Pen. Code, § 4576, subd. (d).)
- 9) Makes it a felony for smuggling a controlled substance into prison or jail. (Pen. Code, § 4573.)
- 10) States it is a felony to bring drugs or alcoholic beverages into a penal institution. (Pen. Code, § 4573.5.)
- 11) Makes it a felony to possess controlled substances where prisoners are kept. (Pen. Code, § 4573.6.)
- 12) States it is a felony to possess drugs or paraphernalia in prison or jail. (Penal Code § 4573.8.)
- 13) Makes it a felony to sell or give drugs to a person in custody in state prison or other institution under the jurisdiction of CDCR. (Pen. Code, § 4573.9.)

FISCAL EFFECT: Unknown

COMMENTS:

- 1) **Author's Statement:** According to the author, "Keeping contraband out of prison and jails is essential to running safe and orderly facilities. Studies show that the presence of contraband increases the risk of violence or disruptive behavior. However, even with the close monitoring of individuals and mail coming into prisons and jails, creating contraband-free facilities has always been a challenge.

"With public access to drones increasing, this issue is escalating. As drones become smaller and easier to operate, virtually anyone will be able to use the device to drop contraband into a prison or jail. Already there have been instances in South Carolina, Georgia, and Canada of attempts to use drones to drop contraband into prisons. It is imperative that California's penal code addresses this reality by limiting the use of drones over prisons and jails.

"Additionally, drones can be used to gather sensitive information from inside prison and jail walls. This information can be used for a variety of dangerous exploits, including inmate escapes and prison riots. Placing restrictions on the use of drones over prisons and jails helps prevent these situations.

- 2) **Argument in Support:** The *California Police Chiefs Association* states, "As unmanned aircraft become more publicly accessible, virtually anyone will be able to use the device to drop contraband into a prison or county jail. Additionally unmanned aircraft systems can be used to gather sensitive information from inside of prisons and jails. This information can be used for a variety of dangerous exploits, including inmate escapes and prison riots. Placing restrictions on the use of unmanned aircraft over prisons and jails helps prevent these situations."
- 3) **Argument in Opposition:** The *California Attorneys for Criminal Justice* argue, "The proposed Penal Code section 4577 would prohibit the use of unmanned aircraft on or above the grounds of a state prison or jail, even when not committing crimes related to the furnishing of contraband. The proposed legislation would impermissibly shield the prison system from the public eye. Given the California's prison system's history of deplorable conditions, this law would promote an air of secrecy in and around the prison's walls."

- 4) **Related Legislation:**

- a) AB 56 (Quirk) regulates the use of unmanned aircraft systems by public agencies. AB 56 is pending hearing in the Senate Appropriations Committee.
- b) AB 271 (Gaines) prohibits the unauthorized use of an unmanned aircraft system on a school grounds during school hours or to capture images of the school grounds during school hours. AB 56 is pending hearing in the Assembly Education Committee.
- c) SB 142 (Jackson) makes it a trespass to operate an unmanned aircraft system less than 350 feet above ground over private property without the consent of the owner. SB 142 is pending hearing in the Assembly Judiciary Committee.

REGISTERED SUPPORT / OPPOSITION:

Support

California Correctional Peace Officers Association
California Police Chiefs Association

Opposition

California Attorneys for Criminal Justice

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

Date of Hearing: July 14, 2015

Counsel: Sandy Uribe

ASSEMBLY COMMITTEE ON PUBLIC SAFETY

Bill Quirk, Chair

SB 178 (Leno) – As Amended July 7, 2015

SUMMARY: Prohibits a government entity from compelling the production of, or access to, electronic-communication information or electronic-device information without a search warrant or wiretap order, except under specified emergency situations. Specifically, **this bill:**

- 1) Prohibits a government entity from:
 - a) Compelling the production of or access to electronic communication information from a service provider;
 - b) Compelling the production of or access to electronic device information from any person or entity except the authorized possessor of the device; and
 - c) Accessing electronic device information by means of physical interaction or electronic communication with the device.
- 2) Permits a government entity to compel the production of, or access to, electronic information from a service provider, or compel the production of or access to electronic device information from any person or entity other than the authorized possessor of the device subject to a warrant, a wiretap order, and an order for electronic reader records, as specified.
- 3) Permits a government entity to access electronic device information by means of physical interaction or electronic communication with the device only as follows:
 - a) Pursuant to a wiretap order or a search warrant, as specified;
 - b) With the consent of the authorized possessor of the device, including when a government entity is the intended recipient of an electronic communication initiated by the authorized possessor of the device;
 - c) With the consent of the owner of the device, only when the device has been reported as lost or stolen;
 - d) If the government entity has a good-faith belief that an emergency involving danger of death or serious physical injury to any person requires access to the electronic device information; and,
 - e) If the government entity has a good-faith belief that the device is lost, stolen, or abandoned, but the entity shall only access electronic device information in order to attempt to identify, verify, or contact the owner or authorized possessor of the device.

- 4) Requires a warrant for electronic information to comply with the following:
 - a) The warrant must be limited to only that information necessary to achieve the warrant's objective, including by specifying the time periods covered, as appropriate and reasonable, the target individuals or accounts, the applications or services covered, and the types of information sought.
 - b) The warrant must comply with all other provisions of California and federal law, including any provisions prohibiting, limiting, or imposing additional requirements on the use of search warrants.
- 5) Gives the court discretion to do any of the following when issuing a warrant for electronic information, or upon the petition from the target or recipient of the warrant:
 - a) Appoint a special master charged with ensuring that only information necessary to achieve the objective of the warrant or order is produced or accessed; and,
 - b) Require that any information obtained through the execution of the warrant or order that is unrelated to the warrant's objective be destroyed as soon as feasible after that determination is made.
- 6) Authorizes, but does not require, a service provider to disclose electronic communication information or subscriber information when that disclosure is not otherwise prohibited by state or federal law.
- 7) Requires a government entity that receives electronic communication information which is voluntarily provided by a service provider to destroy that information within 90 days unless the entity has or obtains the consent of the sender or recipient, or obtains a court order authorizing its retention.
- 8) Requires a court to issue a retention order upon a finding that the conditions justifying the initial voluntary disclosure persist, in which case retention shall be authorized only for as long as those conditions persist, or there is probable cause to believe that the information constitutes evidence that a crime has been committed.
- 9) Requires a government entity that obtains electronic information pursuant to an emergency involving danger of death or serious injury to a person, to seek approval, within three days after obtaining the electronic information, from the appropriate court, as specified.
- 10) Declares that these provisions do not limit the authority of a government entity to use an administrative, grand jury, trial, or civil discovery subpoena to do either of the following:
 - a) Require an originator, addressee, or intended recipient of an electronic communication to disclose any electronic communication information associated with that communication; or,
 - b) Require an entity that provides electronic communications services to its officers, directors, employees, or agents for the purpose of carrying out their duties, to disclose

electronic communication information associated with an electronic communication to or from an officer, director, employee, or agent of the entity.

- 11) Requires a government entity that executes a warrant in an emergency pursuant to these provisions to contemporaneously serve or deliver a notice to the identified targets that informs the recipient that information about the recipient has been compelled or requested, and states with reasonable specificity the nature of the government investigation under which the information is sought, including a copy of the warrant or a written statement setting forth facts giving rise to the emergency.
- 12) Authorizes the government entity, when a warrant is sought, to submit a request supported by a sworn affidavit for an order delaying notification and prohibiting any party providing information from notifying any other party that information has been sought. The court must issue the order if it determines that there is reason to believe that notification may have an adverse result, not to exceed 90 days, but the court may grant extensions of the delay of up to 90 days each.
- 13) Requires, upon expiration of the period of delay of the notification, the government entity to serve or deliver to the identified targets of the warrant, a document that includes specified information and a copy of all electronic information obtained or a summary thereof, and a statement of the grounds for the court's determination to grant a delay in notifying the individual, as specified.
- 14) Requires, if there is no identified target of a warrant, or emergency request or access at the time of its issuance, the government entity to submit to the Department of Justice (DOJ) within three days of the execution of the warrant, a report that states the nature of the government investigation and a copy of the warrant, or a written statement.
- 15) Requires the DOJ to publish each report on its Web site within 90 days of receipt.
- 16) Declares that nothing in these provisions shall prohibit or limit a service provider or any other party from disclosing information about any request or demand for electronic information, except as provided.
- 17) Declares that no evidence obtained or retained in violation of these provisions shall be admissible in a criminal, civil, or administrative proceeding, or used in an affidavit in an effort to obtain a search warrant or court order, except as proof of a violation of these provisions.
- 18) Authorizes the Attorney General to commence a civil action to compel any government entity to comply with these provisions.
- 19) Authorizes an individual whose information is targeted by a warrant, wiretap order, or other legal process that is inconsistent with these provisions, or the California Constitution or the United States Constitution, or a service provider or any other recipient of the warrant, wiretap order, or other legal process, to petition the issuing court to void or modify the warrant, order, or process, or to order the destruction of any information obtained in violation of this chapter, the California Constitution, or the United States Constitution.

20) States that a California or foreign corporation, and its officers, employees, and agents, are not subject to any cause of action for providing records, information, facilities, or assistance in accordance with the terms of a warrant, court order, statutory authorization, emergency certification, or wiretap order issued pursuant to these provisions.

21) Defines the following terms for purposes of this Act:

- a) "Adverse result" means danger to the life or physical safety of an individual, flight from prosecution, imminent destruction of or tampering with evidence, intimidation of potential witnesses, or serious jeopardy to an investigation or undue delay of a trial.
- b) "Authorized possessor" is the possessor of an electronic device when that person is the owner of the device or has been authorized to possess the device by the owner of the device.
- c) "Electronic communication" means the transfer of signs, signals, writings, images, sounds, data, or intelligence of any nature in whole or in part by a wire, radio, electromagnetic, photoelectric, or photo-optical system.
- d) "Electronic communication information" means any information about an electronic communication or the use of an electronic communication service, including, but not limited to, the contents, sender, recipients, format, or location of the sender or recipients at any point during the communication, the time or date the communication was created, sent, or received, or any information pertaining to any individual or device participating in the communication, including, but not limited to, an IP address. It does not include subscriber information as defined in this chapter.
- e) "Electronic communication service" means a service that provides to its subscribers or users the ability to send or receive electronic communications, including any service that acts as an intermediary in the transmission of electronic communications, or stores electronic communication information.
- f) "Electronic device" is a device that stores, generates, or transmits information in electronic form.
- g) "Electronic device information" means any information stored on or generated through the operation of an electronic device, including the current and prior locations of the device.
- h) "Electronic information" is electronic communication information or electronic device information.
- i) "Government entity" is a department or agency of the state or a political subdivision thereof, or an individual acting for, or on behalf of, the state or a political subdivision thereof.
- j) "Service provider" is a person or entity offering an electronic communication service.

- k) "Specific consent" means consent provided directly to the government entity seeking information, including, but not limited to, when the government entity is the addressee or intended recipient of an electronic communication.
- l) "Subscriber information" means the name, street address, telephone number, email address, or similar contact information provided by the subscriber to the provider to establish or maintain an account or communication channel, a subscriber or account number or identifier, the length of service, and the types of services used by a user of or subscriber to a service provider.

EXISTING FEDERAL LAW: Provides that the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized. (U.S. Const., 4th Amend.; Cal. Const., art. I, § 13.)

EXISTING STATE LAW:

- 1) Prohibits exclusion of relevant evidence in a criminal proceeding on the ground that the evidence was obtained unlawfully, unless the relevant evidence must be excluded because it was obtained in violation of the federal Constitution's Fourth Amendment. (Cal. Const., art. I, § 28(f)(2) (Right to Truth-in-Evidence provision).)
- 2) Defines a "search warrant" as a written order in the name of the people, signed by a magistrate and directed to a peace officer, commanding him or her to search for a person or persons, a thing or things, or personal property, and in the case of a thing or things or personal property, bring the same before the magistrate. (Pen. Code, § 1523.)
- 3) Provides the specific grounds upon which a search warrant may be issued, including when the property or things to be seized consist of any item or constitute any evidence that tends to show a felony has been committed, or tends to show that a particular person has committed a felony. (Pen. Code, § 1524.)
- 4) Provides that a search warrant cannot be issued but upon probable cause, supported by affidavit, naming or describing the person to be searched or searched for, and particularly describing the property, thing, or things and the place to be searched. (Pen. Code, § 1525.)
- 5) Requires a magistrate to issue a search warrant if he or she is satisfied of the existence of the grounds of the application or that there is probable cause to believe their existence. (Pen. Code, § 1528, subd. (a).)
- 6) Requires a provider of electronic communication service or remote computing service to disclose to a governmental prosecuting or investigating agency the name, address, local and long distance telephone toll billing records, telephone number or other subscriber number or identity, and length of service of a subscriber to or customer of that service, and the types of services the subscriber or customer utilized, when the governmental entity is granted a search warrant. (Pen. Code, § 1524.3, subd. (a).)

- 7) States that a governmental entity receiving subscriber records or information is not required to provide notice to a subscriber or customer of the warrant. (Pen. Code, § 1524.3, subd. (b).)
- 8) Authorizes a court issuing a search warrant, on a motion made promptly by the service provider, to quash or modify the warrant if the information or records requested are unusually voluminous in nature or compliance with the warrant otherwise would cause an undue burden on the provider. (Pen. Code, § 1524.3(c).)
- 9) Requires a provider of wire or electronic communication services or a remote computing service, upon the request of a peace officer, to take all necessary steps to preserve records and other evidence in its possession pending the issuance of a search warrant or a request in writing and an affidavit declaring an intent to file a warrant to the provider. Records shall be retained for a period of 90 days, which shall be extended for an additional 90-day period upon a renewed request by the peace officer. (Pen. Code, § 1524.3, subd. (d).)
- 10) Specifies that no cause of action shall be brought against any provider, its officers, employees, or agents for providing information, facilities, or assistance in good faith compliance with a search warrant. (Pen. Code, § 1524.3, subd. (e).)
- 11) Provides for a process for a search warrant for records that are in the actual or constructive possession of a foreign corporation that provides electronic communication services or remote computing services to the general public, where the records would reveal the identity of the customers using those services, data stored by, or on behalf of, the customer, the customer's usage of those services, the recipient or destination of communications sent or from those customers, or the content of those communications. (Pen. Code, § 1524.2.)

FISCAL EFFECT: Unknown

COMMENTS:

- 1) **Author's Statement:** According to the author, "Californians are guaranteed robust constitutional rights to privacy and free speech and the Legislature has long been a leader in protecting individual privacy. However, the emergence of new technology has left California's statutory protections behind, and currently, a handwritten letter in a citizen's mailbox enjoys more robust protection from warrantless surveillance than an email in someone's inbox. This is nonsensical, and SB 178, the California Electronic Communications Privacy Act (CalECPA) will restore needed protection against warrantless government access to mobile devices, email, text messages, digital documents, metadata, and location information. CalECPA safeguards the electronic information of California residents and supports innovation in the digital economy by updating state privacy law to match our expanding use of digital information.

"California residents use technology every day to connect, communicate, work and learn. Our state's leading technology companies rely on consumer confidence in these services to help power the California economy. But consumers are increasingly concerned about warrantless government access to their digital information, and for good reason. While technology has advanced exponentially, California privacy law has remained largely unchanged. Law enforcement is increasingly taking advantage of outdated privacy laws to turn mobile phones into tracking devices and to access emails, digital documents, and text

messages without proper judicial oversight.

"For example:

- Google has had a 250% jump in government demands in just the past five years.
- AT&T received over 64,000 demands for location information in 2014, nearly 70% increase in a single year.
- Verizon received over 15,000 demands for location data in the first half of 2014, only 1/3 with a warrant.
- Twitter and Tumblr both received more demands from California law enforcement than any other state.

"As a result, public confidence in technology has been badly damaged. Polls consistently show that consumers believe that their electronic information is sensitive and that current law does not provide adequate protection from government monitoring. Companies in turn are increasingly concerned about the loss of consumer trust and its business impact, and are in need of a consistent statewide standard for law enforcement requests.

"Courts and legislatures around the country are recognizing the need to update privacy laws for the digital age. In two recent decisions, *United States v. Jones* and *Riley v. California*, the U.S. Supreme Court upheld Fourth Amendment privacy rights against warrantless government surveillance. Justice Alito in *Jones* also prompted lawmakers to take action, noting that in circumstances involving dramatic technological change 'a legislative body is well suited to gauge changing public attitudes, to draw detailed lines, and to balance privacy and public safety in a comprehensive way.'

"Sixteen state legislatures throughout the country have already heeded Justice Alito's call and enacted new legislation, with 10 states safeguarding location information and 6 states protecting electronic communications content. The White House has called on lawmakers to update the law to 'ensure the standard of protection for online, digital content is consistent with that afforded in the physical world.' A federal bill on the subject garnered over 270 bipartisan co-sponsors in the United States Congress. California has now fallen behind states as diverse as Texas, Maine, and Utah that have already enacted legislation to safeguard rights, spur innovation, and support public safety.

"SB 178 heeds the call in *Jones* for the legislature to balance privacy and public safety, and will spur innovation by updating state privacy law to match our expanding use of digital information. The bill provides:

- Appropriate Warrant Protection for Digital Information
- Proper Transparency & Oversight
- Appropriate Exceptions for Public Safety and emergency situations

"SB 178 will ensure that, in most cases, the police must obtain a warrant from a judge before accessing a person's private information, including data from personal electronic devices, email, digital documents, text messages, and location information.

"The bill also includes thoughtful exceptions to ensure that law enforcement can continue to

effectively and efficiently protect public safety in emergency situations.

"Californians should not have to choose between using new technology and keeping their personal lives private. The business impacts of eroding public confidence brought on by unwarranted government monitoring has prompted California's leading technology companies to partner with the state's premiere privacy advocates in supporting the enactment of SB 178, The California Electronic Communications Privacy Act (CalECPA)."

