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**ASSEMBLY COMMITTEE ON
PUBLIC SAFETY**
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STELLA Y. CHOE
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AGENDA

9:00 a.m. – May 5, 2015
State Capitol, Room 126

<u>Item</u>	<u>Bill No. & Author</u>	<u>Counsel/ Consultant</u>	<u>Summary</u>
1.	AB 636 (Medina)	Ms. Uribe	Postsecondary education: student safety.
2.	AB 925 (Low)	Mr. Caswell	Intentional recording of telephonic communication.
3.	AB 1276 (Santiago)	Ms. Choe	Child witnesses: human trafficking.
4.	AB 1356 (Lackey)	Mr. Billingsley	Vehicles: driving under the influence: drug testing.

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Date of Hearing: May 5, 2015
Counsel: Sandra Uribe

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Bill Quirk, Chair

AB 636 (Medina) – As Amended April 29, 2015

SUMMARY: Provides specific circumstances under which a post-secondary institution must release an alleged assailant's name to local law enforcement. Specifically, **this bill:**

- 1) Requires a post-secondary institution to disclose the identity of an alleged assailant to local law enforcement if the institution determines that he or she represents a serious and ongoing threat to the safety of persons or the institution, and that the immediate assistance of law enforcement is necessary to contact or to detain him or her.
- 2) Requires the institution to notify the victim of that disclosure.

EXISTING FEDERAL LAW: Requires, under Title IX and the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act), colleges and universities, as a condition of federal student aid program participation, to (a) publish annual campus security reports, maintain crime logs, provide timely warnings of crimes that present a public safety risk, and maintain ongoing crime statistics; and (b) establish certain rights for victims of sexual assault, including notification to victims of legal rights, availability of counselling, safety options for victims, and offering prevention and awareness programs. (20 U.S.C. §1681-1688; 20 U.S.C. §1092(f).)

EXISTING STATE LAW:

- 1) States that the governing board of each community college district (CCD), the Trustees of the California State University (CSU), the Regents of the University of California (UC), and the governing boards of independent postsecondary institutions receiving public funds for student financial assistance shall require the appropriate officials at each campus within their respective jurisdictions to compile records of all occurrences reported to campus police, campus security personnel, or campus safety authorities of, and arrests for, crimes that are committed on campus and that involve violence, hate violence, theft, destruction of property, illegal drugs, or alcohol intoxication. (Ed. Code, § 67380, subd. (a)(1)(A).)
- 2) Requires that the information concerning the crimes compiled be available within two business days following the request of any student or employee of, or applicant for admission to, any campus within their respective jurisdictions, or to the media, unless the information is the type of information exempt from disclosure, as specified. (Ed. Code, § 67380, subd. (a)(3)(A).)
- 3) Requires any report made by a victim or an employee regarding specified violent crimes, sexual assault, or a hate crime which is received by a campus security authority and has been made by the victim for purposes of notifying the institution or law enforcement, to be

disclosed immediately, or as soon as practicably possible, to the local law enforcement agency with which the institution has a written agreement clarifying operational responsibilities for investigations. (Ed. Code, § 67380, subd. (a)(6)(A).)

- 4) Stipulates that the report must not identify the victim without his or her consent, and that if the victim does not consent, the alleged assailant also shall not be identified. (Ed. Code, § 67380, subd. (a)(6)(A).)
- 5) Requires the governing board of each CCD, the CSU Trustees, the UC Regents, and the governing boards of independent postsecondary institutions receiving public funds for student financial assistance to adopt rules requiring each of their respective campuses to enter into written agreements with local law enforcement agencies that clarify operational responsibilities for investigations of specified violent crimes occurring on each campus. (Ed. Code, § 67381, subd. (b).)
- 6) Requires the governing board of each CCD, the CSU Trustees, the Board of Directors of Hastings College of the Law, and the UC Regents to each adopt, and implement at each of their respective campuses or other facilities, a written procedure or protocols to ensure, to the fullest extent possible, that students, faculty, and staff who are victims of sexual assault committed on grounds maintained by the institution or affiliated student organizations, receive treatment and information. (Ed. Code, § 67385, subd. (a).)
- 7) States that the written procedures or protocols must contain at least the following information:
 - a) The college policy regarding sexual assault on campus;
 - b) Personnel on campus who should be notified, and procedures for notification, with the consent of the victim;
 - c) Legal reporting requirements, and procedures for fulfilling them;
 - d) Services available to victims, and personnel responsible for providing these services, such as the person assigned to transport the victim to the hospital, to refer the victim to a counseling center, and to notify the police, with the victim's concurrence;
 - e) A description of campus resources available to victims, as well as appropriate off-campus services;
 - f) Procedures for ongoing case management, including procedures for keeping the victim informed of the status of any student disciplinary proceedings in connection with the sexual assault, and the results of any disciplinary action or appeal, and helping the victim deal with academic difficulties that may arise because of the victimization and its impact;
 - g) Procedures for guaranteeing confidentiality and appropriately handling requests for information from the press, concerned students, and parents; and,
 - h) Each victim of sexual assault should receive information about the existence of at least the following options: criminal prosecutions, civil prosecutions, the disciplinary process

through the college, the availability of mediation, alternative housing assignments, and academic assistance alternatives. (Ed. Code, § 67385, subd. (b).)

- 8) Requires public postsecondary educational institution campuses to develop policies to encourage students to report any campus crimes involving sexual violence to the appropriate campus authorities. (Ed. Code, § 67385.7, subd. (c).)
- 9) Urges campuses to adopt policies to eliminate barriers for victims who come forward to report sexual assaults, and to advise students regarding these policies. These policies may include, but are not necessarily limited to, exempting the victim from campus sanctions for being in violation of any campus policies, including alcohol or substance abuse policies or other policies of the campus, at the time of the incident. (Ed. Code, § 67385.7, subd. (d).)

FISCAL EFFECT: Unknown

COMMENTS:

- 1) **Author's Statement:** According to the author, "This bill strikes the appropriate balance to support victims and to protect the larger campus community."
- 2) **Campus-Based Requirements and Remedies Required Under Federal Law:** Under Title IX of the Higher Education Amendments of 1972 and the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, post-secondary educational institutions receiving federal financial aid are required to disclose information about crimes on and around campuses (Clery Act), as well as establish certain rights for victims of sexual assault (Title IX). Title IX prohibits sex-based discrimination in education. If an institution knows, or reasonably should know, about discrimination, harassment, or violence that is creating a "hostile environment" for any student, it must act to eliminate it, remedy the harm caused, and prevent its recurrence. The rights provided under Title IX include notification to victims of the right to file a complaint, available counseling services, the results of disciplinary proceedings, and the option for victims to change their academic schedule or living arrangements, and requires postsecondary institutions to offer prevention and awareness programs to new students and employees regarding rape, domestic and dating violence, sexual assault, and stalking.

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

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

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

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

- 4) **Confidentiality Provisions:** "For Title IX purposes, if a student requests that his or her name not be revealed to the alleged perpetrator or asks that the school not investigate or seek action against the alleged perpetrator, the school should inform the student that honoring the request may limit its ability to respond fully to the incident, including pursuing disciplinary action against the alleged perpetrator. The school should also explain that Title IX includes protections against retaliation, and that school officials will not only take steps to prevent retaliation but also take strong responsive action if it occurs. ...

"If the student still requests that his or her name not be disclosed to the alleged perpetrator or that the school not investigate or seek action against the alleged perpetrator, the school will need to determine whether or not it can honor such a request while still providing a safe and nondiscriminatory environment for all students, including the student who reported [the crime]." (See *Questions and Answers on Title IX and Sexual Violence*, United States Department Office of Civil Rights <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.) Thus, federal law allows an institution to override the confidentiality wishes of a victim in some instances. The school may weigh the request for confidentiality against its obligation to provide a safe and nondiscriminatory environment for all students, including the reporting student.