- 2) **Fourth Amendment Protections:** The Fourth Amendment of the United States Constitution provides that "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath of affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Section 13, Article I of the California Constitution mirrors the Fourth Amendment of the United States Constitution.

Application of the Fourth Amendment to searches or seizures of electronic information by law enforcement has recently been addressed by the United States Supreme Court in two cases.

In *U.S. v. Jones* (2012) 132 S.Ct. 945, the Court held that attaching a global positioning system (GPS) device to a person's vehicle to track his or her movements constitutes a search within the meaning of the Fourth Amendment. (*Id.* at p. 949.) The legal reasoning for this conclusion differed between the Justices. The majority based its decision on common law trespass principals, holding that attaching a GPS device to a vehicle (an "effect") for purposes of data collection constitutes a search because the government physically occupied private property for the purpose of information gathering. (*Ibid.*)

Jones left open the question of whether law enforcement's collection of geolocation data requires a warrant when there is no physical intrusion, such as when an agency obtains GPS information from a cell phone provider, or when it uses a "StingRay device" that is capable of mimicking a wireless carrier cell tower in order to force all nearby mobile phones and other cellular data devices to connect to it in order to extract data. (See e.g. <http://www.news10.net/story/news/investigations/2014/06/23/is-sacramento-county-sheriff-dept-using-stingray-to-track-collect-data/11296461/>.)

Significantly for purposes of this bill, Justice Sotomayor's concurring opinion in *Jones, supra*, asked whether technological innovations make it "necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties." (*Id.* at p. 957.) Justice Sotomayor proposed that "[t]his approach is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks. People disclose the phone numbers that they dial or text to their cellular providers; the URLs that they visit and the e-mail addresses with which they correspond to their Internet service providers; and the books, groceries, and medications they purchase to online retailers." (*Ibid.*) She suggested that people do not "reasonably expect that their movements will be recorded and aggregated in a manner that enables the Government to ascertain, more or less at will, their political and religious beliefs, sexual habits, and so on." (*Id.* at 956.)

More recently, in *Riley v. California* (2014) 134 S. Ct. 2473, the United States Supreme

Court unanimously held that police must generally obtain a warrant before searching digital information on arrestee's cell phone. In so doing, the Court recognized that the search of digital data has serious implications for an individual's privacy. The court observed that cell phones are both qualitatively and quantitatively different than other objects which might be found on an arrestee's person. (*Id.* at p. 2489.) The court found the immense storage capacity of cell phones significant and noted that this feature has several privacy implications:

First, a cell phone collects in one place may distinct types of information—an address, a note, a prescription, a bank statement, a video—that reveal much more in combination than any isolated record. Second, a cell phone's capacity allows even just one type of information to convey far more than previously possible. The sum of an individual's private life can be reconstructed through a thousand photographs labeled with dates, locations, and descriptions; ... Third, the data on a phone can date back to the purchase of the phone, or even earlier. (*Ibid.*)

As to the qualitative differences between a cell phone and physical records, the court stated:

"An Internet search and browsing history, for example, can be found on an Internet-enabled phone and could reveal an individual's private interests or concerns ... Data on a cell phone can also reveal where a person has been. Historic location information is a standard feature on many smart phones and can reconstruct someone's specific movements down to the minute, not only around town but also within a particular building. (See *United States v. Jones* 565 U.S. ___, 132 S.Ct. 945, (2012) (Sotomayor, J. concurring) ("GPS monitoring generates a precise comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations.") (*Riley v. California*, *supra*, 134 S.Ct. at p. 2490.)

Finally, the Court recognized that "cloud computing" poses additional complications when considering privacy concerns because the data viewed may not in fact be stored on the device itself. (*Id.* at p. 2491.)

The Court concluded, "Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans 'the privacies of life.' The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought. Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—get a warrant." (*Id.* at p. 2495, quotation omitted.)

This bill addresses these privacy concerns by requiring a valid search warrant in order to obtain the content of electronic communications.

- 3) **Current Privacy Practices of Electronic Communication Services Providers:** Some of the biggest technology companies in California already require a search warrant before disclosing the contents of electronic communications. According to a recent article, "Google, Microsoft, Yahoo, and Facebook all say that they require full warrants in order to provide the contents of emails and messages to government entities . . . That's a higher standard than

currently required by US law, which as of now is largely defined by the Electronic Communications Privacy Act (ECPA). The ECPA was passed in 1986 and sets a relatively low bar for accessing private data." These companies reported that they all have their own "policies that require a warrant before providing the content of messages" and that the "fourth amendment backs them up." (Bohn, "Google, Microsoft, Yahoo, and Facebook say they require warrants to give over private content," The Verge (Jan. 26, 2013), <<http://www.theverge.com/2013/1/26/3917684/google-microsoft-yahoo-facebook-require-warrants-private-content>>.)

During a hearing held by the House Judiciary Subcommittee on Crime, Terrorism, Homeland Security and Investigations, Richard Salgado, the Director for Law Enforcement and Information Security at Google provided the following testimony regarding the need to update the ECPA:

"ECPA was enacted in 1986 — well before the web as we know it today even existed. The ways in which people use the Internet in 2013 are dramatically different than 25 years ago.

"In 1986, there was no generally available way to browse the World Wide Web, and commercial email had yet to be offered to the general public. Only 340,000 Americans subscribed to cell phone service, and not one of them was able to send a text message, surf the web, or download applications. To the extent that email was used, users had to download messages from a remote server onto their personal computer, holding and storing data was expensive, and storage devices were limited by technology and size.

"In 2013, hundreds of millions of Americans use the web every day — to work, learn, connect with friends and family, entertain themselves, and more. Data transfer rates are significantly faster than when ECPA became law — making it possible to share richer data, collaborate with many people, and perform more complicated tasks in a fraction of the time. Video sharing sites, video conferencing applications, search engines, and social networks — all the stuff of science fiction in 1986 — are now commonplace. Many of these services are free.

"The distinctions that ECPA made in 1986 were foresighted in light of technology at the time. But in 2013, ECPA frustrates users' reasonable expectations of privacy. Users expect, as they should, that the documents they store online have the same Fourth Amendment protections as they do when the government wants to enter the home to seize documents stored in a desk drawer. There is no compelling policy or legal rationale for this dichotomy." (Testimony of Richard Salgado, Director, Law Enforcement and Information Security, Google Inc., House Judiciary Subcommittee on Crime, Terrorism, Homeland Security and Investigations Hearing on "ECPA Part 1: Lawful Access to Stored Content" (March 19, 2013).)

- 4) **Governor's Veto Message:** SB 467 (Leno) of the 2013-2014 Legislative session, was similar to this bill. It required a search warrant when a governmental agency seeks to obtain the contents of a wire or electronic communication that is stored, held or maintained by a provider of electronic communication services or remote computing services. SB 467 was vetoed.

In his veto message, the Governor said, "This bill requires law enforcement agencies to

obtain a search warrant when seeking access to electronic communications. Federal law currently requires a search warrant, subpoena or court order to access this kind of information and in the vast majority of cases, law enforcement agencies obtain a search warrant.

"The bill, however, imposes new notice requirements that go beyond those required by federal law and could impede ongoing criminal investigations. I do not think that is wise."

- 5) **Argument in Support:** According to the *Electronic Frontier Foundation*, a co-sponsor of this bill, "California has a long and cherished history when it comes to preserving its citizen's privacy. In 1972, Article I of the California state constitution was amended to include privacy amongst the "inalienable" rights of the people of the state. As the California Supreme Court noted in *White v. Davis*, 13 Cal.3d 757 (1975), this amendment was aimed specifically at "the accelerating encroachment on personal freedom and security caused by increased surveillance and data collection activity in contemporary society." As a result, the strong privacy rights contained in the state constitution provide greater protection than the Fourth Amendment to the U.S. Constitution. More than 35 years ago, the California Supreme Court in *People v. Blair*, 25 Cal.3d 640 (1979), disagreed with the U.S. Supreme Court and recognized that a person's telephone calling history- a primitive form of metadata – was entitled to an expectation of privacy under Article I, section 13 of the state constitution because this information provides a "virtual current biography of an individual.

"Today as the advance of technology – born out of companies and universities located in California – permeate everyday life, it become even more important to protect the privacy rights enshrined in California state constitution. Of course digital data stored on electronic devices or online provided law enforcement with a powerful investigative tool for solving crime, a tool it should be permitted to use to make Californians safer and solve crimes. But there must be a balance between security and privacy. That balance has traditionally been struck by requiring law enforcement obtain a search warrant before they can access private information.

"SB 178 brings that balance to the modern, digital world by requiring law enforcement to obtain a search warrant before it can access data on an electronic device or form an online service provider, such as an email provider or social media site.

"While the premise of SB 178 is the strong privacy protections enshrined in the California constitution, even the U.S. Supreme Court is recognizing the need to protect digital data. This past summer, its decision in *Riley v. California* confirmed that electronic devices like cell phones, and specifically the digital data stored on the phone, differ in both "a quantitative and a qualitative sense" for other physical objects accessible to law enforcement. These devices, and the digital data contained within, is "not just another technological convenience" but, given "all they contain and all they may reveal...hold for many Americans "the privacies of life." Thus the Supreme Court required police "get a warrant" before searching the data on a cell phone incident to arrest.

"SB 178 follows the spirit of *Riley* and extends the warrant requirement to a wealth of digital information that reveals personal and sensitive details about who we are, whom we communicate and associate with, and where we've been. While law enforcement will still be able to obtain this information and utilize it to solve crimes, SB 178 provides needed

oversight by requiring law enforcement obtain a search warrant in order to access this wealth of information. The bill contains reasonable exceptions that allow law enforcement to obtain digital information without a warrant during an emergency.”

- 6) **Argument in Opposition:** According to the *California State Sheriffs Association*, "This measure has a myriad of problems: it conflates existing procedures for obtaining certain electronic information under state and federal law, contains burdensome and unnecessary reporting requirements, and will undermine investigations that are fully compliant with the Fourth Amendment.

"Much of the national debate around electronic privacy goes to whether the federal statutes governing third party records provide for sufficient protections. While there is a process for some law enforcement to obtain some records via subpoena rather than a search warrant, under existing California law, California prosecutors cannot obtain any electronic information without judicial review. This measure goes beyond the question of judicial review and search warrants, however, and creates barriers that will hinder law enforcement investigations.

"Finally, we are concerned about the breadth of the exclusionary provisions of proposed section 1546.4. Whether evidence should be admitted or not should be based on a motion to suppress under Penal Code section 1538.5 and should be based on violations of the Fourth Amendment. Technical violations of the 'chapter' that do not implicate a person's right to privacy should not result in the suppression of evidence."

7) **Related Legislation:**

- a) AB 39 (Medina) revises the procedure by which a magistrate may issue a search warrant by use of a telephone and facsimile transmission, electronic mail, or computer server. AB 39 was ordered to engrossing and enrolling.
- b) AB 844 (Bloom) Chapter 57, Statutes of 2015, authorizes a foreign corporation and foreign limited liability company to consent to service of process for a search warrant by email or submission to a designated Internet Web portal.

8) **Prior Legislation:**

- a) SB 467 (Leno) of the 2013-2014 Legislative Session, would have required a search warrant when a governmental agency seeks to obtain the contents of a wire or electronic communication that is stored, held or maintained by a provider of electronic communication services or remote computing services. SB 467 was vetoed.
- b) SB 1434 (Leno), of the 2011-12 Legislative Session, would have required a government entity to get a search warrant in order to obtain the location information of an electronic device. SB 1434 was vetoed.
- c) SB 914 (Leno), of the 2011-2012 Legislative Session, would have restricted the authority of law enforcement to search portable electronic devices without obtaining a search warrant. SB 914 was vetoed.

REGISTERED SUPPORT / OPPOSITION:

Support

American Civil Liberties Union (Co-Sponsor)
California Newspaper Publishers Association (Co-Sponsor)
Electronic Frontier Foundation (Co-Sponsor)
Adobe
Airbnb
Apple Inc.
Asian Law Caucus
Bay Area Civil Liberties Coalition
California Attorneys for Criminal Justice
California Civil Liberties Advocacy
California Correctional Peace Officers Association
California Immigrant Policy Center
California Library Association
California Public Defenders Association
Center for Democracy and Technology
Center for Media Justice
Citizens for Criminal Justice Reform
Civil Justice Association of California
ColorOfChange.org
Consumer Action
Consumer Federation of California
Council on American-Islamic Relations, California Chapter
Dropbox, Inc.
Drug Policy Alliance
Ella Baker Center for Human Rights
Engine
Facebook
Foursquare Labs, Inc.
Google
Internet Archive
Internet Association
Legal Services for Prisoners with Children
LinkedIn
Media Alliance
Mozilla
Namecheap
National Center for Lesbian Rights
Oakland Privacy Working Group
Open Technology Institute
Privacy Rights Clearinghouse
Restore the Fourth, Bay Area Chapter
Small Business California
TechFreedom
The Utility Reform Network
Twitter Inc.

17 Law School Professors
One Private Individual

Opposition

California District Attorneys Association
California Police Chiefs Association
California State Sheriffs Association
California Statewide Law Enforcement Association

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

Date of Hearing: July 14, 2015
Counsel: Gabriel Caswell

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Bill Quirk, Chair

SB 213 (Block) – As Amended April 28, 2015

SUMMARY: Reduces the number of peremptory challenges from ten peremptory challenges to six peremptory challenges for both the prosecution and the defense in misdemeanor criminal trials. Specifically, **this bill:**

- 1) Provides that in any criminal case where the offense is punishable with a maximum term of imprisonment of one year or less, the defendant is entitled to six preemptory challenges. If two or more defendants are jointly tried their challenges shall be exercised jointly but each defendant shall also be entitled to two additional challenges which may be exercised separately, and the state shall also be entitled to additional challenges equal to the number of all the additional separate challenges allowed the defendants.
- 2) States that The Judicial Council shall conduct a study, and on or before January 1, 2020, shall submit a report to the public safety committees of both houses of the Legislature, on the reductions in peremptory challenges. The study shall include, but not be limited to, an examination of the number of peremptory challenges used by the defendant and the state in misdemeanor jury trials, a representative sample of the types of cases that go to jury trial, and the resulting cost savings to the courts.
- 3) Imposes a sunset date of January 1, 2021.

EXISTING LAW:

- 1) Permits each party (prosecution and defense) in criminal cases 10 peremptory challenges. Grants an additional five peremptory challenges in criminal matters to each defendant and five additional challenges, per defendant, to the prosecution when defendants are jointly charged. (Code Civ. Proc., § 231 subd. (a).)
- 2) Specifies 20 peremptory challenges per party in criminal matters when the offenses charged are punishable with death, or life in prison. Grants an additional five peremptory challenges in criminal matters to each defendant and five additional challenges, per defendant, to the prosecution when defendants are jointly charged. (Code Civ. Proc., § 231 subd. (a).)
- 3) Allows parties in criminal matters punishable with a maximum term of imprisonment of 90 days or less six peremptory challenges each. Grants an additional four peremptory challenges to defendants jointly charged, and four per defendant to the prosecution. (Code Civ. Proc., § 231 subd. (b).)

- 4) Permits challenges to jurors under the following provisions (Code Civ. Proc., § 225 subd. (b)):
 - a) Incompetency or incapacity to serve; (Code Civ. Proc., § 228.)
 - b) A challenge for cause, for disqualification from service, or a showing of bias against a party; and,
 - c) A peremptory challenge exercised by a party to the action.
- 5) Specifies a challenge for cause based upon bias may be taken for one or more of the following causes (Code Civ. Proc., § 229):
 - a) Consanguinity or affinity within the fourth degree to any party or to any alleged witness or victim in the case at bar;
 - b) Having the following relationships with a party: parent, spouse, child, guardian, ward, conservator, employer, employee, landlord, tenant, debtor, creditor, business partners, surety, attorney, and client;
 - c) Having served or participated as a juror, witness, or participant in previous litigation involving one of the parties;
 - d) Having an interest in the outcome of the event or action;
 - e) Having an unqualified opinion or belief as to the merits of the action founded on knowledge of its material facts or of some of them;
 - f) The existence of a state of mind in the juror evincing enmity against, or bias towards, either party;
 - g) That the juror is party to an action pending in the court for which he or she is drawn and which action is set for trial before the panel of which the juror is a member; and,
 - h) If the offense charged is punishable with death, the entertaining of such conscientious opinions as would preclude the juror finding the defendant guilty; in which case the juror may neither be permitted nor compelled to serve.

FISCAL EFFECT: Unknown

COMMENTS:

- 1) **Author's Statement:** According to the author, "Due to the recent budget crisis, courts significantly cut their operational budgets, laid off key personnel, and closed entire courtrooms, resulting in a significant reduction in access to justice. As a result the legislature and Governor asked our judicial system to find efficiencies while preserving justice. SB 213 is a modest measure that reduces the number of peremptory challenges in misdemeanor cases from ten to six and when multiple parties are jointly tried from five to two additional

challenges per side. The measure will increase efficiencies for the courts, community, and local economy while ensuring that justice is not undermined.

"California currently ranks among the states with the highest number of peremptory challenges in misdemeanor trials. This costs more in terms of additional volumes of jury summons as well as the need for high-capacity jury rooms and infrastructure to support those jurors. And while peremptory challenges are an important aspect of our justice system, greater numbers of peremptory challenges have been correlated with large numbers of potential jurors being discriminated and dismissed for improper reasons. The current jury selection process has proven itself to be time consuming for potential jurors, burdensome and costly for employers, and inefficient to our justice system.

"By modestly reducing the number of peremptory challenges from ten to six and additional challenges from five to two when there are multiple parties, California would continue to rank above most states while making a significant impact on reducing workload, increasing juror satisfaction, and maximizing fairness. Reducing the number of challenges will decrease the number of jurors who must maximize fairness. Reducing the number of challenges will decrease the number of jurors who must be called for service. Fewer people appearing for jury service will shorten trials as the jury selection process often is the longest part of the misdemeanor trial. This will permit judges and court personnel to be redeployed to areas where layoffs and furloughs have severely hampered court operations. Furthermore, a more efficient jury selection process results in jurors returning to work faster, significantly increasing community cost savings and juror satisfaction. Finally, modestly reducing peremptory challenges will decrease the number of potential jurors dismissed for improper reasons, thereby increasing fairness in the jury selection process, all while preserving justice."

- 2) **2014 Judicial Council Statistics on Misdemeanor Trials:** According to the most recent report on Statewide Caseload Trends, published by the Judicial Council of California¹, there were a total of 319,376 misdemeanor cases in California that were resolved prior to a trial. There were a total of 3,029 cases in the state of California that were resolved after a trial. That means that roughly 1% of misdemeanor cases in the State of California were resolved by a trial in 2014. Of that 1% of trials, only 56% of those cases (or 1,707 cases statewide) were resolved by a jury, the remaining 44% of trials were resolved by a judge. That means that nearly one-half of one percent of filed misdemeanor cases are resolved by a jury after a trial.

According to the report, the following counties had the following number of cases resolved by a jury trial²:

County Resolutions by Jury Trial in 2014

Alameda	(no data provided)
Alpine	0
Amador	2

¹ <http://www.courts.ca.gov/documents/2014-Court-Statistics-Report.pdf>

² Alameda and Orange County failed to provide complete data and are not included.

Butte	12
Calavares	2
Colusa	0
Contra Costa	122
Del Norte	2
El Dorado	14
Fresno	25
Glenn	0
Humbolt	10
Imperial	14
Inyo	1
Kern	43
Kings	6
Lake	5
Lassen	1
Los Angeles	449
Madera	3
Marin	7
Mariposa	0
Mendocino	4
Merced	7
Modoc	0
Mono	0
Monterey	45
Napa	9
Nevada	9
Orange	(no data provided)
Placer	16
Plumas	0
Riverside	83
Sacramento	15
San Benito	1
San Bernardino	133
San Diego	146
San Francisco	82
San Joaquin	26
San Luis Obispo	15
San Mateo	22
Santa Barbara	15
Santa Clara	62
Santa Cruz	15
Shasta	9
Sierra	1
Siskiyou	5
Solano	48
Sonoma	23
Stanislaus	36
Sutter	1
Tehama	0

Trinity	3
Tulare	26
Toulumne	9
Ventura	92
Yolo	27
Yuba	4

- 3) **Jury Selection Process:** The current process permits the parties to remove jurors from the panel in a criminal case by exercising both challenges for "cause" and "peremptory" challenges. These challenges are made during the voir dire phase of the trial, during which the court, with the assistance of the attorneys, inquires of the prospective jurors to determine the suitability of individuals to render a fair judgment about the facts of the case. At the commencement of voir dire, the jurors are asked to reveal any facts which may show they have a disqualification (such as hearing loss) or a relationship with one of the parties or witnesses. Some of these facts (such as employment by one of the parties) may amount to an "implied" bias which causes the juror to be excused from service. Other facts (such as having read about the case in the newspapers) may lead to questioning of the juror to establish whether an actual bias exists. A party usually demonstrates that a juror has an actual bias by eliciting views which show the juror has prejudged some element of the case. After any jurors have been removed from the panel for disqualification and bias, the parties may remove jurors without giving any reason, by exercising peremptory challenges.

In general, the number of peremptory challenges³ available to each side is:

- a) 20 in capital and life imprisonment cases;
 - b) 10 in criminal cases where the sentence may exceed 90 days in jail;
 - c) 6 in criminal cases with sentences less than 90 days in jail; or,
 - d) 6 in civil cases
- 4) **History of Peremptory Challenges:** Peremptory challenges to jurors have been part of the civil law of California since 1851, and were codified in the original Field Codes in 1872. Their previous history in England dates back to at least the Fifteenth Century when persons charged with felonies were entitled to 35 peremptory challenges to members of the jury panel. Peremptory challenges have permeated other nations which have based their systems of justice on English Common Law. Today, nations with roots in English law, such as Australia, New Zealand, and Northern Ireland, continue to utilize peremptory challenges in jury selection.

In 1986, the United States Supreme Court decided *Batson v. Kentucky*, recognizing that the peremptory challenge could be a vehicle for discrimination. Subsequent cases have sought, with some difficulty, to define the limits of inquiry into the motives of the parties in exercise

³ Additional peremptory challenges are awarded to all parties when multiple defendants are involved. The prosecution gains a proportionate number to the defense in such cases.

of challenges which might be based on race or gender. In California, under Civil Code Section 231.5, a party may not excuse a juror with a peremptory challenge based on race, color, religion, sex, national origin, sexual orientation or similar grounds. If questioned, the attorney who exercised the potentially discriminatory challenge must provide the court with a lawful and neutral reason for the use of the challenge.

- 5) **Proponent Arguments:** Proponents make a number of arguments related to court efficiency for the need to cut the number of peremptory challenges. In addition, the proponents argue that peremptory challenges are often used in a discriminatory manner to remove juries of a particular class from service.
- a) *Cost savings:* While savings are difficult to quantify precisely, reducing peremptory challenges by one-half will greatly reduce the number of jurors who must be called for service. This is because sufficient potential jurors must be present in case the full numbers of potential jurors are dismissed. Fewer juror summons' result in less paper, less postage, fewer jurors to pursue for not appearing, less physical infrastructure to hold potential jurors, etc.
 - b) *Personnel efficiencies:* Fewer people appearing for jury service will permit personnel resources involved in calling jurors for service to be redeployed in areas where layoffs and furloughs have severely hampered court operations.
 - c) *Shorter trials:* Fewer peremptory challenges will mean shorter jury selection and thus shorter trials, allowing judges and overburdened staff to handle more matters.
 - d) *Improved juror satisfaction:* Judges report that potential jurors frequently express frustration when they watch otherwise eligible jurors be dismissed for no apparent reason. The willingness of potential jurors to serve is critical to the constitutional right to jury, and judges are convinced that this simple change will help improve juror attitudes.
 - e) *More productive employees in the work force:* Calling fewer potential jurors means that more people will be working productively in their jobs, benefitting private businesses which we ask to pay for jury service and public agencies as well. In the public sector, for example, having police officers in court for shorter periods of time while jury selection unfolds will permit officers to spend more productive time in police work.
 - f) *Impact of Proposition 47:* Unlike previous versions of this bill, the proponents are now arguing that the passage of Proposition 47 has further "complicated" the judicial process. However, the passage of Proposition 47 took cases that were previously felonies and reduced them to misdemeanors. In general, defendants are more likely to plead to a misdemeanor than a felony due to the nature of the consequences of a felony plea versus a misdemeanor plea. Additionally, in terms of pressure on the courts, the courts are facing far fewer potential felony trials as a result of the passage of Proposition 47 and therefore the need for this bill would be reduced.
- 6) **Peremptory Challenges as the Only Method of Eliminating Suspected Bias, Suspected Incompetence, or Suspected Incapacity:** Under the present system, a potential juror may be excused for cause under a number of specified circumstances (generally incompetence, incapacity, and apparent implied or actual bias). One common use of peremptory challenges

is to remove potential jurors who meet the legal definition, but who the attorney suspects may be biased or incompetent.

- a) **Suspected Bias:** In general, many jurors come into the jury selection process with certain biases. Studies have shown that jury bias is particularly prevalent in criminal cases. In fact, this is one of the reasons we have the presumption of innocence.

The jury process is set up to divulge and eliminate these biases through education in basic legal principles such as the presumption of innocence, right against self-incrimination and the burden of proof. Often, jurors begin their jury service with the belief that a defendant must prove his or her innocence. Other jurors may expressly state that they believe that it is incumbent upon the defendant to testify in order to obtain a not guilty verdict. Still others commonly state when questioned that they would vote guilty at the beginning of the case, despite the fact that the defendant is presumed innocent. Upon questioning, if the juror simply states that they can fairly apply the instructions of the judge they meet the legal standard of unbiased.

- b) **Suspected Incompetence:** Jurors are expected to have basic competence in order to adequately judge the facts and circumstances of a case. For example, jurors are expected to have a basic understanding of the English language. Minimal ability to understand the language is generally accepted. One potential use of a peremptory challenge would be to remove a juror who can answer and communicate in yes and no responses, but who may not have the ability to read and comprehend the jury instructions. When a case depends on a complex understanding of the jury instructions, a juror who is less literate may not be sufficiently competent to decide the facts of the case. While this juror is not removable for cause, an attorney may choose to exercise a peremptory challenge.
- c) **Suspected Incapacity:** Jurors are expected to be physically and mentally capable of service. For example, a juror who is so physically infirm that they are unable to sit and comprehend the testimony and courtroom presentation may not be capable of serving on a jury. In instances where the judge determines that the potential juror's health is legally sufficient, an attorney may choose to remove said juror through use of a peremptory challenge. The attorney may feel that the potential juror's infirmity may be so distracting that they could not devote sufficient attention to the determination of the facts of the case.
- 7) **Misdemeanors can be Serious Offenses Imposing a Criminal Record:** The types of cases included in this bill are comparatively serious in nature compared to most civil matters. First, unlike civil matters, the prosecution must convince a unanimous jury by the highest legal standard under the law. Second, these cases involve matters which can result in imprisonment for up to one year. If multiple offenses are charged, a defendant could potentially be sentenced to consecutive multi-year stints. In addition to their liberty interests, criminal defendants must also carry a criminal record. Misdemeanors such as vehicular manslaughter, assault, battery, molestation and domestic violence would be covered under this legislation.
- 8) **Additional Cost and Strain upon the System/Danger of Retrials:** Prosecuting attorneys have the daunting burden of proving to a unanimous jury that a defendant is guilty of the

charges beyond a reasonable doubt.⁴ When a criminal jury cannot reach a unanimous verdict, the prosecution may retry the case and attempt to achieve a unanimous verdict with another trial. There is no limit to the number of trials the prosecution can bring. Every retrial strains the system and requires the cost of a trial. By reducing peremptory challenges available to the prosecution, the likelihood of a non-unanimous jury increases thereby increasing the chances of costly retrials.

9) **Studies Conducted and Compiled by the "National Jury Project":** The National Jury Project (NJP) is a non-profit corporation in Minnesota, with subsidiaries in California, Minnesota, and New York. The NJP has found that numerous institutional and societal norms make the selection of a fair, competent, and unbiased jury difficult. Specifically, the process fails to provide necessary safeguards or allow necessary inquiry into the jury selection process.

a) **Jurors' Opinions and Attitudes:** A juror's preconceptions can substantially impact his or her ability to be fair or impartial.

i) **Bias Against Criminal Defendants:** One important source of bias in any criminal case is the inability or unwillingness of some potential jurors to apply fundamental legal principles correctly. In every jurisdiction, a substantial proportion of persons eligible for jury service enters the courtroom predisposed against any criminal defendant. This predisposition is expressed in disagreement with legal principles designed to protect the presumption of innocence. Attitudinal surveys conducted by NJP in jurisdictions throughout the country reveal that a substantial proportion of persons eligible for jury service believe the following.

(1) Persons eligible for jury service who agree that defendants in criminal trials should be required to testify despite the right against self-incrimination:

<u>Jurisdiction</u>	<u>% Who Agree</u>
Northern District of California (1975)	66%
San Francisco County (1986)	64%

(2) Persons eligible for jury service expecting defendants to prove their innocence despite judge's instructions to the contrary (burden of proof and presumption of innocence):

<u>County</u>	<u>% Who Agree</u>
Alameda (1989)	54%
Lake (1993)	53%
Los Angeles (1995)	50%
Marin (1990)	51%
Napa (1999)	48%
Orange (1991)	46%

⁴The highest standard of proof in the legal system.

Sacramento (2002)	51%
San Diego (1989)	52%
San Francisco (1986)	51%
San Joaquin (1990)	62%
San Mateo (1990)	57%
Santa Clara (1989)	54%
Shasta (1992)	52%
Solano (2003)	54%
Sonoma (1992)	47%
Tulare (2003)	64%
Ventura (1990)	53%
Yolo (1991)	41%

- (3) Persons eligible for jury service agreeing that "If the government brings someone to trial, that person is probably guilty of some crime."

<u>County</u>	<u>% Who Agree</u>
Contra Costa (1990)	27%
Marin (1990)	19%
Merced (1986)	35%
Orange (1984)	32%
Sacramento (1984)	32%
San Joaquin (1990)	21%
San Francisco (1986)	20%
San Mateo (1984)	37%
Solano (1985)	34%
Sonoma (1980)	40%
Yolo (1980)	33%

- ii) **Prejudicial Attitudes:** The ability to be fair and impartial may be precluded by an individual's general prejudicial attitudes or opinions. General attitudes may preclude impartiality. For example, among those who know or understand that under our system of jurisprudence a defendant is presumed innocent unless proven guilty, there are some who at the same time expect the defendant to prove his or her innocence. Since an excuse for cause requires a juror's explicit admission that she or he cannot be fair in the specific case, some judges resist inquiry into areas of general prejudice.
- iii) **Prejudgment:** Jurors who already have opinions about an individual in a case commonly form judgments about the case before hearing any evidence. The number of prospective jurors who will admit in the courtroom that they have formed opinions about a case is generally small. However, substantial evidence demonstrates that the likely presence of bias and prejudgment exists.
- b) **Instructions Cannot Cure Bias:** Research regarding the effectiveness of judges' instructions strongly suggests that instructions alone cannot compensate for the prospective jurors' biases. Post-trial studies have concluded that as many as 50% of

instructed jurors did not understand that the defendant did not have to present evidence of innocence.⁵ When asked whether "the fact that the state decided to bring charges against a criminal defendant" is no evidence, some evidence, or strong evidence "that the defendant committed the charged offense," 40% answered "some evidence" or "strong evidence."⁶

- c) **Psycho-Social Dynamics of the Courtroom:** The impact of the courtroom environment strongly influences the answers jurors provide. The selection process is intended to determine individuals' qualifications for a very important job. Prospective jurors, like everyone else in the courtroom, are aware of this fact. As the questioning begins, jurors understand that they will be included on or excluded from a jury based on their responses to questions. The prospective jurors are aware they are being evaluated by the judge, attorneys, and the audience (including fellow potential jurors). As in any interview, a person's natural reactions to stress, embarrassment, group pressure, and public exposure will affect his or her responses to questions. Responses of a prospective juror, like those of the subject of any interview, are affected by these and other factors that lie outside of the person's control, and often, outside of his or her awareness.⁷ Awareness of the consequences of various responses can also affect the way attitudes and beliefs are expressed.⁸ People portray themselves in socially desirable and politically correct ways when publicly questioned (e.g., when questioned about racial attitudes).⁹

Most people naturally seek to present themselves in the most positive light. They portray themselves as fair rather than unfair, honest rather than dishonest, and so on.¹⁰ In the courtroom, the judge is the person of highest status and authority, thus the status difference between judge and potential jurors often inhibits juror candor. Features of the courtroom such as high ceilings, judicial robes, and a raised bench can be intimidating to lay people. In this environment jurors are more likely to conceal rather than reveal bias.

- d) **Lack of Candor during the Selection Process:** The NJP has found that there is a lack of truthful answers by jurors in the selection process. As a result, the parties and the judge rarely obtain sufficient information from the voir dire process to intelligently exercise challenges for cause. For most prospective jurors, the courtroom is an unfamiliar and intimidating place. Potential jurors strive to present themselves in the

⁵Strawn and Buchanan, *Jury Confusion: A Threat to Justice*, 59 *Judicature* 478, 481 (1976).

⁶ Saxton, *How Well Do Jurors Understand Jury Instructions? A Field Test Using Real Juries and Real Trials in Wyoming*, 33 *Land and Water Review* 59 (1988) at 96. Based on responses from 181 jurors who had served on a criminal jury.

⁷Nisbett & Wilson, "Telling More Than We Can Know: Verbal Reports on Mental Processes", 84 *Psychol. Rev.* 231 (1977).

⁸Collins and Hoyt, "Personal Responsibility for Consequences: An Integration of the Forced Compliance Literature", 8 *J. Experimental Soc. Psychol.* 558 (1972).

⁹Arkin, "Social Anxiety, Self Presentation and the Self-Serving Bias in Casual Attribution", 38 *J. Personality & Soc. Psychol.* 23 (1980).

¹⁰Marlow and Crown, *Social Desirability and Responses to Perceived Situational Demands*, 25 *J. Consulting Psychol.* 109 (1968).

most positive light. The message often communicated to prospective jurors during the voir dire process is that fairness and impartiality mean having *no* opinions. As a result, little is learned about prospective jurors' attitudes and opinions. Bias and prejudice are only infrequently revealed.

- e) **Judges Wield Great Authority in Limiting Inquiries of Jurors:** The NJP found that judges have great discretion in limiting the questioning of jurors, and frequently do exercise their authority to strictly limit questioning of jurors. Judges' decisions concerning areas to include in jury questioning and latitude accorded counsel in conducting the questioning are rarely reversed. [*Mu'Min v. Virginia* (1991) 111 S. Ct. 1899, 1905; *Patton v. Yount*, (1984) 467 U.S. 1025.]

- 10) **Argument in Support:** According to the *California Judges Association* and the *Judicial Council of California*, "The California Judges Association (CJA) and the Judicial Council of California are writing in support and respectfully request your AYE vote.

"SB 213 proposes modest yet significant reductions in the number of peremptory challenges available in misdemeanor trials. Present law grants each side 10 peremptory challenges on misdemeanors with sentences of greater than three months up to one year, and 5 per side for additional parties. For misdemeanors with sentences of three months or less, present law grants 6 peremptory challenges, plus 4 per side for multiple parties.

"SB 213 standardizes and reduces the number for all misdemeanors to 6 per side, with 2 additional for multiple parties. SB 213 contains a five-year sunset provision.