In contrast, current California law gives the victim exclusive control over whether the perpetrator's name is disclosed to the law enforcement agency. It states that a report to law enforcement must be made "without identifying the victim, unless the victim consents to being identified ... If the victim does not consent to being identified, the alleged assailant shall not be identified in the information disclosed to the local law enforcement agency." (Ed. Code, § 67380(a)(6)(A).) While the confidentiality provisions were well-intentioned, the language prohibits a post-secondary educational institution from sharing the name of an assailant even under circumstances in which the institution believes assistance from law enforcement is necessary to protect the student body and the broader campus community.

Under the provisions of this bill, a postsecondary educational institution must now disclose the identity of the alleged perpetrator to local law enforcement if both of the following conditions are met: (1) the institution determines that the alleged assailant is a serious and ongoing threat to the safety of campus community; *and* (2) the immediate assistance of local

law enforcement is needed to contact or apprehend the alleged assailant.

As introduced, this bill authorized the institution to disclose the alleged assailant's identity if the aforementioned conditions were met; but did not require disclosure. As recently amended, the institution is required to disclose the identity of the alleged assailant in all cases where those two conditions are met. While disclosure may be beneficial in most cases, is it better to give the institution discretion, rather than mandating it in every case? A situation may arise where the immediate risk of harm to the victim might weigh in favor of non-disclosure.

- 5) **Argument in Support:** According to the *Association of Independent California Colleges and Universities*, "Education Code section 67383 states that a report to law enforcement must be made without identifying the victim, unless the victim consents to being identified. If the victim does not consent to being identified, the alleged assailant cannot be identified in the information shared with the local law enforcement agency. While this provision is well intentioned, it would prohibit a university from sharing the name of the alleged assailant even under circumstances in which the university believes assistance from law enforcement is necessary to protect the student body and the broader campus community.

"AB 636 appropriately affords colleges and universities discretion with Part I violent crimes, sexual assaults or hate crimes to report the assailant's identity to police in situations where the university believes the assailant is an ongoing threat and needs the assistance of law enforcement to contact or detain the assailant. In these cases, police intervention would be extremely important to help the university assess and alleviate the public safety risks to the campus community. Law enforcement can then make the decision whether to contact and/or detain the alleged assailant.

"AB 636 continues to respect the wish for confidentiality by victims, which is important to protect victims from being further violated and encourage reporting of these offenses to university officials, particularly in cases of sexual assault. Under Title IX, universities have an affirmative obligation to prevent student-on-student sexual harassment and sexual violence. AB 636 assists colleges and universities in fulfilling their obligation under Title IX to prevent sexual violence and protect the broader campus community by allowing the university to provide the necessary information to the local police when assistance is needed."

- 6) **Related Legislation:** AB 913 (Santiago) requires that the written jurisdictional agreements between postsecondary educational institutions and local law enforcement which designate the agency responsible for investigating specified violent crimes to also make a designation with respect to the investigation of sexual assaults and hate crimes. AB 913 is pending hearing in the Assembly Appropriations Committee.
- 7) **Prior Legislation:** AB 1433 (Gatto), Chapter 798, Statutes of 2014, requires the governing board of each public, private and independent postsecondary educational institution, which receives public funds for student financial assistance, to adopt and implement written policies and procedures governing the reporting of specified crimes to law enforcement agencies.

REGISTERED SUPPORT / OPPOSITION:

Support

Association for Los Angeles Deputy Sheriffs
Association of Independent California Colleges and Universities
California Association of Code Enforcement Officers
California College and University Police Chiefs
California District Attorneys Association
California Narcotic Officers Association
Los Angeles Police Protective League
Riverside Sheriffs Association

Opposition

None

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

Date of Hearing: May 5, 2015
Counsel: Gabriel Caswell

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Bill Quirk, Chair

AB 925 (Low) – As Amended April 13, 2015

SUMMARY: Exempts non-confidential communications between a person or business and a current or former customer regarding their business relationship from any illegal non-consensual recording prohibitions. Specifically, **this bill:** Provides an exception to the prohibition of calling a mobile phone and intentionally recording a telephonic communication without the consent of both parties for all non-confidential communications between a person or business and a current or former customer of the person or business, or a person reasonably believed to be a current or former customer, regarding their business relationship, including, but not limited to, communications regarding billing, provisioning, maintaining, or operating the product or service provided by the person or business.

EXISTING LAW:

- 1) States that the Legislature hereby declares that advances in science and technology have led to the development of new devices and techniques for the purpose of eavesdropping upon private communications and that the invasion of privacy resulting from the continual and increasing use of such devices and techniques has created a serious threat to the free exercise of personal liberties and cannot be tolerated in a free and civilized society. The Legislature by this chapter intends to protect the right of privacy of the people of this state. The Legislature recognizes that law enforcement agencies have a legitimate need to employ modern listening devices and techniques in the investigation of criminal conduct and the apprehension of lawbreakers. Therefore, it is not the intent of the Legislature to place greater restraints on the use of listening devices and techniques by law enforcement agencies than existed prior to the effective date of this chapter. (Pen. Code, § 630.)
- 2) Provides that every person who, without the consent of all parties to a communication, intercepts or receives and intentionally records, or assists in the interception or reception and intentional recordation of, a communication transmitted between two cellular radio telephones, a cellular radio telephone and a landline telephone, two cordless telephones, a cordless telephone and a landline telephone, or a cordless telephone and a cellular radio telephone, shall be punished by a fine not exceeding two thousand five hundred dollars (\$2,500), or by imprisonment in a county jail not exceeding one year, or in the state prison, or by both that fine and imprisonment. If the person has been convicted previously of a violation of specified unauthorized recording sections, the person shall be punished by a fine not exceeding ten thousand dollars (\$10,000), by imprisonment in a county jail not exceeding one year, or in the state prison, or by both that fine and imprisonment. (Pen. Code, § 632.7.) Exempts the following from these provisions:
 - a) Any public utility engaged in the business of providing communications services and facilities, or to the officers, employees, or agents thereof, where the acts otherwise

- prohibited are for the purpose of construction, maintenance, conduct, or operation of the services and facilities of the public utility.
- b) The use of any instrument, equipment, facility, or service furnished and used pursuant to the tariffs of the public utility.
 - c) Any telephonic communication system used for communication exclusively within a state, county, city and county, or city correctional facility.
- 3) Provides that every person who, intentionally and without the consent of all parties to a confidential communication, by means of any electronic amplifying or recording device, eavesdrops upon or records the confidential communication, whether the communication is carried on among the parties in the presence of one another or by means of a telegraph, telephone, or other device, except a radio, shall be punished by a fine not exceeding two thousand five hundred dollars (\$2,500), or imprisonment in the county jail not exceeding one year, or in the state prison, or by both that fine and imprisonment. If the person has previously been convicted of a violation of specified eavesdropping sections, the person shall be punished by a fine not exceeding ten thousand dollars (\$10,000), by imprisonment in the county jail not exceeding one year, or in the state prison, or by both that fine and imprisonment. (Pen. Code, § 632.)
- a) Specifies that the term "person" includes an individual, business association, partnership, corporation, limited liability company, or other legal entity, and an individual acting or purporting to act for or on behalf of any government or subdivision thereof, whether federal, state, or local, but excludes an individual known by all parties to a confidential communication to be overhearing or recording the communication. (Pen. Code, § 632, subd. (b).)
 - b) States that the term "confidential communication" includes any communication carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties thereto, but excludes a communication made in a public gathering or in any legislative, judicial, executive or administrative proceeding open to the public, or in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded. (Pen. Code, § 632, subd. (c).)
 - c) Provides that except as proof in an action or prosecution for violation of this section, no evidence obtained as a result of eavesdropping upon or recording a confidential communication in violation of this section shall be admissible in any judicial, administrative, legislative, or other proceeding. (Pen. Code, § 632, subd. (d).)
 - d) States that this section does not apply to: (Pen. Code, § 632, subd. (e).)
 - i) Any public utility engaged in the business of providing communications services and facilities, or to the officers, employees or agents thereof, where the acts otherwise prohibited by this section are for the purpose of construction, maintenance, conduct or operation of the services and facilities of the public utility; or