"Please note that SB 213 proposes no changes in felony trials, in the size or majority required for conviction, and most importantly, no limitations on challenges for cause. The bill affects only peremptory challenges, which are available to counsel for any reason, or for no reason, as long as challenges are not being exercised for impermissible reasons, such as race.

"The need for economies and efficiencies in our court system has never been greater. Legislators have repeatedly asked the courts to identify measures which can save time and resources. Reducing peremptory challenges in misdemeanor is one commonsense proposal which can assist the courts. This is why all 58 presiding judges have voted to support the bill.

"Fewer peremptory challenges will reduce the time spent by law enforcement officers who remain on standby during jury selection, returning those officers to patrol duty sooner. Jurors likewise could return to productive work sooner. In addition to modest cost savings to the courts, savings to communities, particularly to both public and private employers, will be significant.

"Overall, a reduction in the number of misdemeanor peremptory challenges is expected to increase juror satisfaction, with no reduction in justice for anyone. In fact, greater numbers of peremptory challenges could carry the risk of dismissing more potential jurors dismissed for improper, discriminatory reasons, such as race.

"SB 213 offers the following benefits:

- "An expedited jury selection phase will shorten misdemeanor trials resulting in more misdemeanor trials conducted within existing trial departments.
- "Law enforcement officers will spend less non-productive time in the courtroom while jury selection is conducted.
- "More jurors will be available for service on higher stakes felony cases.
- "Juror satisfaction will increase as fewer jurors are called to misdemeanor courtrooms to sit through extended jury selection on lesser crimes.
- "Millions of dollars annually will be saved by public and private employers alike with fewer people being called to jury duty.
- "Personnel efficiencies: Fewer people appearing for jury service will permit personnel resources involved in calling jurors for service to be redeployed in areas where layoffs and furloughs have severely hampered court operations.

"California presently allows more peremptory challenges for misdemeanors than 47 other states. Only New Jersey and New York presently permit the same number as California, and even in those states, fewer challenges are permitted for additional parties. California also allows far more challenges than the federal system. A review of 50-state data reviews that even with the proposed reduction in peremptory challenges, 36 states would still offer fewer peremptory challenges than California. Even the federal system offers only 6 peremptory challenges (3 per side). We are aware of no allegation that the ability to effectively prosecute or defend criminal cases in those states or in the federal system are impaired by fewer available peremptory challenges.

"An excessive number of misdemeanor peremptory challenges unnecessarily extends the jury selection process often making jury selection the longest part of the misdemeanor trial and reducing the number of misdemeanor trials that can be heard with existing resources. Oversized misdemeanor panels also encumber large numbers of jurors rendering them unavailable for service on higher stakes felony cases. With the recent passage of Proposition 47, these problems will soon increase significantly.

"Finally, unused or poorly used jurors express that jury service is a waste of valuable time, souring their perception of the criminal justice system and reducing the likelihood of future jury service.

"With budget cutbacks forcing dramatic changes in many areas of civil law, it is time for California to adopt modest, commonsense changes in criminal misdemeanor jury selection. California's judges make it their life-work to insure the fair administration of justice, and if there was any serious suggestion that reducing peremptory challenges would impair that critical objective, we would not be proposing the change."

- 11) **Argument in Opposition:** According to the *Los Angeles District Attorney's Office*, "SB 213 reduces the number of peremptory challenges in misdemeanor cases from 10 to 6 and reduces the number of additional peremptory challenges provided to each defendant from 5 to 2 when

defendants are tried jointly thereby reducing the number of peremptory challenges available to the prosecution in multi-defendant cases. SB 213 also contains language that provides the reduced number of peremptory challenges shall sunset on 1/1/2021 unless subsequent legislation extends this date.

"Prior to the passage of Proposition 115 in 1990, both attorneys and judges conducted the questioning of jurors, commonly referred to as '*voir dire*.' Proposition 115 eliminated attorney conducted *voir dire* excepted in limited circumstances. Ten years after the passage of Proposition 115, the Legislature recognized that the elimination of attorney conducted *voir dire* negatively impacted both the prosecutors and defense counsel's ability to effectively assess a prospective jurors' capacity for fairness and the absence of bias. In 2000, AB 2406 (Chapter 192, Statutes of 2000) was approved by the Legislature and signed into law. AB 2406 amended Proposition 115 to require courts conduct an initial examination of prospective jurors and thereafter give both the prosecution and defense counsel the right to examine, by oral and direct questioning, any or all of the prospective jurors. However AB 2406 did not specify the amount of time that attorneys for each side would have to conduct their examinations which has resulted in a very limited examination of jurors for bias and fairness in many misdemeanor cases.

"Even with this limited *voir dire* many judges believe that prosecutors and defense counsel spend too much time ensuring that a fair and unbiased jury panel is selected. According to the sponsor, SB 213 is supposed to result in both cost savings and reduce the length of misdemeanor trials. Neither of these goals will be achieved by SB 213.

"Simply reducing the number of peremptory challenges will have the unintended consequence of increasing both the defense attorney and prosecution request for challenges for cause. While the number of peremptory challenges is limited, both the defense and prosecution have an unlimited number of challenges for cause. Prosecutors and defense counsel use peremptory challenges more frequently in California because of the limited attorney conducted *voir dire* which forces each side to use their peremptory challenges in situations where a more thorough *voir dire* could have determined whether a juror was fit to serve or should be disqualified 'for cause.'

"The time and resources needed to challenge a prospective juror for cause greatly exceed the time and resources used when a prosecutor or defense counsel use a peremptory challenge. With the number of peremptory challenges reduced under SB 213, there will be demands for additional attorney conducted *voir dire* to ensure that both the People's and defendant's constitutional right to a fair and unbiased trial is protected.

"The sponsors of SB 213 argue that a blue ribbon report recommended that the number of peremptory challenges be reduced. However the sponsors have chosen to selectively pick and choose the recommendations from the report for inclusion in SB 213. The report did in fact recommend a reduction in the number of peremptory challenges in misdemeanor cases, but it linked the reduction in peremptory challenges to a reduction in the size of misdemeanor juries which is not contained in SB 213. The sponsors note that California is one of 3 states that allow for up to 10 peremptory challenges, however states like Indiana, Minnesota, New Mexico, and Texas which limit the number of peremptory challenges to 5 also have 6 person juries.

"Prosecuting attorneys have the burden of proving to a unanimous jury that a defendant is guilty of the charges beyond a reasonable doubt. When a criminal jury cannot reach a unanimous verdict, the prosecution may retry the case and attempt to achieve a unanimous verdict with another trial. There is no limit to the number of trials the prosecution can bring. Every retrial strains the system and requires the cost of a trial. By reducing peremptory challenges available to the prosecution, the likelihood of a non-unanimous jury increases because the prosecutor cannot use their instincts to remove a juror the prosecutor believes may prejudice the jury. Each non-unanimous verdict increases the chances of costly retrials.

"The inclusion of a sunset clause in SB 213 all but guarantees that there will be lengthy and costly appellate challenges to any and all guilty verdicts rendered by a jury with limited peremptory challenges if it's provisions sunset. Defense counsel will challenge a guilty verdict reached by a jury on constitutional equal protection grounds that their client was not provided the same opportunity to eliminate potentially biased jurors as a similarly situated defendant tried before or after the provisions of SB 213 sunsetted.

"Jury selection is viewed as the most critical portion of the criminal trial process by a large majority of prosecutors and defense attorneys. Selecting a jury is a skill that must be learned by all new criminal attorneys at the beginning of their careers which is when most criminal attorneys conduct misdemeanor trials. SB 213 will interfere with a new attorney's ability to learn this critical skill. If new criminal attorneys fail to properly learn this skill during their misdemeanor rotation it will result in unfair results for either the People or the defendant in felony trials which is an injustice to California's criminal justice system which is viewed as a model by many criminal justice professionals.

"The notion that misdemeanors are less serious than felony crimes is well founded. However just because a misdemeanor is considered less serious than a felony does not mean that it is a trivial matter. Defendants convicted of misdemeanor crimes can be incarcerated for up to 1 year per offense in a county jail. There are also misdemeanor crimes that result in a defendant having to register for life as a sex offender under California law. Unlike civil matters, there are real liberty interests at stake in criminal cases. Shouldn't California provide both the prosecution and defense counsel with every opportunity to ensure a fair and unbiased jury is selected to make such potentially life altering decisions?

"The purpose of peremptory challenges is to provide prosecutors and defense counsel the ability to select a fair and unbiased jury that provides each side with an opportunity to select a jury that represents the diversity of their community. The reduction of peremptory challenges will make it far more difficult to select a fair and unbiased jury that reflects a community's diversity. By limiting the use of peremptory challenges, SB 213 has the real potential to result in less diverse and more biased juries because of the prosecutors or defense counsel's inability to remove a juror they believe is biased and therefore unqualified to serve as a juror but cannot prove to the satisfaction of the judge that the potential juror should be removed 'for cause.'

"As prosecutors, it is both our goal and responsibility to ensure that justice prevails in every criminal case that is filed. Verdicts reached by juries that are biased or that are not selected from a proper cross-section of the community cannot be viewed as just.

"SB 213 will not result in the cost savings it claims will result, nor will it improve the quality of California's criminal justice system. A fair and unbiased jury is the right of the People and every defendant in our justice system. SB 213 will make ensuring justice is carried out more difficult."

12) Prior Legislation:

- a) SB 794 (Evans), of the 2013-2014 legislative session, provided in any criminal case where the offense is punishable with a maximum term of imprisonment of one year or less, the defendant is entitled to five preemptory challenges. If two or more defendants are jointly tried each defendant shall also be entitled to two additional challenges which may be exercised separately, and the state shall also be entitled to additional challenges equal to the number of all the additional separate challenges allowed the defendants. SB 794 failed passage in the Assembly Public Safety Committee.
- b) AB 1557 (Feuer) of the 2007-2008 legislative session, reduced the number of preemptory challenges available to the prosecution and defense in all misdemeanor criminal matters punishable by up to one year in custody from ten to six challenges. AB 1557 failed passage on the Assembly Floor.
- c) AB 886 (Morrow), of the 1997-98 Legislative Session, would have reduced the number of preemptory challenges in misdemeanor cases from 10 to 6 and made various changes to the jury system. AB 886 was never heard by the Assembly Judiciary Committee.
- d) AB 2003 (Goldsmith), of the 1995-96 Legislative Session, would have reduced the number of "preemptory challenges" available to each side in criminal cases during the jury selection process. AB 2003 failed passage on Assembly Floor.
- e) AB 2060 (Bowen), of the 1995-96 Legislative Session, would have eliminated preemptory challenges. AB 2060 was never heard by the Assembly Judiciary Committee.

REGISTERED SUPPORT / OPPOSITION:

Support

Alameda County District Attorney's Office
California Judges Association
Judicial Council of California
San Diego County District Attorney's Office
San Francisco County District Attorney's Office
San Mateo County District Attorney's Office
Santa Cruz Superior Court

28 private individuals

Opposition

California Attorneys for Criminal Justice
California Public Defenders Association
Criminal Defense Lawyers Club of San Diego
Legal Services for Prisoners with Children
Los Angeles County Public Defenders Association
Los Angeles District Attorney's Office
Riverside County Public Defender

6 private individuals

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

Date of Hearing: July 14, 2015
Counsel: Gabriel Caswell

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Bill Quirk, Chair

SB 413 (Wieckowski) – As Amended July 1, 2015

SUMMARY: Specifies that local jurisdictions may pass ordinances that permit the issuance of infraction tickets for failing to yield a seat to an elderly or disabled person, or for playing sound equipment in an unreasonably loud manner, and allows transit operators to levy administrative penalties against minors for specified transit violations. Specifically, **this bill:**

- 1) Makes failing to yield seating reserved for elderly or disabled persons on public transit property punishable as an infraction provided that the governing board of the public transportation agency enacts an ordinance following a public hearing on the issue.
- 2) Clarifies that playing unreasonably loud sound equipment on or in a transit facility or vehicle or failing to comply with the warning of a transit official regarding disturbing others with unreasonably loud noise is punishable as an infraction.
- 3) Allows transit operators to levy administrative penalties against minors who have committed certain violations on their systems.
- 4) Clarifies what constitutes rail transit property.
- 5) Makes related, clarifying amendments.

EXISTING LAW:

- 1) Makes it an infraction, punishable by a fine of \$250 and 48 hours of community service, for adults who engage in the following activities in a transit system facility or vehicle: (Pen. Code, § 640, subs. (a) & (b).)
 - a) Eating, drinking, or smoking in areas where those activities are prohibited;
 - b) Disturbing other people with loud or unreasonable noise;
 - c) Expectorating;
 - d) Skateboarding, roller blading, bicycle riding, or operating a motorized scooter or similar device, as specified; and,
 - e) Selling or peddling goods, merchandise, property, or services as prohibited by the public transportation system.

- 2) Allows transit operators to levy administrative penalties against adults who have committed certain violations on their systems, but sends minors who commit these same acts through the judicial system. (Pub. & Util. Code, § 99580.)
- 3) Provides for misdemeanor penalties (for third or subsequent offenses) for adults engaging in various forms of fare evasion. (Pen. Code, § 640 subds. (c) & (d).)

FISCAL EFFECT:

COMMENTS:

- 1) **Author's Statement:** According to the author, "Beginning with SB 1749 (Migden) in 2006, transit agencies have sought authority to enforce administrative penalties against those who have committed minor violations. When the City and County of San Francisco initially pushed for the statute, it intentionally did not apply the process to minors as it was thought, at the time, that keeping minors in the judicial system might act as a deterrent to committing future violations. Subsequent legislation expanded the list of specified violations and increased the number of transit agencies authorized to seek administrative penalties against violators. This bill is needed to subject minors to an administrative process for resolving violations in the same manner as adults, removing them from the criminal process. Allowing administrative adjudication for minors reduces pressure on the court system, which has experienced severe cuts over the years. SB 413 also enables transit systems to immediately enforce ADA requirements if they have approved an ordinance in a public hearing. Currently, they have little recourse when attempting to enforce reserved seating for disabled and elderly passengers. The bill is also necessary to provide uniformity on what constitutes noise violations on a transit property. Currently, the violation for excessive noise differs between the codes."
- 2) **Administrative Penalties for Minors:** In 2006, SB 1749 (Migden), Chapter 258, Statutes of 2006, authorized certain transit operators to enforce administrative penalties for transit violations. While SB 1749 provided this administrative process for adults, it specifically precluded minors from using it with the intention that forcing minors to go to court would serve as a deterrent to engaging in prohibited conduct. As it stands, minors are instead required to enter the court system with respect to transit citations. This has overburdened the court system and the author believes that supplanting the requirement that minors go to court with resolving transit citations administratively, would provide minors with a means to more easily, quickly, and cost effectively resolve transit citations.

This proposed amendment has drawn mixed reaction from youth advocates. The San Francisco Youth Commission supports the provision for youth to use an administrative process to resolve transit citations and their support letter notes that allowing local transit agencies to use an administrative process to address transit citations for minors makes it easier for youth to resolve citations quickly and easily online thereby avoiding the need to go to court where excessive penalties and administrative fees are often assessed. They correctly point out when criminal penalties are assessed; fees often end up costing triple the base fine.

The Youth Law Center (YLC), on the other hand, contends that replacing the option of going to court with an administrative process would make it impossible for youth to "negotiate" alternative penalties, such as community service in lieu of fines. They also contend that

online payment systems used by transit entities are not a realistic option for indigent youth who often lack computers, internet access, and credit cards. Transit agencies have confirmed, however, that their administrative processes do allow for all forms of payment (cash, credit cards, and checks) as well as the ability to substitute community service for fines.

- 3) **Noise Violations:** According to the author, different standards are applied with respect to what constitutes a noise violation on transit property. For example, the Penal Code states that officers may cite an individual for "disturbing another person with loud or unreasonable noise" while the Public Utilities Code states that individuals may be cited for "playing sound equipment on or in a system facility." To address inconsistencies and provide regular enforcement, SB 413 matches the wording with respect to noise violations and adds the clarification that failing to comply with the warning of a transit official related to a noise disturbance also constitutes a violation. By adding this clarifying language, the author hopes to make noise disturbance enforcement more uniform and consistent.

The YLC contended in the Assembly Transportation Committee that in an attempt to clarify the codes, SB 413 has made the provision overly broad, implying that simply playing sound equipment could be a citable offense. While it is unlikely that a transit officer would issue a citation if someone were simply listening to music on their iPod. The YLC suggested amending the bill to specify "unreasonably" loud music.

To respond to the contention of the YLC, the author amended the bill in the Assembly Transportation Committee to specify "unreasonably loud music." The argument in opposition below was sent prior to the amendment taken on July 1, 2015.

- 4) **Rail Authority Property:** SB 413 seeks to clarify what constitutes a rail authority property. According to the sponsor, transit officers often need to take enforcement action to address activities occurring on adjunct facilities such as tracks, culverts beneath tracks, viaducts, and facilities that are leased rather than owned. SB 413 elucidates that transit facilities include all properties owned or leased by the transit operator, including stations and rail cars or buses and associated facilities. By clarifying what constitutes a rail authority property, SB 413 will allow transit operators to better address prohibited conduct.
- 5) **ADA Compliance:** SB 413 addresses the act of failing to give up designated priority seating to elderly or disabled person, making failure to comply a violation that can be cited as an infraction. Specifically, the sponsor notes that in accordance with ADA requirements, signs are posted in facilities specifying that individuals must give up designated priority seating for elderly and disabled persons, upon request. Transit entities, however, are not authorized to cite passengers who refuse to comply, making it impossible for the transit agency to enforce ADA requirements.
- 6) **Argument in Support:** According to the *San Francisco Municipal Transit Agency*, "This bill would amend Public Utilities Code § 99580 and Penal Code § 640 to allow transit agencies to use the administrative process afforded to them under PUC § 99580 to cite and process minors in violation of specified prohibited acts (e.g. fare evasion, smoking where prohibited) occurring on transit vehicles and facilities. In doing so, minors could be subject to an administrative process for resolving violations in the same manner as adults, removing them from the criminal process in certain jurisdictions. This change is important for jurisdictions like San Francisco which has established a free-transit for low-income youth

program, with an estimated 48,000 youth eligible to participate. Key goals of this program are to increase youth transit ridership, improve school attendance and eliminate the fear and stigma attached to fare evasion enforcement.

"By retaining the jurisdiction for administration of the transit violations for youth in the court system, an undue burden is placed on children and families by requiring them to appear in court during school and/or work hours. Adults, on the other hand, are able to simply pay or protest their violation by mail, online, or by phone. In addition, adults charged with fare evasion pay a \$109 administrative fee, while juveniles may be subject to criminal penalties and administrative fees up to \$380. Failure to appear in court may also result in a warrant being issued and further criminal penalties."

- 7) **Argument in Opposition:** According to the *Youth Law Center*, "While we are gratified with the language about criminalizing failure to yield one's seat to elderly or disabled people now requires the enactment of a specific ordinance, after a hearing, we are still concerned with specific parts of the language. In particular,

"SEC. 2. Section 99580 of the Public Utilities Code is amended to read:...(b)(3) Playing loud sound equipment on or in a system facility or vehicle, or failing to comply with the warning of a transit official related to disturbing another person by loud or unreasonable noise.

"This language is overbroad and would criminalize typical teenage behavior, such as playing an iPod or other music streaming device on the bus, without regard to whether it is bothering anyone. In our view, the language should be amended to require that the use of sound equipment is excessively loud or disturbing and continues after the person has been asked to stop. For example:

"(b) Failing to comply with the request of a transit official to stop playing sound equipment or in a system facility that produces by loud or unreasonable noise.

"Also, we are still concerned about the general thrust of this bill. While we understand the need to maintain peace and order on public transit vehicles, we are concerned that the infraction system will just make things worse for the predominantly poor young people who use public transit. As every parent knows, even 'good' teenagers can be thoughtless, noisy (especially in the company of peers), and obnoxious. Subjecting them and their families to the infraction process for behavior that is a predictable part of adolescent development will not address the underlying issues. In fact, it will have negative consequences when they are unable to negotiate the online infraction process or simply do not have the means to pay.

8) **Related Legislation:**

- a) SB 24 (Hill), would restrict the use of e-cigarettes in specific areas, including adding the use of e-cigarettes on transit property to the list of activities that are infractions. SB 24 failed passage on the Senate Floor and was placed on the inactive file at the request of the author.
- b) SB 140 (Leno), would, among other things, define "smoking" to include the use of e-cigarettes, and references this definition in relation to the smoking activity on a transit

property. SB 140 is currently pending in the Assembly Governmental Organization Committee.

- 9) **Prior Legislation:** SB 1749 (Migden), Chapter 258, Statutes of 2006, allowed for administrative enforcement of transit-related violations in the City and County of San Francisco and The Los Angeles County Metropolitan Transportation Authority.

REGISTERED SUPPORT / OPPOSITION:

Support

California Transit Association
City and County of San Francisco
Los Angeles County Sheriff's Department
San Bernardino Associated Governments
San Francisco Bay Area Rapid Transit District
San Francisco Municipal Transportation Agency
San Francisco Youth Commission
Santa Clara County Valley Transportation Authority
Solano County Transit
Southern California Regional Rail Authority (Metrolink)
Transportation Agency for Monterey County

Opposition

Legal Services for Prisoners with Children
Youth Law Center

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

Date of Hearing: July 14, 2015
Counsel: David Billingsley

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Bill Quirk, Chair

SB 443(Mitchell) – As Amended June 2, 2015
As Proposed to be Amended in Committee

SUMMARY: Requires additional due process protection in cases where the State of California seeks to forfeit assets in connection with specified drug offenses. Changes the process concerning how money or property forfeited under federal forfeiture law is distributed to state or local law enforcement. Specifically, **this bill:**

- 1) States that it shall be necessary to obtain a criminal conviction for the unlawful manufacture or cultivation of any controlled substance or its precursors in order to recover law enforcement expenses related to the seizing or destroying of illegal drugs.
- 2) Specifies that state and local law enforcement authorities shall not refer, or otherwise transfer, property seized under state law to a federal agency seeking the adoption of the seized property.
- 3) Clarifies that language of this bill does not prohibit the federal government from seeking forfeiture under federal law, or sharing proceeds from federal forfeiture proceedings with state and local law enforcement in those situations where there are joint investigations.
- 4) States that all property, money, or other things of value received by any state or local law enforcement agency pursuant to any federal law that authorizes the sharing or transfer forfeited property to a state or local law enforcement agency shall be promptly transferred, sold, and distributed through the State Asset Forfeiture Fund for Law Enforcement Purposes.
- 5) Creates the State Asset Forfeiture Fund for Law Enforcement Purposes where money or property received by state or local law enforcement based on any federal law that authorizes sharing of forfeited property will be deposited. Money from the fund will be distributed primarily for criminal justice purposes and the courts.
- 6) Provides that the money in the State Asset Forfeiture Fund for Law Enforcement Purpose shall be distributed as follows:
 - a) To the state agency or local government for costs incurred by it in connection with the sale of the property, including expenditures for any necessary costs for public notice, hearings, or for any necessary repairs, storage, or transportation of any property lawfully forfeited;
 - b) The remaining funds shall be distributed as follows:

- i) Twenty four percent (24%) to the General Fund; and,
 - ii) Seventy six percent (76%) to the State Asset Forfeiture Fund for Courts and Criminal Justice Purposes to be made available, upon appropriation by the Legislature, for purposes of criminal and civil court functions, prosecution, public defense and indigent defense, law enforcement, crime prevention including afterschool programs for adolescents and drug treatment for adolescents and adults, and victim services.
- 7) Provides that a state or local law enforcement agency may not receive forfeited property or proceeds from property forfeited pursuant to federal law unless a defendant is convicted in an underlying or related criminal action of a specified offense, or any offense under federal law that includes all of the elements of a specified California offense.
 - 8) Requires a conviction on the related, specified criminal charge to forfeit property in every case in which a claim is filed to contest the forfeiture of property, unless the defendant in the related criminal case willfully fails to appear for court.
 - 9) Requires proof beyond a reasonable doubt in all forfeiture cases which are contested.
 - 10) States that if the defendant in the related criminal matter is represented by court-appointed counsel, the trial court shall appoint counsel for the defendant in the forfeiture proceeding.
 - 11) Specifies that in any forfeiture proceeding in which the defendant or claimant substantially prevails, the defendant or claimant shall be entitled to recover reasonable attorneys' fees and other litigation costs reasonably incurred by the defendant or claimant.
 - 12) Allows forfeiture of property less than \$25,000 if notice of the forfeiture has been provided, as specified, and no claims have been made.
 - 13) Specifies that property less than \$25,000, which has been forfeited because no claim has been made on the property, will be disposed of in the manner required by State Asset Forfeiture Fund for Law Enforcement Purposes.
 - 14) Allows more time to make a claim contesting forfeiture.
 - 15) Allows property of \$25,000 or more to be forfeited through a judicial process when no claim to the forfeited property has been made within the specified time. Requires property forfeited in this manner will be disposed as directed by State Asset Forfeiture Fund for Law Enforcement Purposes.
 - 16) Any property forfeited after a contested forfeiture hearing will be disposed of with 40% going to state and local law enforcement groups that participated in the seizure, 24% to the general fund, 34% to the State Asset Forfeiture Fund for Courts and Criminal Justice Purposes, 1% to nonprofit group of prosecutors to provide forfeiture education, 1% to nonprofit group of criminal defense attorney to educate on forfeiture.
 - 17) Each year, the Attorney General shall publish a report which sets forth the following information for the state, each county, each city, and each city and county:

- a) The number of forfeiture actions initiated and administered by state or local agencies under California law, the number of cases adopted by the federal government, and the number of cases initiated by a joint federal-state action that were prosecuted under federal law;
- b) The number of cases and the administrative number or court docket number of each case for which forfeiture was ordered or declared;
- c) The number of suspects charged with a controlled substance violation;
- d) The number of alleged criminal offenses that were under federal or state law;
- e) The disposition of cases, including no charge, dropped charges, acquittal, plea agreement, jury conviction, or other;
- f) The value of the assets forfeited; and,
- g) The recipients of the forfeited assets, the amounts received, and the date of the disbursement.

EXISTING LAW:

- 1) Establishes an asset-forfeiture procedure for drug-related cases. (Health & Saf. Code, §§ 11469-11495.)
- 2) Sets out detailed procedures for a drug forfeiture action, including: the filing of a petition for forfeiture within one year of seizure, notice of seizure, publication of notice, the right to a jury trial, and a motion for return of property. (Health & Saf. Code, § 11488.4.)
- 3) Requires a conviction in an underlying criminal case and provides that the burden of proof in the (civil) judicial forfeiture action shall be beyond a reasonable doubt in cases where the value of the forfeited property is under \$25,000. (Health & Saf. Code, § 11488.4, subd. (i)(3).)
- 4) Specifies that forfeiture does not require a conviction on an underlying drug offense where the property sought to be forfeited is cash or negotiable securities over \$25,000, and allows forfeiture upon a burden of proof of “clear and convincing evidence” under these circumstances. (Health & Saf. Code, § 11488.4, subd. (i)(4).)
- 5) Allows for administrative (nonjudicial) forfeiture for cases involving personal property worth \$25,000 or less. A full hearing is required if a claim as to the property is filed, as specified. (Health & Saf. Code, § 11488.4, subd. (j).)
- 6) Provides a scheme for the distribution of fund from forfeitures and seizures. Specifically, after distribution to any bona fide innocent owners and reimbursement of expenses, 65% of proceeds go to participating law enforcement agencies, 10% to the prosecutorial agency, 24% to the General Fund, and 1% to nonprofit group of prosecutors to provide forfeiture education. (Health & Saf. Code § 11489.)

- 7) Requires the Department of Justice (DOJ) to publish an annual report detailing specified information on forfeiture actions. (Health & Saf. Code, § 11495, subd. (c).)

FISCAL EFFECT: Unknown.

COMMENTS:

- 1) **Author's Statement:** According to the author, "SB 443 will reign in abuses surrounding the practice to civil asset forfeiture, and reestablish the most basic tenets of Constitutional law and values, requiring that in most cases, a defendant be convicted of an underlying crime before cash or property can be permanently seized. This bill will require that more drug asset forfeiture cases be handled under state law, rather than transferred to federal courts, and that seized assets are dispersed to local law enforcement agencies, courts, defenders, prosecutors and the General Fund, pursuant to state law."
- 2) **Differences in California and Federal Forfeiture Law:** Compared to California law, Federal law gives law enforcement more power and puts fewer burdens on the government before property is forfeited. Some ways in which California and federal provisions differ are:
 - a) **Administrative forfeiture:** While state law limits cases involving personal property worth \$25,000 or less, under federal law administrative forfeiture is available for any amount of currency and personal property valued at \$500,000 or less, including cars, guns, and boats. [19 U.S.C. Section 1607(a).]
 - b) **Burden of proof:** Under federal civil forfeiture law, the government's burden of proof is "preponderance of the evidence." [18 U.S.C. Section 983(c)(1).] This is a lower standard than the "beyond a reasonable doubt" standard used in California.
 - c) **Conviction:** In contrast to California law, federal civil forfeiture law does not require a conviction in any cases. (18 U.S.C. Section 981.)
 - d) **Use of forfeited assets:** Under federal law, a seizing agency can use the seized asset or transfer it to a state or local agency that participated in the proceedings. [18 U.S.C. Section 881(e)(1)(A).] Direct use of the forfeited asset is disallowed under state law.
- 3) **Three Exceptions to the California Requirement that Forfeiture Action Must Have a Conviction:**
 - a) The forfeiture of cash or negotiable instruments whose value is at least \$25,000. (Health & Saf. Code 11488.4, sud. (i)(4)-(5).)
 - b) When the defendant in the underlying criminal case is also the claimant in the forfeiture action and willfully fails to appear in the criminal case. Application for forfeiture must be approved by a judge. The prosecution must provide notice of its application for entry of default to the defense attorney and make a showing of due diligence to locate the defendant. (Health & Saf. Code 11488.4, sud. (k).)
 - c) When no one files a claim contesting the forfeiture. (Health & Saf. Code 11488.4, sud. (i)(1)-(3).)

- 4) **Federal Law on Sharing Forfeiture Proceeds with State and Local Law Enforcement Agencies:** Section 881(e)(3) of Title 21, United States Code, provides that: The Attorney General shall assure that any property transferred to a State or local law enforcement agency... (A) has a value that bears a reasonable relationship to the degree of direct participation of the State or local agency in the law enforcement effort resulting in the forfeiture, taking into account the total value of all property forfeited and the total law enforcement effort as a whole; and with respect to the violation of law on which the forfeiture is based; and (B) will serve to encourage further cooperation between the recipient State or local agency and Federal law enforcement agencies
- 5) **The New Federal Policy on Adoption of State Forfeiture Actions will have Limited Effects:** On January 16, 2015, United States Attorney General Holder issued a new policy order for all United States Attorney offices. The policy was widely described as effectively ending equitable sharing of federal forfeiture proceeds with local law enforcement agencies. However, the order did not limit equitable sharing in cases involving a joint federal-state task forces or investigations. The policy prohibits wholesale “adoption” of what would otherwise solely be a state or local seizure and forfeiture. Adoptions - counted as a subset of equitable sharing - account for about 3% of forfeiture deposits. Total equitable sharing amounts to about 22% of forfeiture deposits. Thus, approximately 85% of the proceeds of federal forfeiture that goes to state and local agencies is unaffected by the new policy.¹

The policy provides:

Federal adoption of property seized by state or local law enforcement under state law is prohibited, except for property that directly relates to public safety concerns, including firearms, Ammunition, explosives and property associated with child pornography. To the extent that seizures of property other than these...categories are ... considered for federal adoption...such seizures [must be approved by] the Assistant Attorney General for the Criminal Division. The prohibition ... includes...seizures by state or local law enforcement of vehicles, valuable, and cash, [including currency, checks] stored value cards” and specified other categories

The policy order allows equitable sharing as follows:

This order does not apply to (1) seizures by state and local authorities working together with federal authorities in a joint task force; (2) seizures...that are the result of joint federal-state investigations or that are coordinated with federal authorities as part of ongoing federal investigations; or (3) seizures pursuant to federal search warrant, obtained from federal courts to take custody of assets originally seized under state law.

It thus appears that many seizures of property by state and local authorities are still subject to forfeiture under federal law through the equitable sharing process. It appears that joint task forces and federal-state cooperation in investigations is

¹ <http://www.washingtonpost.com/news/the-watch/wp/2015/01/20/how-much-civil-asset-forfeiture-will-holders-new-policy-actually-prevent/>

relatively common. Just concerning joint task force operations, the Drug Enforcement Administration website² explains:

In 2013, the DEA State and Local Task Force Program managed 259 state and local task forces, which included Program Funded, Provisional, HIDTA, and Tactical Diversion Squads. The difference between funded and provisional state and local task forces is that the financial support for funded task forces is provided by DEA headquarters and includes additional resources for state and local overtime. Provisional task forces are supported by the operating budgets of DEA field division offices, without resources from DEA headquarters, and do not include state and local overtime. These task forces are staffed by over 2,190 DEA special agents and over 2,556 state and local officers. Participating state and local task force officers are deputized to perform the same functions as DEA special agents. (Italics added.)

- 6) **Proposed Amendments:** The proposed amendments attempt to address some of the concerns that have been articulated by district attorney offices and other stakeholders.

The proposed amendments permit forfeiture in cases where the defendant willfully fails to appear in his or her criminal court proceedings.

The proposed amendments eliminate earlier language which would have provided that 5% of the proceeds of forfeited property go to the public defender office in county in which the forfeiture proceeding was initiated. Concerns had been articulated that if public defender offices received money directly connected to their defense of forfeiture actions, there would be a conflict of interest. The proposed amendments also eliminate money going directly to the district attorney offices that processes the forfeiture action, to remove any similar conflict of interest. Similar concerns have been raised regarding law enforcement agencies who are currently the direct beneficiary of any successful forfeiture action in which they are involved.

As an alternative, the proposed amendments create the State Asset Forfeiture Fund for Law Enforcement Purposes. The proposed amendments direct that money and property forfeited through federal law which is shared with state and local law enforcement agencies be distributed through that fund. The proposed amendments also direct that money or property forfeited because no person makes a claim to challenge the forfeiture, will go through the same fund.

Forfeited property and money received by state or local law enforcement from federal authorities as part of equitable sharing or other federal program will be deposited in the State Asset Forfeiture Fund for Law Enforcement Purposes to be distributed to law enforcement agencies statewide based on the population of the jurisdiction they serve.

Forfeited property and proceeds obtained through California forfeiture process when no individual files a claim with distributed through the State Asset Forfeiture Fund for Law Enforcement Purposes in the following manner: Reimburse law enforcement agencies and local government for any costs related to the forfeited property; remaining money in the fund will to distributed to the General Fund (24%) and to the State Asset Forfeiture Fund for Courts and Criminal Justice Purposes (76%) to fund law enforcement, criminal and civil

² <http://www.dea.gov/ops/taskforces.shtml>

courts, prosecution and public defense, crime prevention, drug treatment and victim services.

- 7) **Argument in Support:** According to *Drug Policy Alliance*, “SB 443 would reestablish the most basic tenets of Constitutional law and values, requiring that in most cases, a defendant be convicted of an underlying crime before cash or property can be permanently seized. It will require that more drug asset forfeiture cases be handled under state law, rather than transferred to federal courts, and that seized assets are dispersed to local law enforcement agencies, courts, defenders, prosecutors and the General Fund, pursuant to state law.