- ii) To the use of any instrument, equipment, facility, or service furnished and used pursuant to the tariffs of a public utility; or
 - iii) To any telephonic communication system used for communication exclusively within a state, county, city and county, or city correctional facility.
- e) Provides that this section does not apply to the use of hearing aids and similar devices, by persons afflicted with impaired hearing, for the purpose of overcoming the impairment to permit the hearing of sounds ordinarily audible to the human ear. (Pen. Code, § 632, (f).)

FISCAL EFFECT: Unknown

COMMENTS:

- 1) **Author's Statement:** According to the author, "The legislature initially enacted CIPA in 1967 and amongst its provisions, made it illegal to intentionally intercept or record confidential communications by means of a telegraph, telephone or other device under Penal Code 632. With the advent and proliferation of cellular and cordless telephones, the legislature updated CIPA by enacting Penal Code 632.7 which applies to mobile phones. Specifically, it ensured that communications conducted with a cellular device are not intentionally recorded without consent of the parties. But unlike Penal Code 632, this section does not distinguish between confidential and non-confidential calls. As such, courts have been compelled by the plain language of Penal Code 632.7 to require consent prior to recording *any* portion of *all* calls made to persons on a mobile phone, regardless of whether confidential information is discussed.

"Unfortunately, this has led to illogical outcomes where calls to customers are legal if they are on a land line but not if they're on a mobile phone. We have recently seen a number of examples of lawsuits filed based on entirely routine and benign conduct. For example, one class action alleged a violation of 632.7 based on the recording of a conversation where the answering party stated that the caller had dialed the wrong number and the call ends before any recording disclosure is given. Although the conversation lasted only a few seconds and *contained no confidential or private information*, plaintiffs sought extensive damages under Section 632.7.

"AB 925 seeks to harmonize Penal Code 632 and 632.7 by creating a very narrow exception for these non-confidential calls. It only intends to capture the brief non-confidential communication between a business and a customer prior to providing the recording disclosure. Practically, this would include an introductory conversation to identify the parties and purpose of the call.

"This bill will *not* remove the CIPA requirement to obtain the consent of a party prior to recording a confidential communication. AB 925's limited language cleans up the arbitrary distinction between land lines and mobile phones for a very distinct type of call."

- 2) **Creates Inconsistent Definitions of Confidential Communications:** The author argues that this bill corrects an inconsistency in the law between land lines and mobile phones. California Penal Code § 632 was passed in 1967. That section specifies that confidential communications cannot be recorded without the consent of both parties to the

communication. Pen. Code, § 632, subd. (c) defines a "confidential communication" as follows:

The term "confidential communication" includes any communication carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties thereto, but excludes a communication made in a public gathering or in any legislative, judicial, executive or administrative proceeding open to the public, or in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded.

California Penal Code, § 632.7 was passed in 1992 as a companion piece to the original statute. Penal Code, § 632.7 applies generally to mobile phones, and cordless land lines. This section does not make a distinction between confidential or non-confidential communications and merely states that all communications between persons on these devices may not be recorded without the consent of both parties to the communication.

This bill seeks to apply an exception to the prohibition against eavesdropping in Penal Code, § 632.7 for communications from businesses to current and former customers which are "non-confidential." The bill applies a new definition for content to communications that are non-confidential in nature. Unlike the Penal Code § 632 definition, the proposed definition is much more specific in terms of what information is deemed non-confidential. The bill proposes the following language as non-confidential and subject to recording without the consent of consumers. The definition includes communications:

"regarding their business relationship, including, but not limited to, communications regarding billing, provisioning, maintaining, or operating the product or service provided by the person or business."

The new definition includes quite a wide range of communications that would likely be deemed confidential under the existing definition as applied to wired telephones under the 1967 definition. Specifically, communications regarding billing information would likely contain information related to account balances, personal information, social security numbers, account histories, and credit report information. Additionally information regarding "provisioning, maintaining, and operating" could easily contain information such as the health history or customers if they are speaking with their health insurance provider. The author and proponents have argued that the new proposed definition is narrowly tailored, however they specifically say that the non-confidential communication "includes" but is "not limited to" the specific examples they provide.

- 3) **Wireless Land Lines:** This bill seeks to amend California Penal Code § 632.7. Pen. Code, § 632.7 not only covers mobile telephones, but it also covers all wireless telephones, including those that are connected to a land line.
- 4) **Possible One-Way Application:** The opponents of the proposed legislation argue that this bill is applied in a one-way fashion. The exception to the eavesdropping requirement would apply to a person or business who is contacting a current or former customer. However, the current or former customer would still be subject to criminal penalties for recording conversations with the business without the consent of both parties. Opponents have argued that businesses will be in possession of all recordings and that many businesses have

selectively released recordings in the past that assist them in litigation, but withhold recordings of customers that would further the consumer's arguments. The language of the legislation is vague on this issue, and if it is not the author's intent that the bill only apply in a one-way manner then additional clarifying language should be added.

- 5) **Argument in Support:** According to *TechAmerica*, "Originally enacted in 1967, the [California Invasion of Privacy Act (CIPA)] made it illegal to intentionally intercept or record confidential communications by means of a telegraph, telephone, or other device under Penal Code 632. However, with the advent and proliferation of cellular telephones, the legislature attempted to update the CIPA by enacting Penal code 632.7 which applies specifically to mobile phones. Unfortunately, while mobile devices were added to the Penal Code to ensure that communications conducted with a cellular telephone were applied similarly to landlines, code section 632.7 failed to distinguish between confidential and non-confidential calls. As such, courts have been compelled by the plain language of Penal Code 632.7 to require consent prior to recording "any" portion of "all" calls made to persons on a mobile phone, regardless of whether confidential information is discussed.

"As a result, this distinction has led to a number of lawsuits based on whether an innocuous business service call is placed to a customer on a landline or a mobile phone. AB 925 seeks to harmonize Penal Code 632 and 632.7 by creating a very narrow exception for non-confidential communication between a business and a customer prior to providing the recording disclosure. This bill will not remove the CIPA requirement to obtain the consent of a party prior to recording a confidential communication."

- 6) **Argument in Opposition:** According to the *Consumer Attorneys of California*, "AB 925 would reverse long standing privacy protection law to allow businesses and individuals to secretly record phone conversations with current or former customers without their knowledge or consent.

"AB 925 robs California citizens of the important right to know when someone records their telephone calls. This bill extinguishes what Assemblyman Jesse M. Unruh advocated for decades ago: all party consent in California. In 1967, the California Legislature enacted a broad, protective invasion-of-privacy statute in response to what it viewed as a serious and increasing threat to the confidentiality of private communications resulting from then recent advances in science and technology that had led to the development of new devices and techniques for eavesdropping upon and recording such private communications. (Stats.1967, ch. 1509, § 1, pp. 3584–3588, enacting Pen.Code, §§ 630–637.2). In 1992, AB 2465 (Connelly) added § 632.7 to the penal code to expand these privacy protections to include cellular telephones. This legislative intent is even more applicable in today's world as privacy and information protections are of the highest concern to consumers.