“From 2002 to 2013, the vast majority of assets seized by law enforcement agencies in California were steered into the federal courts. From 2002 to 2013, the annual revenue from asset forfeiture to law enforcement coffers in California pursuant to state actions, state laws and through state courts, remained stable at approximately 18.3 million dollars. However, assets seized from California residents and revenue provided to California law enforcement agencies through federal courts and pursuant to federal laws more than tripled from 2002 to over \$100 million dollars per year in 2012 and 2013. SB 43 by Senator Mitchell will create conditions whereby most cases will remain in our state courts and be prosecuted according to the laws of California, which have superior due process standards and property rights protections, including protection of guiltless spouses and family members. And importantly, Senator Mitchell’s bill provides that in state law, there will be no permanent loss of property or cash without a conviction for the underlying criminal case.

“Furthermore, SB 443 will eliminate the current fiscal incentives offered by the federal government that rewards California law enforcement agencies for steering cases into the federal process. Under current law, the federal Department of Justice or Department of Treasury may seize property and cash, and force permanent forfeiture without charging a person with any crime, or seeking a conviction. And under federal law and so-called “equitable sharing,” the local law enforcement gets an 80% slice of the forfeiture, even when there was no criminal conviction. Under Senator Mitchell’s bill, local law enforcement entities will only receive revenue from seizure and forfeiture, if the federal government convicts the defendants.

“Whatever its original intent, there is a growing bipartisan consensus that civil asset forfeiture has turned into government run amok and that reform is urgently needed to protect common people from unconstitutional overreach. Civil asset forfeiture was originally conceived as a way to drain resources away from drug ‘kingpins’, these programs have been perverted into an ongoing attack on low-income individuals and families who are unable to afford to fight the federal government in civil court. Furthermore, despite federal laws and guidelines that intended to insure non-supplantation, civil asset forfeiture has become a relied upon source of funding for law enforcement agencies all across the state. Civil asset seizure was never intended to be a primary funding source for law enforcement, and the fact that it has evolved into such has not only led to greater abuses, but also an unhealthy and growing overreliance on it.”

- 8) **Argument in Opposition:** According to the *Los Angeles County District Attorney’s Office*, “SB 443 would require that federally received asset forfeiture monies be distributed according to state rather than federal law. The language contradicts federal law and policy relative to the US Department of Justice (DOJ) Equitable Sharing Program. Our county participates in numerous coordinated efforts to address large scale unlawful narcotics

operations. These efforts involve federal, state and local law enforcement. We believe that the conflict of law created by SB 443 may jeopardize our ability to share in the proceeds of recovered assets and to participate in these important anti-drug task forces.

“Current law does not require a criminal conviction for drug asset forfeiture where the property to be forfeited is cash or a negotiable instrument worth \$25,000 or more. SB 443 would require a criminal conviction in these cases. This is problematic as many criminals fail to file a claim for large amounts of drug money in order to avoid criminal prosecution. In these cases, it is fairly clear that the seized asset is drug money but asset forfeiture would no longer be available in cases where the defendant cannot be prosecuted (possibly because he or she has fled the jurisdiction or witnesses are unavailable to testify).

“SB 443 reduces the amount of forfeited assets that may be distributed to law enforcement and prosecutors, thus hurting our ability to fund future anti-drug efforts. Loss of these funds could make it difficult to investigate and prosecute major illicit drug operations in California.

“SB 443 provides for a portion of asset forfeiture proceeds to go to public defenders offices and provides for the appointment of the public defender to represent the claimants when they have been appointed in the related criminal case. This will create a conflict for public defenders as they will financially benefit from forfeitures that they will now be tasked with opposing.

“SB 443 provides for payment of attorney fees to the prevailing party in asset forfeiture cases. However, there is no source of revenue identified to pay these fees. This could result in a drain upon county general funds or, alternatively, result in a reluctance to pursue valid cases, due to the risk to the county budget.”

9) **Prior Legislation:**

- a) AB 639 (Norby), Legislative Session of 2011-2012, would have changed drug asset forfeiture law to discourage federal adoption of such cases. AB 639 died in Senate Appropriations Committee.
- b) SB 1866 (Vasconcellos), Legislative Session of 1999-2000, would have made changes in asset forfeiture transfers, shifts distribution of money from forfeited property and required the Attorney General to publish electronic reports. SB 1866 was vetoed.
- c) AB 114 (Burton), Chapter 314, Statutes of 1994, provided guidelines for the use of asset forfeiture.

REGISTERED SUPPORT / OPPOSITION:

Support

American Civil Liberties Union of California (Co-Sponsor)
Drug Policy Alliance (Co-Sponsor)
Institute for Justice (Co-Sponsor)

A New Path
Alpha Project
Americans for SafeAccess
Amity Foundation
Asian Americans Advancing Justice
Asian American Drug Abuse Program
Broken No More
California State Conference of the NAACP
California Prison Focus
California Public Defenders Association
Californians United for a Responsible Budget
Coalition for Humane Immigrant Rights of Los Angeles (CHIRLA)
Courage Campaign
Dignity and Power Now
FACTS Education Fund
Friends Committee on Legislation of California
Further The Work
Immigrant Legal Resource Center
Inland Empire Immigrant Youth Coalition
Justice Fellowship
Justice Not Jails
Law Enforcement Against Prohibition
Lawyers Committee for Civil Rights of the San Francisco Bay Area
Legal Services for Prisoners with Children
LIUNA Locals 777 & 792
Los Angeles Regional reentry Partnership
Marijuana Policy Project
National Organization for the Reform of Marijuana Laws
New Way of Life Re-Entry Project
R Street Insitute
San Diego Organizing Project
Tarzana Treatment Centers, Inc.
Western Center on Law and Poverty
Westward Liberty
William C. Velasquez Institute
20 Law Professors

Opposition

Association of Deputy District Attorneys
Association of Los Angeles Deputy Sheriffs
California Association of Code Enforcement Officers
California College and University Police Chiefs Association
California District Attorneys Association
California Police Chiefs Association
California Narcotic Officers Association
California State Lodge, Fraternal Order of Police
California State Sheriffs' Association
George Gascon, District Attorney, City and County of San Francisco

Nancy O'Malley, District Attorney, Alameda County
Los Angeles County District Attorney's Office
Los Angeles County Professional Police Officer Association
Los Angeles Police Protective League
Long Beach Police Officers Association
Riverside Sheriff's Association
Sacramento County Deputy Sheriffs' Association
San Diego County District Attorney
Ventura County District Attorney

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Amendments Mock-up for 2015-2016 SB-443 (Mitchell (S))

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

**Mock-up based on Version Number 97 - Amended Senate 6/2/15
Submitted by: David Billingsley, Assembly Public Safety Committee**

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

TITLE is amended to read:

Introduced by Senator Mitchell

(Principal coauthors: Assembly Member Hadley, Assembly Member Cristina Garcia and Senator Leno)

SEC. 1 Section 11470.1 of the Health and Safety Code is amended to read:

11470.1. (a) The expenses of seizing, eradicating, destroying, or taking remedial action with respect to, any controlled substance or its precursors shall be recoverable from:

- (1) Any person who manufactures or cultivates a controlled substance or its precursors in violation of this division.
- (2) Any person who aids and abets or who knowingly profits in any manner from the manufacture or cultivation of a controlled substance or its precursors on property owned, leased, or possessed by the defendant, in violation of this division.
- (b) The expenses of taking remedial action with respect to any controlled substance or its precursors shall also be recoverable from any person liable for the costs of that remedial action under Chapter 6.8 (commencing with Section 25300) of Division 20 of the Health and Safety Code.
- (c) It shall be necessary to seek or obtain a criminal conviction for the unlawful manufacture or cultivation of any controlled substance or its precursors prior to the entry of judgment for the recovery of expenses. If criminal charges are pending against the defendant for the unlawful manufacture or cultivation of any controlled substance or its precursors, an action brought pursuant to this section shall, upon a defendant's request, be continued while the criminal charges are pending.
- (d) The action may be brought by the district attorney, county counsel, city attorney, the State Department of Health Care Services, or Attorney General. All expenses recovered pursuant to this section shall be remitted to the law enforcement agency which incurred them.

(e) (1) The burden of proof as to liability shall be on the plaintiff and shall be by a preponderance of the evidence in an action alleging that the defendant is liable for expenses pursuant to paragraph (1) of subdivision (a). The burden of proof as to liability shall be on the plaintiff and shall be by clear and convincing evidence in an action alleging that the defendant is liable for expenses pursuant to paragraph (2) of subdivision (a). The burden of proof as to the amount of expenses recoverable shall be on the plaintiff and shall be by a preponderance of the evidence in any action brought pursuant to subdivision (a).

(2) Notwithstanding paragraph (1), for any person convicted of a criminal charge of the manufacture or cultivation of a controlled substance or its precursors there shall be a presumption affecting the burden of proof that the person is liable.

(f) Only expenses which meet the following requirements shall be recoverable under this section:

(1) The expenses were incurred in seizing, eradicating, or destroying the controlled substance or its precursors or in taking remedial action with respect to a hazardous substance. These expenses may not include any costs incurred in use of the herbicide paraquat.

(2) The expenses were incurred as a proximate result of the defendant's manufacture or cultivation of a controlled substance in violation of this division.

(3) The expenses were reasonably incurred.

(g) For purposes of this section, "remedial action" shall have the meaning set forth in Section 25322.

(h) For the purpose of discharge in bankruptcy, a judgment for recovery of expenses under this section shall be deemed to be a debt for willful and malicious injury by the defendant to another entity or to the property of another entity.

(i) Notwithstanding Section 526 of the Code of Civil Procedure, the plaintiff may be granted a temporary restraining order or a preliminary injunction, pending or during trial, to restrain the defendant from transferring, encumbering, hypothecating, or otherwise disposing of any assets specified by the court, if it appears by the complaint that the plaintiff is entitled to the relief demanded and it appears that the defendant may dispose of those assets to thwart enforcement of the judgment.

(j) The Legislature finds and declares that civil penalties for the recovery of expenses incurred in enforcing the provisions of this division shall not supplant criminal prosecution for violation of those provisions, but shall be a supplemental remedy to criminal enforcement.

(k) Any testimony, admission, or any other statement made by the defendant in any proceeding brought pursuant to this section, or any evidence derived from the testimony, admission, or other statement, shall not be admitted or otherwise used in any criminal proceeding arising out of the same conduct.

(l) No action shall be brought or maintained pursuant to this section against a person who has been acquitted of criminal charges for conduct which ~~may be~~ is the basis for an action under this section.

SEC. 2. Section 11471.2 is added to the Health and Safety Code, to read:

11471.2. (a) State or local law enforcement authorities shall not refer or otherwise transfer property seized under state law authorizing the seizure of property to a federal agency seeking the adoption of the seized property by the federal agency ~~of the seized property~~ for proceeding with federal forfeiture. Nothing in this section shall be construed to prohibit the federal

government, or any of its agencies, from seizing property, seeking forfeiture under federal law, or sharing federally forfeited property with state or local law enforcement agencies when such state or local agencies work with federal agencies in joint investigations arising out of federal or federal joint task forces comprised of federal and state or local agencies.

(b) All property, moneys, negotiable instruments, securities, or other things of value received by any state or local law enforcement agency pursuant to any federal law that authorizes the sharing or transfer by federal agencies of all or a portion of forfeited property or the proceeds of from the sale of forfeited property to a state or local law enforcement agency shall be promptly transferred, sold, and deposited distributed as set forth in subdivision (a) Section 11489.1.

(c) A state or local law enforcement agency participating in a joint investigation with a federal agency may shall not receive request an equitable share from the federal agency of all or a portion of the forfeited property or proceeds from the sale of property forfeited pursuant to federal law unless a defendant is convicted in an underlying or related criminal action of an offense for which property is subject to forfeiture as specified in Section 11470 or Section 11488 or any offense under federal law that includes all of the elements of an offense for which property is subject to forfeiture as specified in Section 11470 and Section 11488.

~~(d) If federal law prohibits compliance with Section 11489 or if~~ If a conviction in the underlying or related criminal action is not obtained, state law enforcement authorities shall not receive request an equitable share from the federal agency of all or a portion of the forfeited property or proceeds from the sale of ~~forfeited~~ property ~~forfeited~~ ~~shared or transferred~~ pursuant to federal law.

SEC 3. Section 11488.4 of the Health and Safety Code is amended to read:

11488.4. (a) (1) Except as provided in subdivision (j), if the Department of Justice or the local governmental entity determines that the factual circumstances do warrant that the moneys, negotiable instruments, securities, or other things of value seized or subject to forfeiture come within the provisions of subdivisions (a) to (g), inclusive, of Section 11470, and are not automatically made forfeitable or subject to court order of forfeiture or destruction by another provision of this chapter, the Attorney General or district attorney shall file a petition of forfeiture with the superior court of the county in which the defendant has been charged with the underlying criminal offense or in which the property subject to forfeiture has been seized or, if no seizure has occurred, in the county in which the property subject to forfeiture is located. If the petition alleges that real property is forfeitable, the prosecuting attorney shall cause a lis pendens to be recorded in the office of the county recorder of each county in which the real property is located.

(2) A petition of forfeiture under this subdivision shall be filed as soon as practicable, but in any case within one year of the seizure of the property which is subject to forfeiture, or as soon as practicable, but in any case within one year of the filing by the Attorney General or district attorney of a lis pendens or other process against the property, whichever is earlier.

(b) Physical seizure of assets shall not be necessary in order to have that particular asset alleged to be forfeitable in a petition under this section. The prosecuting attorney may seek protective orders for any asset pursuant to Section 11492.

(c) The Attorney General or district attorney shall make service of process regarding this petition upon every individual designated in a receipt issued for the property seized. In addition, the Attorney General or district attorney shall cause a notice of the seizure, if any, and of the intended forfeiture proceeding, as well as a notice stating that any interested party may file a verified claim with the superior court of the county in which the property was seized or if the property was not seized, a notice of the initiation of forfeiture proceedings with respect to any interest in the property seized or subject to forfeiture, to be served by personal delivery or by registered mail upon any person who has an interest in the seized property or property subject to forfeiture other than persons designated in a receipt issued for the property seized. Whenever a notice is delivered pursuant to this section, it shall be accompanied by a claim form as described in Section 11488.5 and directions for the filing and service of a claim.

(d) An investigation shall be made by the law enforcement agency as to any claimant to a vehicle, boat, or airplane whose right, title, interest, or lien is of record in the Department of Motor Vehicles or appropriate federal agency. If the law enforcement agency finds that any person, other than the registered owner, is the legal owner thereof, and that ownership did not arise subsequent to the date and time of arrest or notification of the forfeiture proceedings or seizure of the vehicle, boat, or airplane, it shall forthwith send a notice to the legal owner at his or her address appearing on the records of the Department of Motor Vehicles or appropriate federal agency.

(e) When a forfeiture action is filed, the notices shall be published once a week for three successive weeks in a newspaper of general circulation in the county where the seizure was made or where the property subject to forfeiture is located.

(f) All notices shall set forth the time within which a claim of interest in the property seized or subject to forfeiture is required to be filed pursuant to Section 11488.5. The notices shall explain, in plain language, what an interested party must do and the time in which the person must act to contest the forfeiture in a hearing. The notices shall state what rights the interested party has at a hearing. The notices shall also state the legal consequences for failing to respond to the forfeiture notice.

(g) Nothing contained in this chapter shall preclude a person, other than a defendant, claiming an interest in property actually seized from moving for a return of property if that person can show standing by proving an interest in the property not assigned subsequent to the seizure or filing of the forfeiture petition.

(h) (1) If there is an underlying or related criminal action, a defendant may move for the return of the property on the grounds that there is not probable cause to believe that the property is forfeitable pursuant to subdivisions (a) to (g), inclusive, of Section 11470 and is not

automatically made forfeitable or 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 preliminary examination. If made subsequent to the preliminary examination, the Attorney General or district attorney may submit the record of the preliminary hearing as evidence that probable cause exists to believe that the underlying or related criminal violations have occurred.

(2) Within 15 days after a defendant's motion is granted, the people may file a petition for a writ of mandate or prohibition seeking appellate review of the ruling.

(i) (1) With respect to property described in subdivisions (e) and (g) of Section 11470 for which forfeiture is sought and as to which forfeiture is contested, the state or local governmental entity shall have the burden of proving beyond a reasonable doubt that the property for which forfeiture is sought was used, or intended to be used, to facilitate a violation of one of the offenses enumerated in subdivision (f) or (g) of Section 11470.

(2) In the case of property described in subdivision (f) of Section 11470, for which forfeiture is sought and as to which forfeiture is contested, the state or local governmental entity shall have the burden of proving beyond a reasonable doubt that the property for which forfeiture is sought meets the criteria for forfeiture described in subdivision (f) of Section 11470.

(3) In the case of property described in paragraphs (1) and (2), **where forfeiture is contested**, a judgment of forfeiture requires as a condition precedent thereto, that a defendant be convicted in an underlying or related criminal action of an offense specified in subdivision (f) or (g) of Section 11470 which offense occurred within five years of the seizure of the property subject to forfeiture or within five years of the notification of intention to seek forfeiture. If the defendant is found guilty of the underlying or related criminal offense, the issue of forfeiture shall be tried before the same jury, if the trial was by jury, or tried before the same court, if trial was by court, unless waived by all parties. The issue of forfeiture shall be bifurcated from the criminal trial and tried after conviction unless waived by all the parties. If the defendant in the related criminal matter is represented by court-appointed counsel, the trial court shall appoint counsel for the defendant in the forfeiture proceeding.

(4) If there is an underlying or related criminal action, and a criminal conviction is required before a judgment of forfeiture may be entered, the issue of forfeiture shall be tried in conjunction therewith. **In such a case, the issue of forfeiture shall be bifurcated from the criminal trial and tried after conviction unless waived by the parties.** Trial shall be by jury unless waived by all parties. If there is no underlying or related criminal action, the presiding judge of the superior court shall assign the action brought pursuant to this chapter for trial.

(j) The Attorney General or the district attorney of the county in which property is subject to forfeiture under Section 11470 may, pursuant to this subdivision, order forfeiture of personal property not exceeding twenty-five thousand dollars (\$25,000) in value. The Attorney General or district attorney shall provide notice of proceedings under this subdivision pursuant to subdivisions (c), (d), (e), and (f), including:

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- (1) A description of the property.
- (2) The appraised value of the property.
- (3) The date and place of seizure or location of any property not seized but subject to forfeiture.
- (4) The violation of law alleged with respect to forfeiture of the property.
- (5) (A) The instructions for filing and serving a claim with the Attorney General or the district attorney pursuant to Section 11488.5 and time limits for filing a claim and claim form.
(B) If no claims are timely filed, the Attorney General or the district attorney shall prepare a written declaration of forfeiture of the subject property to the state and dispose of the property in accordance with **subdivision (b) of Section 11489 11489.1**. A written declaration of forfeiture signed by the Attorney General or district attorney under this subdivision shall be deemed to provide good and sufficient title to the forfeited property. The prosecuting agency ordering forfeiture pursuant to this subdivision shall provide a copy of the declaration of forfeiture to any person listed in the receipt given at the time of seizure and to any person personally served notice of the forfeiture proceedings.
(C) If a claim is timely filed, then the Attorney General or district attorney shall file a petition of forfeiture pursuant to this section within 30 days of the receipt of the claim. The petition of forfeiture shall then proceed pursuant to other provisions of this chapter, except that no additional notice need be given and no additional claim need be filed.
(k) If in any underlying or related criminal action or proceeding, in which a petition for forfeiture has been filed pursuant to this section, and a criminal conviction is required before a judgment of forfeiture may be entered, the defendant willfully fails to appear as required, **there shall be no requirement of a criminal conviction as a prerequisite to the forfeiture. In these cases,** forfeiture shall be ordered as against the defendant and judgment entered upon default, upon application of the state or local governmental entity. In its application for default, the state or local governmental entity shall be required to give notice to the defendant's attorney of record, if any, in the underlying or related criminal action, and to make a showing of due diligence to locate the defendant. In moving for a default judgment pursuant to this subdivision, the state or local governmental entity shall be required to establish a prima facie case in support of its petition for forfeiture.

SEC. 4.
New Section

Section 11488.5 of the Health and Safety Code is amended to read:

- (a) (1) Any person claiming an interest in the property seized pursuant to Section 11488 may, unless for good cause shown the court extends the time for filing, at any time within 30 days from the date of the **first last** publication of the notice of seizure, if that person was not personally served or served by mail, or within 30 days after receipt of actual notice, file with the

superior court of the county in which the defendant has been charged with the underlying or related criminal offense or in which the property was seized or, if there was no seizure, in which the property is located, a claim, verified in accordance with Section 446 of the Code of Civil Procedure, stating his or her interest in the property. An endorsed copy of the claim shall be served by the claimant on the Attorney General or district attorney, as appropriate, within 30 days of the filing of the claim. The Judicial Council shall develop and approve official forms for the verified claim that is to be filed pursuant to this section. The official forms shall be drafted in nontechnical language, in English and in Spanish, and shall be made available through the office of the clerk of the appropriate court.

(2) Any person who claims that the property was assigned to him or to her prior to the seizure or notification of pending forfeiture of the property under this chapter, whichever occurs **first last**, shall file a claim with the court and prosecuting agency pursuant to Section 11488.5 declaring an interest in that property and that interest shall be adjudicated at the forfeiture hearing. The property shall remain under control of the law enforcement or prosecutorial agency until the adjudication of the forfeiture hearing. Seized property shall be protected and its value shall be preserved pending the outcome of the forfeiture proceedings.

(3) The clerk of the court shall not charge or collect a fee for the filing of a claim in any case in which the value of the respondent property as specified in the notice is five thousand dollars (\$5,000) or less. If the value of the property, as specified in the notice, is more than five thousand dollars (\$5,000), the clerk of the court shall charge the filing fee specified in Section 70611 of the Government Code.

(4) The claim of a law enforcement agency to property seized pursuant to Section 11488 or subject to forfeiture shall have priority over a claim to the seized or forfeitable property made by the Franchise Tax Board in a notice to withhold issued pursuant to Section 18817 or 26132 of the Revenue and Taxation Code.

(b) (1) If at the end of the time set forth in subdivision (a) there is no claim on file, the court, upon motion, shall declare the property seized or subject to forfeiture pursuant to subdivisions (a) to (g), inclusive, of Section 11470 forfeited to the state. In moving for a default judgment pursuant to this subdivision, the state or local governmental entity shall be required to establish a prima facie case in support of its petition for forfeiture.

(2) The court shall order the **money** forfeited **or the proceeds of the sale of** property to be distributed as set forth in **subdivision (b) of Section ~~11489~~ 11489.1**.

(c) (1) If a verified claim is filed, the forfeiture proceeding shall be set for hearing on a day not less than 30 days therefrom, and the proceeding shall have priority over other civil cases. Notice of the hearing shall be given in the same manner as provided in Section 11488.4. Such a verified claim or a claim filed pursuant to subdivision (j) of Section 11488.4 shall not be admissible in the proceedings regarding the underlying or related criminal offense set forth in subdivision (a) of Section 11488.

(2) The hearing shall be by jury, unless waived by consent of all parties.

(3) The provisions of the Code of Civil Procedure shall apply to proceedings under this chapter unless otherwise inconsistent with the provisions or procedures set forth in this chapter.

However, in proceedings under this chapter, there shall be no joinder of actions, coordination of actions, except for forfeiture proceedings, or cross-complaints, and the issues shall be limited strictly to the questions related to this chapter.

(d) (1) At the hearing, the state or local governmental entity shall have the burden of establishing, pursuant to subdivision (i) of Section 11488.4, that the owner of any interest in the seized property consented to the use of the property with knowledge that it would be or was used for a purpose for which forfeiture is permitted, in accordance with the burden of proof set forth in subdivision (i) of Section 11488.4.

(2) No interest in the seized property shall be affected by a forfeiture decree under this section unless the state or local governmental entity has proven that the owner of that interest consented to the use of the property with knowledge that it would be or was used for the purpose charged. Forfeiture shall be ordered when, at the hearing, the state or local governmental entity has shown that the assets in question are subject to forfeiture pursuant to Section 11470, in accordance with the burden of proof set forth in subdivision (i) of Section 11488.4.

(e) The forfeiture hearing shall be continued upon motion of the prosecution or the defendant until after a verdict of guilty on any criminal charges specified in this chapter and pending against the defendant have been decided. **In cases in which the forfeiture hearing, or any related civil discovery, is continued or stayed, the requirement that the forfeiture case be tried in conjunction with the related criminal case or to the same jury as in the related criminal case may be waived by the parties.** The forfeiture hearing shall be conducted in accordance with Sections 190 to 222.5, inclusive, Sections 224 to 234, inclusive, Section 237, and Sections 607 to 630, inclusive, of the Code of Civil Procedure if a trial by jury, and by Sections 631 to 636, inclusive, of the Code of Civil Procedure if by the court. Unless the court or jury finds that the seized property was used for a purpose for which forfeiture is permitted, the court shall order the seized property released to the person it determines is entitled thereto. If the court or jury finds that the seized property was used for a purpose for which forfeiture is permitted, but does not find that a person claiming an interest therein, to which the court has determined he or she is entitled, had actual knowledge that the seized property would be or was used for a purpose for which forfeiture is permitted and consented to that use, the court shall order the seized property released to the claimant.

(f) All seized property which was the subject of a contested forfeiture hearing and which was not released by the court to a claimant shall be declared by the court to be forfeited to the state, provided the burden of proof required pursuant to subdivision (i) of Section 11488.4 has been met. The court shall order the forfeited property to be distributed as set forth in Section 11489.

(g) All seized property which was the subject of the forfeiture hearing and which was not forfeited shall remain subject to any order to withhold issued with respect to the property by the Franchise Tax Board.

SEC. 5. Section 11488.7 is added to the Health and Safety Code, to read:

11488.7. In any forfeiture proceeding under this chapter in which the defendant or claimant substantially prevails, the defendant or claimant shall be entitled to recover reasonable attorneys' fees and other litigation costs reasonably incurred by the defendant or claimant. Any final award of fees and costs shall be paid directly to the defendant's or claimant's attorney.

SEC. 56. Section 11489 of the Health and Safety Code is amended to read:

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11489. Notwithstanding Section 11502 and except as otherwise provided in Section 11473, in all cases where the property is seized pursuant to this chapter and forfeited to the state or local governmental entity and, where necessary, sold by the Department of General Services or local governmental entity, the money forfeited or the proceeds of sale shall be distributed by the state or local governmental entity as follows:

(a) To the bona fide or innocent purchaser, conditional sales vendor, or mortgagee of the property, if any, up to the amount of his or her interest in the property, when the court declaring the forfeiture orders a distribution to that person.

(b) The balance, if any, to accumulate, and to be distributed and transferred quarterly in the following manner:

(1) To the state agency 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 costs of notice required by Section 11488.4, and for any necessary repairs, storage, or transportation of any property seized under this chapter.

(2) The remaining funds shall be distributed as follows:

(A) ~~Forty~~ ~~Fifty-four~~ percent to the state, local, or state and local law enforcement entities that participated in the seizure distributed so as to reflect the proportionate contribution of each agency. ~~(i)~~ Fifteen percent of the funds distributed pursuant to this subparagraph shall be deposited in a special fund maintained by the county, city, or city and county of any agency making the seizure or seeking an order for forfeiture. This fund shall be used for the sole purpose of funding programs designed to combat drug abuse and divert gang activity, and shall wherever possible involve educators, parents, community-based organizations and local businesses, and uniformed law enforcement officers. Those programs that have been evaluated as successful shall be given priority. These funds shall not be used to supplant any state or local funds that would, in the absence of this clause, otherwise be made available to the programs.

It is the intent of the Legislature to cause the development and continuation of positive intervention programs for high-risk elementary and secondary schoolage students. ~~Local law enforcement should work in partnership with state and local agencies and the private sector in administering these programs.~~

~~(ii) The actual distribution of funds set aside pursuant to clause (i) shall be determined by a panel consisting of the sheriff of the county, a police chief selected by the other chiefs in the county, and the district attorney and the chief probation officer of the county.~~

~~(B) Five percent to the prosecutorial agency that processes the forfeiture action.~~

~~(C) Ten percent to the court in the jurisdiction where the forfeiture proceedings are initiated.~~

~~(D) Five percent to the public defender's office or provider of court-appointed counsel in the jurisdiction where the forfeiture proceedings were initiated.~~

~~(B)~~ (E) Twenty-four percent to the General Fund. Notwithstanding Section 13340 of the Government Code, the moneys are hereby continuously appropriated to the General Fund. Commencing January 1, 2016, all moneys deposited in the General Fund pursuant to this subparagraph, in an amount not to exceed ten million dollars (\$10,000,000), shall be made available for school safety and security, upon appropriation by the Legislature, and shall be disbursed pursuant to Senate Bill 1255 of the 1993–94 Regular Session, as enacted.

(C) Thirty-four percent to State Asset Forfeiture Fund for Courts and Criminal Justice Purposes described in subdivision (b) of Section 11489.1.

~~(D)~~ (F) One percent to a private nonprofit organization composed of local prosecutors, which shall use these funds for the exclusive purpose of providing a statewide program of education and training for prosecutors and law enforcement officers in ethics and the proper use of laws permitting the seizure and forfeiture of assets under this chapter.

~~(E)~~ (G) One percent to a private nonprofit organization composed of local criminal defense attorneys, which shall use these funds for the exclusive purpose of providing a statewide program of education and training in the use of laws permitting the seizure and forfeiture of assets under this chapter.

(c) Notwithstanding Item 0820-101-469 of the Budget Act of 1985 (Chapter 111, Statutes of 1985), all funds allocated to the Department of Justice pursuant to subparagraph (A) of paragraph (2) of subdivision (b) shall be deposited into the Department of Justice Special Deposit Fund–State Asset Forfeiture Account and used for the law enforcement efforts of the state or for state or local law enforcement efforts pursuant to Section 11493.

All funds allocated to the Department of Justice by the federal government under its Federal Asset Forfeiture program authorized by the Comprehensive Crime Control Act of 1984 (Public Law 98-473) may be deposited directly into the Narcotics Assistance and Relinquishment by Criminal Offender Fund and used for state and local law enforcement efforts pursuant to Section 11493.

Funds that are not deposited pursuant to the above paragraph shall be deposited into the Department of Justice Special Deposit Fund–Federal Asset Forfeiture Account.

SEC. 67.

New Section

Section 11489.1 is added to the Health and Safety Code, to read:

- (a) All property, moneys, negotiable instruments, securities, or other things of value received by any state or local law enforcement agency pursuant to any federal law that authorizes the sharing or transfer of all or a portion of forfeited property or the proceeds from the sale of forfeited property to a state or local law enforcement agency shall be deposited into the State Asset Forfeiture Fund for Law Enforcement

Purposes to be allocated to law enforcement agencies statewide based on population of jurisdiction served.

(b) All property, moneys, negotiable instruments, securities, or other things of value forfeited pursuant to subdivision (j) of Section 11488.4 and subdivision (b)(2) of Section 11488.5 shall be distributed as follows:

- 1. To the state agency or local governmental entity for all expenditures made or incurred by it in connection with sale of the property, including expenditures for any necessary costs for public notice, hearings, or for any necessary repairs, storage, or transportation of any property lawfully forfeited.**
- 2. The remaining funds shall be distributed as follows:**
 - A. Twenty four percent (24%) to the General Fund**
 - B. Seventy six percent (76%) to the State Asset Forfeiture Fund for Courts and Criminal Justice Purposes to be made available, upon appropriation by the Legislature, for purposes of criminal and civil court functions, prosecution, public defense and indigent defense, law enforcement, crime prevention including afterschool programs for adolescents and drug treatment for adolescents and adults, and victim services.**

SEC. 68. Section 11495 of the Health and Safety Code is amended to read:

11495. (a) The funds received by the law enforcement agencies under Section 11489 shall be deposited into an account maintained by the Controller, county auditor, or city treasurer. These funds shall be distributed to the law enforcement agencies at their request. The Controller, auditor, or treasurer shall maintain a record of these disbursements which records shall be open to public inspection, subject to the privileges contained in Sections 1040, 1041, and 1042 of the Evidence Code.

(b) Upon request of the governing body of the jurisdiction in which the distributions are made, the Controller, auditor, or treasurer shall conduct an audit of these funds and their use. In the case of the state, the governing body shall be the Legislature.

(c) Each year, the Attorney General shall publish a report which sets forth the following information for the state, each county, each city, and each city and county:

(1) The number of forfeiture actions initiated and administered by state or local agencies under California law, the number of cases adopted by the federal government, and the number of cases initiated by a joint federal-state action that were prosecuted under federal law.

(2) The number of cases and the administrative number or court docket number of each case for which forfeiture was ordered or declared.

(3) The number of suspects charged with a controlled substance violation.

- (4) The number of alleged criminal offenses that were under federal or state law.
- (5) The disposition of cases, including no charge, dropped charges, acquittal, plea agreement, jury conviction, or other.
- (6) The value of the assets forfeited.
- (7) The recipients of the forfeited assets, the amounts received, and the date of the disbursement.
- (d) The Attorney General shall develop administrative guidelines for the collection and publication of the information required in subdivision (c).
- (e) The Attorney General's report shall cover the calendar year and shall be made no later than March 1 of each year beginning with the year after the enactment of this law.

SEC. 79. If the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code.

Date of Hearing: July 14, 2015

Counsel: Sandy Uribe

ASSEMBLY COMMITTEE ON PUBLIC SAFETY

Bill Quirk, Chair

SB 507 (Pavley) – As Amended July 2, 2015

SUMMARY: Allows the prosecutor petitioning for commitment of a person alleged to be a sexually violent predator (SVP) to access treatment records reviewed by the expert evaluators. Specifically, **this bill:**

- 1) Requires an evaluator who is performing an updated evaluation to include a statement listing all records reviewed to make that evaluation.
- 2) Allows either party to subpoena for a certified copy of the records. The records shall be provided to both the attorney petitioning for commitment and the attorney for the SVP.
- 3) Allows the attorneys to use the records for the SVP proceedings, but prohibits disclosure for any other purpose.
- 4) Specifies that the right of any party to object to all or a portion of a subpoenaed record on grounds of prejudicial effect outweighing probative value, or on the basis of materiality to the issue of whether the person is a SVP or to any other issue to be decided by the court remains unaffected.
- 5) States that if the objection is sustained in whole or in part, the record or records shall retain their confidentiality, as specified.
- 6) Specifies that this subdivision does not affect the right of a party to seek other records regarding the SVP.
- 7) Provides that with the exception created above, the rights of a SVP to assert that his or her records are confidential are not affected.
- 8) States that this bill does not affect the California Supreme Court's determination of the issue of whether or not an expert retained by the district attorney in a SVP proceeding is entitled to review otherwise confidential treatment information.