"This bill contradicts well-established, decades old law that has been unanimously affirmed by the California Supreme Court. Current law requires that all parties to a phone conversation consent to the recording of the conversation. Penal Code § 632.7. This is commonly referred to as "two-party consent." The "California Supreme Court unanimously held:

"We believe that California must be viewed as having a strong and continuing interest in the full and vigorous application of the provisions of Section 632 prohibiting the

recording of telephone conversations without the knowledge or consent of *all* parties to the conversation.” *Kearney v. Salomon Smith Barney, Inc.* 39 Cal.4th 95, 125 (2006).

"Under Penal Code § 632.7, conversations can be recorded; however, a party cannot secretly record the conversation without first informing all parties that the conversation is being recorded so a person has the opportunity to end the call and avoid invasion of privacy. Businesses currently comply by simply announcing at the beginning of the call, “this call may be recorded.” This routine announcement is sufficient to establish notice and consent for the recording or monitoring of the conversation.

"AB 925 will allow businesses to secretly record telephone calls and selectively use these recordings when it benefits their business, not the consumer. In 2006, California Supreme Court discussed this very issue in *Kearney*.

"Companies may utilize such undisclosed recording to further their economic interests—perhaps in selectively disclosing recordings when disclosure serves the company's interest, but not volunteering the recordings' existence (or quickly destroying them) when they would be detrimental to the company." *Id.* at 124.

"For example, if a hotel and its guest dispute the room price or other terms of a reservation and the customer's recollection is correct, the business could decide not to produce the recording and the customer would not object since the customer has no knowledge that the conversation was ever recorded. On the other hand, if the business's recollection is correct, it could produce the recording since it now benefits the company's financial interest.

"Lenders and debt collection companies have the most to gain as AB 925 will allow them to legally record calls, without consent, to hold customers to "their word" when it benefits them. These companies have been the subject of much of the litigation in this area. Most if not all of these calls involved personal and confidential financial information. Many debt collection companies have engaged in such practices, and under current law customers whose calls are recorded without their consent have a right bring suit. AB 925 would effectively legalize this practice leaving consumers no remedy for this invasion of privacy and at risk for additional harm that may follow.

"Without informing consumers that their conversation is recorded, consumers are left in the dark as to what personal, private information is collected or how it is used. They have no knowledge that their transactional details are being recorded, which can and often does include private financial, personal, and sometimes even HIPPA protected medical information. For example, 1-800 Contacts illegally recorded, without notification or warning, their customer's confidential medical, financial, billing, and address information. Anyone who accessed this information would be able to access the customer's medical record. In another similar case, the plaintiff discussed his erectile dysfunction with Humana and they secretly recorded the call without his consent. The court found that “defendant's line of business and the sensitive medical information that is likely to be discussed between Defendant's representatives and its customers” supported plaintiff's claim. *Perea v. Humana Pharmacy*, Case No. 12-1881-JST (ANx) (C.D. Cal. 2013). Under AB 925, this practice would be legalized without any knowledge of the consumer.

"Under AB 925, not only would consumers be unaware that the call is being recorded, but they also have no way of knowing who would have access to their information. Although consumers may believe that they are dealing with a business in California, many businesses now outsource customer service functions to third-party call centers that may be located elsewhere in the United States or in other countries. Not only will customers unknowingly allow their credit card or other personal information to be recorded by the company they are doing business with, they may also be giving their information to an unknown outsourced third-party."

- 7) **Prior Legislation:** AB 2465 (Connelly), Statutes of 1992, Chapter 298, created Pen. Code, § 637.2 which prohibited the recording of communications on wireless telephones and mobile phones as specified.

REGISTERED SUPPORT / OPPOSITION:

Support

California Chamber of Commerce
TechAmerica

Opposition

American Civil Liberties Union
California Advocates for Nursing Home Reform
California Alliance for Retired Americans
California Competes
California Federation of Teachers
California Nurses Association
California Rural Legal Assistance Foundation
Communication Workers of America, AFL-CIO District 9
Consumer Action
Consumer Attorneys of California
Consumer Federation of California
Consumer Watchdog
Consumers for Auto Reliability and Safety
Consumers Union
Courage Campaign
Elder Financial Protection Network
Electronic Frontier Foundation
Older Women's League
Privacy Rights Clearinghouse
Public Advocates Inc.
United Fruit and Commercial Workers
University of San Diego Center for Public Interest Law
Utility Reform Network
World Privacy Forum

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

Date of Hearing: May 5, 2015

Counsel: Stella Choe

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Bill Quirk, Chair

AB 1276 (Santiago) – As Amended March 26, 2015

SUMMARY: Adds human trafficking to the list of offenses which permits a child witness to testify at trial out of the presence of the defendant and jury by way of closed-circuit television and increases the permissible age of the child witness from 13 years old and under to 17 years old and under.

EXISTING LAW:

- 1) Authorizes a court in any criminal proceeding, upon written notice by the prosecutor made at least three days prior to the date of the preliminary hearing or trial date on which the testimony of the minor is scheduled, or during the course of the proceeding on the court's own motion, may order that the testimony of a minor 13 years of age or younger at the time of the motion be taken by contemporaneous examination and cross-examination in another place and out of the presence of the judge, jury, defendant or defendants, and attorneys, and communicated to the courtroom by means of closed-circuit television, if the court makes all of the following findings:
 - a) The minor's testimony will involve a recitation of the facts of any of the following:
 - i) An alleged sexual offense committed on or with the minor;
 - ii) An alleged violent felony, as defined, of which the minor is a victim; or
 - iii) An alleged felony offense of willful harm or injury to a child or corporal punishment of a child of which the minor is a victim;
 - b) The impact on the minor of one or more of the factors enumerated in the following paragraphs, inclusive, is shown by clear and convincing evidence to be so substantial as to make the minor unavailable as a witness unless closed-circuit testimony is used:
 - i) Testimony by the minor in the presence of the defendant would result in the child suffering serious emotional distress so that the child would be unavailable as a witness.
 - ii) The defendant used a deadly weapon in the commission of the offense.
 - iii) The defendant threatened serious bodily injury to the child or the child's family, threatened incarceration or deportation of the child or a member of the child's family, threatened removal of the child from the child's family, or threatened the dissolution of the child's family in order to prevent or dissuade the minor from attending or

giving testimony at any trial or court proceeding, or to prevent the minor from reporting the alleged sexual offense, or from assisting in criminal prosecution.

- iv) The defendant inflicted great bodily injury upon the child in the commission of the offense.
 - v) The defendant or his or her counsel behaved during the hearing or trial in a way that caused the minor to be unable to continue his or her testimony.
 - c) The equipment available for use of closed-circuit television would accurately communicate the image and demeanor of the minor to the judge, jury, defendant or defendants, and attorneys. (Pen. Code, § 1347, subd. (b).)
- 2) Directs the court, in making the determination required by this section, to consider the age of the minor, the relationship between the minor and the defendant or defendants, any handicap or disability of the minor, and the nature of the acts charged. The minor's refusal to testify shall not alone constitute sufficient evidence that the special procedure described in this section is necessary to obtain the minor's testimony. (Pen. Code, § 1347, subd. (b)(2)(E).)
 - 3) Allows the court to question the minor in chambers, or at some other comfortable place other than the courtroom, on the record for a reasonable period of time with the support person, the prosecutor, and defense counsel present. The defendant or defendants shall not be present. The court shall conduct the questioning of the minor and shall not permit the prosecutor or defense counsel to examine the minor. The prosecutor and defense counsel shall be permitted to submit proposed questions to the court prior to the session in chambers. Defense counsel shall be afforded a reasonable opportunity to consult with the defendant or defendants prior to the conclusion of the session in chambers. (Pen. Code, § 1347, subd. (d)(3).)
 - 4) Provides that when a court orders the testimony of a minor to be taken in another place outside the courtroom, nothing in this section prohibits the court from ordering the minor to be brought into the courtroom for a limited purpose, including the identification of the defendant or defendants as the court deems necessary. (Pen. Code, § 1347, subd. (h).)
 - 5) States that it is the intent of the Legislature in enacting this section to provide the court with discretion to employ alternative court procedures to protect the rights of a child witness, the rights of the defendant, and the integrity of the judicial process. In exercising its discretion, the court necessarily will be required to balance the rights of the defendant or defendants against the need to protect a child witness and to preserve the integrity of the court's truthfinding function. This discretion is intended to be used selectively when the facts and circumstances in the individual case present compelling evidence of the need to use these alternative procedures. (Pen. Code, § 1347, subd. (a).)
 - 6) Provides that any person who deprives or violates the personal liberty of any other with the intent to obtain forced labor or services is guilty of human trafficking and shall be punished in state prison for 5, 8, or 12 years and a fine of not more than \$500,000. (Pen. Code, § 236.1, subd. (a).)
 - 7) States that any person who deprives or violates the personal liberty of any other with the intent to effect or maintain a violation of specified offenses related to sexual conduct,

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

- 8) Specifies the following penalties for any person who causes, induces, or persuades, or attempts to cause, induce, persuade, a person who is minor at the time of commission of the offense to engage in a commercial sex act, as provided:
 - a) Five, 8, or 12 years and a fine of not more than \$500,000; or,
 - b) Fifteen years to life and a fine of not more than \$500,000 when the offense involves force, fear, fraud, deceit, coercion, violence, duress, menace, or threat of unlawful injury to the victim or to another person. (Pen. Code, § 236.1, subd. (c).)

FISCAL EFFECT: Unknown

COMMENTS:

- 1) **Author's Statement:** According to the author, "Testifying in court can be particularly traumatic for minor victims of human trafficking. Facing or confronting the perpetrator in court and being asked to recall horrifying and personal details of the crime can cause severe emotional trauma. The inability of minors who are victims of human trafficking to communicate effectively in court or who refuse to testify against their trafficker can lead to ineffective prosecution of the case. AB 1276 will ensure minors who are victims of human trafficking are protected from additional trauma by allowing them to testify in court by means of closed-circuit television."
- 2) **Sixth Amendment Right to Confrontation:** The Sixth Amendment of the U.S. Constitution provides, that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." (U.S. Const., amend. VI.) The constitutional right of the accused to confront witnesses against him or her is a fundamental right essential to a fair trial. (*Pointer v. Texas* (1965) 380 U.S. 400.) Fundamental rights are the most important rights guaranteed in the Constitution, and the protection of the right to confrontation is as important as the freedom of speech and the freedom of religion. The right guaranteed under the confrontation clause includes the right to face the person's accuser, requiring the witness to make his or her statements under oath, thus impressing upon the witness the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; forcing the witness to submit to cross-examination; and permitting the jury to observe the demeanor of the witness in making his or her statement, thus aiding the jury in assessing the witness's credibility. (*Maryland v. Craig* (1990) 497 U.S. 836, 845-846.)

The Sixth Amendment right to confrontation guarantees the defendant a face-to-face meeting with witnesses against him. (*Maryland v. Craig, supra*, 497 U.S. at p. 855, citing *Coy v. Iowa* (1988) 487 U.S. 1012, 1016.) The purpose of this guarantee originates from the desire to prevent conviction by anonymous accusers and absentee witnesses. (*Ibid.*) "[F]ace-to-face confrontation enhances the accuracy of factfinding by reducing the risk that a witness will wrongfully implicate an innocent person. . . . (It is always more difficult to tell a lie about a person "to his face" than "behind his back." . . . That face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may

confound and undo the false accuser, or reveal the child coached by a malevolent adult.')." (*Maryland v. Craig* (1990) 497 U.S. at pp. 846-847, citing *Ohio v. Roberts* (1980) 448 U.S. 56, 63.)

The right to confront witnesses face-to-face, however, is not an indispensable element of the confrontation clause. (*Maryland v. Craig, supra*, 497 U.S. 836.) The *Maryland v. Craig, supra*, case involved sexual abuse of a 6-year-old child. The prosecutor relied on a state statutory procedure permitting a judge to receive, by one-way closed circuit television, the testimony of an alleged child abuse victim upon determining that the child's courtroom testimony would result in the child suffering serious emotional distress, such that he or she could not reasonably communicate. The Supreme Court held that "the state interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special procedure that permits a child witness in such cases to testify at trial against a defendant in the absence of face-to-face confrontation with the defendant." (*Maryland v. Craig, supra*, 497 U.S. at p. 855.)

The Supreme Court cautioned, however, that their ruling "[t]hat the face-to-face confrontation requirement is not absolute does not, of course, mean that it may easily be dispensed with. As we suggested in *Coy*, our precedents confirm that a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured. (*Maryland v. Craig, supra*, 497 U.S. at p. 850.) Four Justices dissented in the majority opinion. Justice Scalia, writing for the dissent, stated "[t]he purpose of enshrining this protection in the Constitution was to assure that none of the many policy interests from time to time pursued by statutory law could overcome a defendant's right to face his or her accusers in court." (*Maryland v. Craig, supra*, 497 U.S. at p. 861.)

In fact, "[i]n recent years, the Supreme Court of the United States' understanding of the meaning of this Clause may well be the single part of constitutional law – certainly of criminal procedure – that has undergone the most radical change.

"Two Supreme Court judgments [in recent years] have introduced this change and have greatly expanded the right of the accused in criminal prosecutions to confront the witnesses against them." (See Fenner, *Today's Confrontation Clause (After Crawford and Melendez-Diaz)*, (Nov. 2009) 43 Creighton L.Rev. 35, p. 101, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1507257> (as of May 1, 2015).) This bill goes against the trend by limiting a defendant's right to confront his or her accuser.

Moreover, the human trafficking statute authorizes severe punishments, including substantial terms of imprisonment in state prison. If the crime involves a minor, a defendant may face up to 20 years in state prison, and in some instances imprisonment for 15-years-to-life. (Pen. Code, § 236.1.) Considering how serious the existing punishments are for human trafficking, should the Legislature expand the circumstances that would allow witnesses to avoid a face-to-face confrontation with the defendant, when the purpose of this confrontation is to ensure a fair trial?

- 3) **Contemporaneous Testimony for Child Witnesses: Legislative History:** Existing law provides courts with discretion to authorize a child victim under 14 to testify by means of

closed-circuit television in specified felony cases. The court must make a finding by clear and convincing evidence that the impact on the minor is so substantial as to make the minor unavailable and one or more of the enumerated factors exist. The court may hear testimony from witnesses such as a social worker or therapist to establish the impact on the minor. A child's refusal to testify does constitute sufficient evidence that the contemporaneous testimony is necessary. (Pen. Code, § 1347.)