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) Provides that if evaluators concur that a petition should be filed to commit a person as a SVP, the Director of the Department of State Hospitals (DSH) shall forward a request for a petition for commitment to the pertinent prosecuting attorney for the county. Copies of the evaluation reports and any other supporting documentation shall be made available to that attorney. (Welf. & Inst. Code, § 6601, subds. (d) & (h).)
- 4) States that if the county's designated prosecuting attorney concurs with the recommendation, then the commitment petition shall be filed in the county of conviction. (Welf. & Inst. Code, § 6601, subd. (i).)
- 5) Entitles a person alleged to be a SVP to certain rights, including the right to a jury trial, to the assistance of counsel, to retain experts or professionals to perform an examination, and to have access to all relevant medical and psychological records and reports. (Welf. & Inst. Code, § 6603, subd. (a).)
- 6) Allows the prosecutor to obtain updated evaluations of the alleged SVP if he or she determines they are necessary to properly present the case for commitment. The prosecutor may also obtain replacement evaluations if the original evaluator is no longer available to testify. (Welf. & Inst. Code, § 6603, subd. (c).)
- 7) Specifies that updated or replacement evaluations include review of available medical and psychological records, including treatment records, consultation with current treating clinicians, and interviews with the alleged SVP. (Welf. & Inst. Code, § 6603, subd. (c).)
- 8) Permits a person committed as a SVP to be held for an indeterminate term upon commitment. (Welf. & Inst. Code, §§ 6604 & 6604.1.)
- 9) 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 be in the form of a declaration. The report must be filed with the court and also be served on the prosecuting agency involved in the initial commitment. The report shall include consideration of conditional release to a less restrictive alternative or 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.)
- 10) Permits the SVP to retain a qualified expert or professional person to examine him or her, and the retained individual shall have access to all records concerning the SVP. (Welf. & Inst. Code, § 6604.9, subd. (a).)
- 11) Provides that when DSH determines that the person's condition has so changed that he or she is not likely to commit acts of predatory sexual violence while under community treatment and supervision, then the DSH Director shall forward a report and recommendation for conditional release to the court, the prosecuting agency, and the attorney of record for the committed person. (Welf. & Inst. Code, § 6607.)

- 12) Establishes a process whereby a person committed as a SVP can petition for conditional release 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).)
- 13) Provides that all information and records obtained in the course of providing services to either a voluntary or involuntary recipient of services under the Sexually Violent Predator Act (SVPA) shall be confidential, except under limited circumstances. (Welf. & Inst. Code, § 5328.)

FISCAL EFFECT: Unknown

COMMENTS:

- 1) **Author's Statement:** According to the author, "SB 507 addresses the need for fair hearings when Sexually Violent Predators (SVPs) come up for state hospital commitment reviews. This bill establishes that both prosecuting attorneys and defense attorneys will have equal access to mental health treatment records before SVPs are assessed for their potential release from state's hospitals. A lack of access to these records can deprive judges and juries of the information they need to decide whether or not it is safe to release a violent sex offender from a state hospital. The records would remain confidential for all purposes other than the SVP proceedings.

"Under California law, SVPs are those who have been convicted of a sexually violent offense, such as forcible rape, forcible sodomy, or child molestation, and who have been determined by a judge or jury to be likely to commit a similar offense in the future due to a diagnosed mental disorder. In these instances, SVPs are committed to a state hospital.

"In 1996, the Legislature created the Sex Offender Commitment Program to target a small, but extremely dangerous subset of sexually violent offenders who present a continuing threat to society because their diagnosed mental disorders predispose them to engage in sexually violent criminal behavior.

"This can be particularly problematic in SVP cases because the District Attorney is charged with proving to a unanimous jury, beyond a reasonable doubt, that a sexual predator currently has a diagnosed mental disorder which predisposes him to commit sexually violent crimes, and that he meets the criteria for indefinite commitment of a state hospital for sex offender treatment.

"In *Albertson v. Superior Court* (2001) 25 Cal. 4th 796, the court held that WIC section 6603 granted express authority for updated evaluations and clarified an exception to the general rule of confidentiality of treatment records in that it allows the district attorney "access to treatment record information, insofar as that information is contained in an updated evaluation." Some trial courts have interpreted this language to grant the DA access only to treatment information and not to the records themselves.

"The court issued this decision immediately after the Legislature enacted Section 6603 to allow prosecuting attorneys to request updated evaluations. Section 6603 states that the updated evaluations shall include a review of medical and mental health records. It did not explicitly grant access of the records to prosecutors, nor did it explicitly deny or limit access

either. The Albertson court noted that 'in a SVPA proceeding, a district attorney may obtain, through updated mental evaluations otherwise confidential information concerning an alleged SVP's treatment.'

"At the present time, whether or not the DA is granted direct access to the records or whether the DA is only allowed to access records relied upon by the evaluating psychologists, depends upon the judge's reading of Albertson. As a result, the issue is repeatedly litigated and the results vary throughout California.

"In *Seaton vs. Mayberg* (2010) 610 P.3rd 530, 539, the Ninth Circuit court cited that sexually violent predator evaluations fall within those long established exceptions to the confidentiality of medical communications. It cited other public health and public safety requirements overcoming a right to privacy include cases of restraint due to insanity, contagious diseases, abuse of children and gunshot wounds. In *People v. Martinez*, the 4th District Court of Appeal held that it is not a violation of the California right to privacy (Article I, Section 1 of the California Constitution) to provide copies of mental health treatment records to the prosecutor in an SVP case. *People v. Martinez* (1994) 88 Cal App 4th 465.

"Some of California's most violent sexual predators can be released back into society if complete information is not available to prosecutors and defense lawyers at the time the predator's cases are being reviewed. This bill is needed to help ensure such mistakes are prevented in the future, providing more peace of mind to already traumatized victims, their families and the public at large.

"According to the National Intimate Partners and Sexual Violence Survey, conducted by the Centers for Disease Control and Prevention, there are an estimated two million female victims of rape in California, and estimated 8.5 million survivors of sexual violence, other than rape, in the United States.

"There are 20 states that have laws providing for involuntary civil commitment of sexually violent predators similar to California's SVP law, in addition to the federal SVP law (the Adam Walsh Act). California is the only state that does not have a specific legislative provision granting prosecutors access to mental health and medical records for the purpose of carrying out sexually violent predator commitment law."

- 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 a specified criterion to determine whether or not 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, (c) 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 is then 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, § 6605, subd. (a).) In addition, the 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, § 6605, subd. (f).)

The SVPA was substantially amended by Proposition 83 ("Jessica's Law") 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 the defendant no longer poses a danger to others. (See *People v. McKee* (2010) 47 Cal. 4th 1172, 1185-1187.) 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 order 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).) If the petition is not found to be frivolous, the court is required to 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) **Disclosure of Records:** Under current law, the prosecuting attorney can access the mental health records of a person who is initially referred to a state hospital for a SVP screening. (See Welf. & Inst. Code, § 6601, subd. (d).) The psychotherapist-patient privilege arguably does not attach because the consultation is not for purposes of treatment; rather the person is being examined by a potential adversary's doctor for the potential adversary's purpose. (See e.g., *Seaton v. Mayberg* (2010) 610 F.3d 530, 540.)

However, once the person is in treatment, Welfare and Institutions Code section 5328 requires the confidentiality of all information and records obtained in the course of providing services to either voluntary or involuntary recipients of treatment under the SVPA. There are several limited exceptions to the general rule on the confidentiality of treatment records. For example, section 5328, subdivision (f) permits release of information "to the courts, as necessary to the administration of justice." Similarly, subdivision (j) permits release "to the attorney for the patient in any and all proceedings upon presentation of a release of information signed by the patient."

Additionally, under section 6603, the prosecution may access "otherwise confidential treatment information ... to the extent such information is contained in an updated evaluation."

In *Albertson v. Superior Court* (2001) 25 Cal.4th 796, the California Supreme Court considered, inter alia, whether the legislation amending section 6603, subdivision (c), regarding updated and replacement evaluations authorized the prosecutor to obtain access to the SVP's treatment records. The statute provides in pertinent part: "These updated or replacement evaluations shall include review of available medical and psychological records,

including treatment records, consultation with current treating clinicians, and interviews of the person being evaluated, either voluntarily or by court order." Relying on legislative history the court held "that in an SVPA proceeding a local government's designated counsel (here, the district attorney) may obtain, through updated mental evaluations, otherwise confidential information concerning an alleged SVP's treatment." (*Id.* at p. 805.) The court referenced letters in opposition to the bill which raised concerns that the language would compromise confidentiality, and a recommendation from the Assembly Public Safety Committee to omit the language mandating the release of treatment records. (*Id.* at pp. 806-807.) The court noted that despite this recommendation, the final version of the bill left intact the language allowing review of treatment records. (*Id.* at p. 807.) The court concluded that the provision provides an exception to the general rule of confidentiality of treatment records, and allows the district attorney access to treatment record information, *insofar as that information is contained in an updated evaluation.* (*Ibid.*; italics added.)

However, at least one recent appellate court case has interpreted section 6603 to give prosecutors limited direct access to such records. See (*Gilbert v. Superior Court* (2014) 224 Cal.App.4th 367, 382.)

This bill seeks to ensure that the prosecuting attorney has access to all the records on which the evaluators have based their evaluations. The most recent amendments to the bill require an evaluator to list in the evaluation all the records relied upon. These are the records which will be subject to disclosure.

It should be noted that the California Supreme Court recently granted review in *People v. Superior Court (Smith)* (Feb. 24, 2015, G050827) [nonpub. opn.], review granted 5/20/2015 (S225562) and one of the questions it is considering whether prosecutors pursuing recommitment under the SVP statute should have access to confidential patient-psychotherapist records. Should the Legislature intervene at this time when the subject matter addressed by this bill will be decided by the California Supreme Court?

- 5) **Psychotherapist-Patient Privilege:** "Crucial to psychotherapeutic treatment is a patient's readiness to reveal his thoughts, dreams, fantasies, sins and shame. It would be unreasonable to expect a patient to freely participate in such treatment if he knew that what he said and what the therapist learned from what he said could all be revealed in court. A patient in therapy has and needs a justifiable expectation of confidentiality as to his psychotherapeutic treatment." (*In re Eduardo A.* (1989) 209 Cal.App.3d 1038, 1042.)

Recently, the California Supreme Court held that in a trial under the SVPA, admission of defendant's therapy records and therapist's testimony, under the dangerous patient exception was erroneous. (*People v. Gonzales* (2013) 56 Cal.4th 353, 357.) Before the SVP trial, the prosecutor sought to access the defendant's psychological records compiled during evaluations and counseling sessions. The trial court granted access to the records based on the dangerous-patient exception to the psychotherapist-patient privilege. The appellate court reversed, holding that disclosure was inappropriate and that the error amounted to a violation of the federal constitutional right of privacy. The Supreme Court granted the People's petition for review. (*Ibid.*) The Supreme Court agreed that it was erroneous to permit disclosure of the records under the dangerous-patient exception to the psychotherapist-patient privilege.

The court stated that, regardless of whether or not it would be useful or valuable for a district attorney to have access to confidential communications made by a SVP in the course of therapy sessions in order to evaluate his or her mental condition or potential danger, the usefulness or value of such information was not a valid basis to eliminate the patient's right to protect against the disclosure of such communications. (*Id.* at p. 374.)

However, the Court did note that the privilege is not absolute and when a therapist providing treatment to a SVP concludes that the patient is a danger to himself or others and disclosure is necessary to prevent the threatened danger, despite the psychotherapist-patient privilege, the therapist may testify in an SVP proceeding. (*Id.* at p. 380.) In this case, the trial court's conclusion that the dangerous patient exception applied was based solely on the prosecution's conclusory offer of proof that the records and testimony of the therapist would show that the therapist believed appellant presented a danger, and no actual proof was presented. Nevertheless, the Court noted that even when some of the patient's statements in therapy might be subject to disclosure under the dangerous-patient exception, the rest of the confidential communications during therapy sessions remain privileged. (*Id.* at p. 382.)

- 6) **Argument in Support:** The *Los Angeles District Attorney's Office*, the sponsor of this bill, states, "Los Angeles courts have recently refused to provide prosecutors with access to treatment records necessary to prepare for trial. Given that SVP cases are based upon the current mental condition of the offender and given that the district attorney must prove the People's care to a jury, beyond a reasonable doubt, this places the People in an untenable position.

"SB 507 would require that attorneys for both the People and the SVP be provided copies of records that were reviewed by the State Department of State Hospital experts as part of the offender's updated evaluation. Since these experts testify in the SVP trial, the bill permits records they reviewed as part of their evaluation to be used for the purpose of that trial. However, the records would remain confidential for all other purposes...."

"In the past, state hospital records were routinely provided to district attorneys in SVP cases. In the last few years, Los Angeles courts have denied requests for subpoenas for state hospital records when requested by the People. A review of California counties revealed that courts in every other California county surveyed grant the People access to these records. Moreover, every one of the 20 states that have sexually violent predator laws grants prosecutors access to mental health and medical records for the purpose of carrying out the law.

"The SVP is entitled to hire his or her own experts, at the expense of the state. That expert is given full access to the mental health records. It is difficult, if not impossible, to cross examine the SVP's expert without knowing what is in the mental health records.

"Even direct examination of the state hospital evaluators is difficult as crucial evidence is often left out of their reports. This is unavoidable given that the evaluator generally provides only a brief summary of the records he or she has reviewed as part of the evaluation...."

7) **Arguments in Opposition:**

- a) The *California Psychiatric Association* (CPA) writes, "The CPA has concerns that SB 507 would breach the patient-psychotherapist privilege thereby undermining both the purposes and effectiveness of therapy. Courts have ruled, that even though 'the privilege may operate in particular cases to withhold relevant information, the interests of society will be better served if psychiatrists are able to assure patients that their confidences will be protects (sic).' (*People v. Gonzales* (2013) 56 Cal.4th 353, citing California Law Revision Com.) CPA's further concern is that if enacted SB 507 would not only have serious adverse effects on its members, other mental health professionals as well as on the patients they treat, it may open the door to further incursions into the relationship between a therapist and their patient.

"The CPA supports current law that provides comprehensive safeguards requiring and permitting reports to the authorities from an individual's confidential therapy under certain delineated circumstances. None allows direct disclosure of the record themselves. The precedent SB 507 would set were it to be enacted may threaten to broaden out those exceptions in carefully crafted current law and could potentially allow direct disclosure in those laws."

- b) The *California Public Defenders Association* states, "Under existing law, individuals subject to Welfare & Institutions Code section 6603 are Pretrial Detainees. They have not been committed under the SVPA. They are being held on probable cause pending trial.

"Under existing practice, many of these Pretrial Detainee Individuals have been given the opportunity for the first time and have successfully participated in sex offender treatment at Coalinga State Hospital. Some of these Pretrial Detainees have completed years of sex offender treatment at Coalinga which entailed undergoing a course of incredibly invasive treatment, where they were expected to speak openly, in a group setting, about their most painful childhood experiences, their most shameful thoughts, fantasies and actions, and their plans for relapse prevention when released. Most, if not, all of them were never given the option of participating in a comprehensive intensive sex offender treatment program before because, with the exception of a small pilot program, sex offender treatment has not been available in California prisons for decades. If sex offender treatment had been offered in prison, many of these Pretrial Detainees Individuals would never have been held under the SVPA.

"When the prosecution requests updated evaluations pursuant to Welfare & Institutions Code section 6603, the independent and state evaluators are obligated to determine whether the Pretrial Detainees are currently dangerous. If the Pretrial Detainee is infirm, significantly older or has successfully completed many years of sex offender treatment, the state and independent mental health professionals may find that the Pretrial Detainee does not currently meet the criteria for commitment under the SVPA. The evaluators' conclusions are grounded in evidence based research. The evaluators are trained by the Department of State Hospitals and adhere to the protocol promulgated by the Department.

"SB 507 would give district attorneys access to the Pretrial Detainees' mental health

records so that they could “second guess” the Department of State Hospitals mental health professionals thus allowing the district attorneys to supplant the Department’s evidence based judgment with their own non-scientific judgment about an individual Pretrial Detainee’s future dangerousness. This is a slippery slope which trends away from a civil commitment scheme based on independent expert opinion toward further incarceration for past crimes."

- c) According to the *ACLU*, "We appreciate that the bill has been amended to make clear that it is not intended to impact the issue of prosecutor’s use of expert witnesses in SVP proceedings, now before the California Supreme Court in the case of *People v. Superior Court (Smith)* (Docket No. S225562). This has been one of our concerns about the bill.

"The Smith case will also address the issue that is the core of SB 507: whether prosecutors pursuing recommitment under the SVP statute should have access to confidential patient-psychotherapist records. We believe that the Legislature should wait until the court has ruled on this issue before changing the current rules.

"We remain concerned that SB 507 invades the confidential nature of the patient-therapist relationship, as discussed in *People v. Gonzales* (2013) 56 Cal.4th 353. Giving the prosecution complete and unfettered access to the patient’s treatment records would make it even more difficult for the patient to share honestly and openly with the therapist and, ultimately, make it more difficult to treat these individuals."

- 8) **Related Legislation:** AB 262 (Lackey) places additional residency restrictions on SVP's conditionally released for community outpatient treatment. AB 262 failed passage in this committee and granted reconsideration.

9) **Prior Legislation:**

- a) SB 295 (Emmerson), Chapter 182, Statutes of 2013, revised the procedures to be used by the courts for SVP petitions, whether with or without DSH concurrence, for conditional release and unconditional discharge.
- b) Proposition 83 ("Jessica's Law"), operative on November 7, 2006, and SB 1128 (Alquist), Chapter 337, Statutes of 2006, made numerous changes to sex offender and SVP law, including making commitment terms indefinite.
- c) SB 2018 (Schiff), Chapter 420, Statutes of 2000, allows the prosecutor to obtain updated or replacement evaluations.

REGISTERED SUPPORT / OPPOSITION:

Support

Los Angeles County District Attorney's Office (Sponsor)
Association of Deputy District Attorneys
Association for Los Angeles Deputy Sheriffs
California Association of Code Enforcement Officers
California College and University Police Chiefs Association

California Narcotic Officers Association
California State Lodge, Fraternal Order of Police
Crime Victims United of California
Long Beach Police Officers Association
Los Angeles County Professional Peace Officers Association
Los Angeles Police Protective League
Sacramento County Deputy Sheriffs' Association
Riverside Sheriffs Association

Opposition

American Civil Liberties Union
California Psychiatric Association
California Public Defenders Association
Legal Services for Prisoners with Children

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