Prior to 1998, this statute applied to child victims 10 years of age or younger. This statute was amended by AB 1692 (Bowen), Chapter 670, Statutes of 1998, to apply the procedure to child victims who were 13 years of age or younger. AB 1692, as amended April 27, 1998, applied these provisions to child witnesses 15 years of age or younger. "Responding to the suggestion that section 1347 should be consistent with the law that punishes more severely lewd acts upon a child 'under the age of 14' (Assem. Com. on Public Safety, Analysis of Assem. Bill No. 1692 (1997–1998 Reg. Sess.) as amended Apr. 27, 1998, p. 3; see Sen. Com. on Public Safety, Analysis of Assem. Bill No. 1692 (1997–1998 Reg. Sess.) as amended June 23, 1998), the Legislature revised the statute to authorize courts to order the testimony of a minor '13 years of age or younger' to be taken by closed-circuit television." (*People v. Cornett* (2012) 53 Cal. 4th 1261, 1269.)

Notably, the Uniform Law Commission, which is tasked with providing states with non-partisan, well-conceived and well-drafted legislation that brings uniformity to state statutory law, also recommends placing the age limit at 13 for contemporaneous testimony by a child witness. (*Uniform Child Witness Testimony by Alternative Methods Act*, National Conference on Commissioners on Uniform State Laws, (Aug. 2002) p. 2.)

- 4) **Enhanced Protections for Children Under 14 Years Old:** While a person under the age of 18 is a minor under the law, the statute authorizing contemporaneous testimony is more narrowly tailored to protect young children under the age of 14, not all minors, from the trauma of facing his or her abuser in court. Limiting this enhanced protection to children under 14 years old reflects the state's interest in protecting young children from harm. The state's specific protection of children under 14 is evidenced by the existence of current statutes that punish more harshly an act committed against a child under the age of 14 compared to acts committed against children 14 and over. (Pen. Code, §§ 264, subd. (c)(1); 264.1, subd. (b)(1); 271; 286, subd. (c)(2)(B), 288, subd. (a); 288a, subd. (c)(2)(B); 288.5; 289, subd. (a)(1)(B); 667.61, subd. (j)(2); 667.8; 667.85; and 667.9.)

Furthermore, the state's juvenile court system also demonstrates this enhanced protection for minors who are under the age of 14 and charged with committing a crime. The statutory framework that authorizes minors to be tried in adult court rather than juvenile court for the commission of serious offenses applies to minors 14 years of age and older. (Welf. & Inst. Code, § 707, subd. (b).)

The current statute authorizing contemporaneous testimony through closed circuit television also reflects the existing enhanced protections that are in place for children under the age of 14. Because the statute interferes with a defendant's constitutional right to confrontation, the statute must be narrowly tailored to serve a compelling state interest. (*Globe Newspaper Co. v. Superior Court* (1982) 457 U.S. 596, 607.) The compelling state interest is the desire to provide children under 14 with more protections than older children. This bill would increase the age of child witnesses who may testify through the use of closed-circuit television from

13 years old and under to 17 years old and under. Allowing the procedure to be used for all minors may mean that the statute is no longer narrowly tailored to meet a compelling state interest as required to maintain the statute's constitutionality.

- 5) **Support Persons for Victims When Testifying in Court:** Under existing law, a victim of human trafficking crimes and other specified sex crimes, violent crimes, child abuse or elder abuse crimes may choose up to two support persons, one of whom may accompany the witness to the witness stand. The other may remain in the courtroom. (Pen. Code, § 868.5.) This provision has been found not to violate the Confrontation Clause of the Constitution because the witness would still have to testify in front of the jury and having the support witness sit next to the witness was similar to having a parent or other family member sitting in the audience in support of the witness. (See *People v. Johns* (1997) 56 Cal.App. 4th 550, 555-556.)

While the statute that authorizes contemporaneous testimony through closed-circuit television is limited to child witnesses 13 years of age or under, the statute that provides support persons for witnesses of specified crimes, including human trafficking, does not limit the age of the victim or witness. This provides the victim with support in order to minimize the trauma of testifying in court but also preserves a defendant's right to meet his or her accuser face-to-face.

- 6) **Practical Considerations:** According to a law review article discussing a 2005 amendment to Penal Code Section 1347 authorizing the procedure's use in specified child abuse cases, the procedure is not preferred by prosecutors because it results in a loss of emotional impact and therefore less effective on juries.

"In a 2001 study specifically designed to test closed-circuit child testimony, researchers found that jurors were no better at accurately spotting false accusers in face-to-face testimony than they were via closed-circuit testimony. Further, the study found that the use of closed-circuit television actually resulted in a pro-defense bias; that is, jurors were more inclined to discredit and disbelieve a child testifying via television than a child sitting in front of them, even when the child was telling the truth. It was concluded that the use of closed-circuit television resulted in 'a loss of emotional impact and immediacy,' meaning the jurors were less likely to feel empathy for the child's story.

"Indeed, many prosecutors prefer in-court testimony to closed-circuit for those very reasons. A survey of members of the National District Attorneys Association showed that only about seventeen percent of the attorneys surveyed had ever used closed-circuit testimony for a child witness." (Rowlands, *Cole's Law Confronts Constitutional Issues: Expanding the Availability of Closed-Circuit Child Testimony in the Face of the Confrontation Clause* (2005) 37 McGeorge L. Rev. 294.)

- 7) **Suggested Amendment:** The Committee staff has suggested that the author delete the provision in this bill that increases the age of victims who may testify through the use of closed-circuit television.
- 8) **Argument in Support:** According to the *Coalition Against Slavery and Trafficking*, "Minors who are victims of human trafficking are among the most vulnerable and exploited people in the world. In California, startling numbers of children are forced into sex and/or

labor trafficking each year. Rape, abuse, isolation, confinement, and emotional, physical, and psychological trauma are just some conditions these young victims face.

"Minors who are victims of human trafficking often experience Post Traumatic Stress Disorder (PTSD), depression, substance abuse, suicidal thoughts or behavior, in addition to physical trauma. Testifying in court can be particularly traumatic for minors who are victims of human trafficking. Facing the perpetrator in court and recalling horrifying and personal details of the abuse forces the victims to relive the crime mentally and emotionally, leading them to feel as though the abuse is recurring and re-experiencing a lack of control and terror. Furthermore, the minor victims' inability to communicate effectively in court or refusal to testify against their trafficker can lead to ineffective prosecution of the case."

- 9) **Argument in Opposition:** According to the *American Civil Liberties Union of California*, "In *Maryland v. Craig*, the U.S. Supreme Court upheld a statute permitting a child witness alleged to be a victim of abuse to testify by closed circuit television. The case involved a child who was six at the time of the abuse and seven at the time of trial. The court held the 'preferred right of physical presence, or "face-to-face" confrontation, may be dispensed with *only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured.*' (*Craig*, 497 U.S. at 849-50 [emphasis added].) The court held that the state's interest in protecting child-abuse victims could—in specific cases—outweigh the defendant's right to confront his or her accusers in person in the courtroom. (*Craig*, 497 U.S. at 853.)

"In *Craig*, the court emphasized several times the state's special interest in protecting the victims of child abuse outweighed the infringement on the accused person's constitutionally protected right to confront the witnesses. Notably, the court had previously held that allowing teenage victims of alleged sexual abuse to testify from behind a screen violated the Confrontation Clause. (*Coy v. Iowa* (1988) 487 US 1012, 1017.) While the court in *Craig* did not establish a specific age limit for the use of closed circuit television, the *Coy* decision demonstrates that the court does not view teenage witnesses through the same lens as younger children.

"By expanding the use of closed circuit television to teenage witnesses, AB 1276 strays too far from the limited circumstances in which this procedure has been approved by the U.S. Supreme Court. AB 1276 is thus likely to lead to violations of the Sixth Amendment Confrontation Clause."

- 10) **Related Legislation:** SB 176 (Mitchell) would codify existing case law that allows a minor 13 years of age or younger to testify by way of closed circuit television if the testimony would involve the recitation of facts of an alleged violent felony, whether or not the minor was a victim. SB 176 is pending referral from the Assembly Rules Committee.

11) **Prior Legislation:**

- a) SB 138 (Maldonado), Chapter 480, Statutes of 2005, added specified child abuse and child endangerment cases to the list of instances when closed-circuit testimony is permissible for child witnesses.

- b) SB 1559 (Figueroa), Chapter , Statutes of 2002, deleted the sunset date of January 1, 2003, in provisions of law which allow a minor 13 years of age or younger to testify by way of closed-circuit television under specified circumstances.
- c) AB 1692 (Bowen), Chapter 670, Statutes of 1998, allows a minor 13 years of age or younger to testify at trial or a preliminary hearing by way of closed-circuit television where the court finds by clear and convincing evidence that the victim would otherwise be unavailable.
- d) AB 1077 (Cardoza), Chapter 669, Statutes of 1998, authorized the testimony of a child 10 years of age or under who is the victim of a violent crime to be transmitted to the courtroom by way of closed-circuit television.

REGISTERED SUPPORT / OPPOSITION:

Support

Alameda County District Attorney's Office
California Catholic Conference
California District Attorneys Association
California State Lodge, Fraternal Order of Police
Children's Law Center of California
Coalition to Abolish Slavery and Trafficking
Consumer Attorneys of California
Court Appointed Special Advocates for Children of Los Angeles
Katherine & George Alexander Community Law Center, Santa Clara University
League of California Cities
Long Beach Police Officers Association
Los Angeles County Professional Peace Officers Association
Mary Magdalene Project
National Council of Jewish Women California
Sacramento County Deputy Sheriffs' Association
Santa Ana Police Officers Association

One private individual

Opposition

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

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

Date of Hearing: May 5, 2015
Counsel: David Billingsley

ASSEMBLY COMMITTEE ON PUBLIC SAFETY

Bill Quirk, Chair

AB 1356 (Lackey) – As Amended April 29, 2015

SUMMARY: Allows the use of an oral fluids screening test to determine the presence or concentration of drugs, to assist the officer in making a determination that a person was driving under the influence of drugs. Specifically, **this bill:**

- 1) Provides that a preliminary oral fluids screening test that indicates the presence or concentration of a drug or controlled substances based on a sample is a field sobriety test and may be used in order to establish reasonable cause to believe the person was driving a vehicle in violation of specified driving under the influence offenses.
- 2) States that if an officer decides to use an oral fluids screening test, the officer shall advise the person that he or she is requesting that person to take an oral fluids screening test to assist the officer in determining if that person is under the influence of alcohol or drugs, or a combination of alcohol and drugs.
- 3) States that a person's obligation to submit to a blood, breath, or urine, as required after arrest, for the purpose of determining the alcohol or drug content of that person's blood, is not satisfied by the person submitting to an oral fluids screening test. The officer shall advise the person of that fact.
- 4) Requires the officer to advise the person of their right to refuse to take the oral fluids screening test.
- 5) Specifies that a local law enforcement agency is authorized, but not required to provide oral fluids testing for purposes of this section.
- 6) States that a state law enforcement agency is not authorized to provide or make an oral fluids test available.

EXISTING LAW:

- 1) States that a preliminary alcohol screening test that indicates the presence or concentration of alcohol based on a breath sample in order to establish reasonable cause to believe the person was driving a vehicle under the influence of alcohol is a field sobriety test and may be used by an officer as a further investigative tool. (Veh. Code, § 23612, subd. (h).)
- 2) Specifies that if the officer decides to use a preliminary alcohol screening test, the officer shall advise the person that he or she is requesting that person to take a preliminary alcohol screening test to assist the officer in determining if that person is under the influence of alcohol or drugs, or a combination of alcohol and drugs. The person's obligation to submit to

a blood, breath, or urine test, as required if arrested for driving a vehicle under the influence of alcohol or drugs, for the purpose of determining the alcohol or drug content of that person's blood, is not satisfied by the person submitting to a preliminary alcohol screening test. The officer shall advise the person of that fact and of the person's right to refuse to take the preliminary alcohol screening test. (Veh. Code, § 23612, subd. (i).)

- 3) States that a person who drives a motor vehicle is deemed to have given his or her consent to chemical testing of his or her blood or breath for the purpose of determining the alcoholic content of his or her blood, if lawfully arrested for an offense allegedly committed in violation driving under the influence of drugs or alcohol. If a blood or breath test, or both, are unavailable, then the person shall give urine. (Veh. Code, § 23612, subd. (a)(1)(A).)
- 4) Provides that a person who drives a motor vehicle is deemed to have given his or her consent to chemical testing of his or her blood for the purpose of determining the drug content of his or her blood, if lawfully arrested driving under the influence of drugs or drugs and alcohol. If a blood test is unavailable, the person shall be deemed to have given his or her consent to chemical testing of his or her urine and shall submit to a urine test. (Veh. Code, § 23612, subd. (a)(1)(B).)
- 5) States that the testing shall be incidental to a lawful arrest and administered at the direction of a peace officer having reasonable cause to believe the person was driving a motor vehicle in violation of specified driving under the influence offenses. (Veh. Code, § 23612, subd. (a)(1)(C).)
- 6) Specifies that the person shall be told that his or her failure to submit to, or the failure to complete, the required chemical testing will result in a fine, mandatory imprisonment if the person is convicted of a violation driving under the influence or driving under the influence causing injury, and (i) the suspension of the person's privilege to operate a motor vehicle for a period of one year, (ii) the revocation of the person's privilege to operate a motor vehicle for a period of two years if the refusal occurs within 10 years of a separate violation of specified offenses, or if the person's privilege to operate a motor vehicle has been suspended or revoked pursuant to the Department of Motor Vehicles (DMV) administrative action for driving under the influence of alcohol for an offense that occurred on a separate occasion, or (iii) the revocation of the person's privilege to operate a motor vehicle for a period of three years if the refusal occurs within 10 years of a two or more separate violations of specified offenses, or if the person's privilege to operate a motor vehicle has been suspended or revoked pursuant DMV administrative action for driving under the influence of alcohol for an offense that occurred on a separate occasion, or if there is any combination of those convictions, administrative suspensions, or revocations. (Veh. Code, § 23612, subd. (a)(1)(D).)
- 7) States that if the person is lawfully arrested for driving under the influence of an alcoholic beverage, the person has the choice of whether the test shall be of his or her blood or breath and the officer shall advise the person that he or she has that choice. If the person arrested either is incapable, or states that he or she is incapable, of completing the chosen test, the person shall submit to the remaining test. If a blood or breath test, or both, are unavailable, then the individual shall provide urine. (Veh. Code, § 23612, subd. (a)(2)(A).)

- 8) Provides that if the person is lawfully arrested for driving under the influence of any drug or the combined influence of an alcoholic beverage and any drug, the person has the choice of whether the test shall be of his or her blood or breath, and the officer shall advise the person that he or she has that choice. (Veh. Code, § 23612, subd. (a)(2)(B).)
- 9) States that a person who chooses to submit to a breath test may also be requested to submit to a blood test if the officer has reasonable cause to believe that the person was driving under the influence of a drug or the combined influence of an alcoholic beverage and a drug and if the officer has a clear indication that a blood test will reveal evidence of the person being under the influence. The officer shall state in his or her report the facts upon which that belief and that clear indication are based. The officer shall advise the person that he or she is required to submit to an additional test. The person shall submit to and complete a blood test. If the person arrested is incapable of completing the blood test, the person shall submit to and complete a urine test. (Veh. Code, § 23612, subd. (a)(2)(c).)
- 10) Requires that the officer advise the person that he or she does not have the right to have an attorney present before stating whether he or she will submit to a test or tests, before deciding which test or tests to take, or during administration of the test or tests chosen, and that, in the event of refusal to submit to a test or tests, the refusal may be used against him or her in a court of law. (Veh. Code, § 23612, subd. (4).)
- 11) Specifies that a person lawfully arrested for an offense allegedly committed while the person was driving a motor vehicle under the influence, may request the arresting officer to have a chemical test made of the arrested person's blood or breath for the purpose of determining the alcoholic content of that person's blood, and, if so requested, the arresting officer shall have the test performed. (Veh. Code, § 23612, subd. (d)(1).)
- 12) States that if a blood or breath test is not available, the person shall submit to the remaining test in order to determine the percent, by weight, of alcohol in the person's blood. If both the blood and breath tests are unavailable, the person shall be deemed to have given his or her consent to chemical testing of his or her urine and shall submit to a urine test. (Veh. Code, § 23612, subd. (d)(2).)
- 13) Provides that if the person, who has been arrested for specified violations of driving a motor vehicle under the influence of alcohol or drugs, refuses or fails to complete a chemical test or tests, or requests that a blood or urine test be taken, the peace officer, acting on behalf of the department, shall serve the notice of the order of suspension or revocation of the person's privilege to operate a motor vehicle personally on the arrested person. (Veh. Code, § 23612, subd. (e).)

FISCAL EFFECT: Unknown

COMMENTS:

- 1) **Author's Statement:** According to the author, "AB 1356 simply authorizes California law enforcement agencies to use oral fluid testing to detect drug impaired drivers. The bill does not impose "a per se" definition—such as the current .08 BAC limit for alcohol. Instead, AB 1356 allows the option for using oral fluid tests as evidence to prove a driver was impaired at the time they were driving. Keeping our state's road safe from impaired drivers will require

innovative technology which AB 1356 would authorize.

"Driving under the influence of drugs is a growing problem nationally and in California. A 2014 National Highway Traffic Safety Administration report found that between 2007 and 2014, the percentage of drivers with drugs in their system on weekend nights grew from 16% to 20%--including a 50% increase in drivers with cannabis in their system. The same study found that the prevalence of alcohol declined by 30% over the same period, showing the success of increased enforcement efforts.

"In California, current drug impairment testing utilizes blood and urine tests. However, logistical delays mean these tests are not administered at the time of the traffic stop which makes providing evidence of a driver's impairment difficult for drugs. For example, 90% of cannabis's THC is cleared from blood within the first hour of smoking. By the time law enforcement are able to take a blood test, the results show very little active THC.

"Oral fluid technology presents a solution to this problem by allowing an opportunity to provide roadside testing to detect the presence of drugs at the time of the traffic stop before the drug has had time to metabolize. Oral fluid testing is now used internationally in Australia and Belgium among other countries, and has been used to administer roadside tests in a pilot program by the City of Los Angeles since 2012. The Los Angeles City Attorney's office has cited that impaired driving cases filed using oral fluid technology as evidence are pleading out earlier than cases solely using blood tests. The speed of test results from oral fluids allowed them to be available at the time of filing the case, while blood results were still pending at the crime lab.

"Join me in supporting AB 1356 which presents a unique opportunity to greatly improve roadway safety by allowing law enforcement to have better tools available to identify drug-impaired drivers."

- 2) **Alere Mobile Oral Fluid Drug Testing System:** The Alere DDS2 is a mobile instrument which analyzes oral fluid for the presence of drugs. The Alere DDS2 and the Draeger Drug Test 5000 have been used in pilot programs in California. The Alere unit is stored in a case the size of a small briefcase. The testing unit can be easily held in the hand.

In order to conduct the oral fluid test, the officer provides the individual with a handheld swab. The officer observes as the individual inserts the swab into their mouth. The swab turns blue when it has absorbed a sufficient amount of oral fluid for testing. The instrument is turned on and at the conclusion of the self-check the officer is instructed to insert the test cartridge. The instrument then reads the barcode on the cartridge then prompts the officer to insert the collection swab. At that point, the officer inserts the swab into the testing machine. The machine analyzes the oral fluid and tests for the following categories of drugs: THC, opiates, methamphetamine, benzodiazepines, cocaine, and amphetamine. The results of the test will be either positive or negative. The instrument does not quantify the level of drug(s) in an individual's system. The instrument indicates the presence of the active component of the drug (if present). The threshold amount of a drug required to trigger a positive result is incorporated into the test cartridge technology.

The machine can provide a paper printout reflecting the results of the test. The printout reflects date, time, test number, test Cartridge unique ID, Lot # of test cartridges, Instrument

Serial number and results of the instrument self-check along with a brief questionnaire of gender-age-type of vehicle-reason for test also individual's name can be written in and signed, and test results. The instrument also retains digital information for the completed tests which can be accessed at a later date. Alere recommends that the instrument be tested at least once per day or once during the officer's shift by using the positive and negative control included with the instrument. Testing the instrument with known controls will verify that the instrument is interpreting the test results correctly.

- 3) **Preliminary Alcohol Screening (PAS) Test:** A Preliminary Alcohol Screening (PAS) Device is a handheld instrument used to test a breath sample for alcohol in the field. Existing law allows an officer to ask an individual to take a PAS test as part of the investigatory process. The test is meant to be used as a test to assist the officer in making a determination if probable cause exists to arrest a person was driving under the influence of alcohol, or alcohol and drugs. (Veh. Code, § 23612, subd. (h).) Before seeking consent to administer a PAS test, the officer must inform the individual that they have the right to refuse the PAS test and that if they submit to a PAS test and are subsequently arrested for DUI, they must still provide a separate sample for testing (breath, blood, urine). (Veh. Code, § 23612, subd. (i).)
- 4) **Driving Under the Influence (DUI) Investigations:** A DUI investigation is triggered when an officer has reasonable suspicion that an individual is driving under the influence of alcohol, drugs, or the combined influence of alcohol and drugs. A person is under the influence if, as a result of drinking an alcoholic beverage and/or taking a drug, his or her mental or physical abilities are so impaired that he or she is no longer able to drive a vehicle with the caution of a sober person, using ordinary care, under similar circumstances. (CALCRIM no. 2110.) The DUI investigation can be triggered by an individual's driving pattern, or based on an observation of the person's demeanor or physical dexterity when the officer makes contact with the driver. Once an officer has reasonable suspicion that a person is driving under the influence, they will conduct the DUI investigation. One component of the investigation is a series of questions which include, among other things, the individual's consumption of alcohol (amount and timing). Generally, the officer will also have the individual participate in a series of field sobriety tests. Those tests are designed to test a person's balance, physical ability, and attention. One field sobriety test that can be administered is a PAS test, if the individual consents. If an officer suspects that an individual is under the influence of drugs, or the combined influence of alcohol and drugs, the officer can conduct an evaluation for drug impairment. Drug Recognition Experts (DRE) are trained in identifying signs of impairment based on drug use. If an officer has not been trained as a DRE, the officer can call a DRE to the scene to assist with the investigation. At the conclusion of the investigation, the officer(s) will make a decision to arrest the individual, or release them. If the individual is arrested, they must provide a sample for analysis of alcohol (blood, breath, or urine), or drugs (blood or urine), or combined influence of alcohol and drugs (blood or urine). (Veh. Code, § 23612.)
- 5) **The DRE Protocol:** The DRE protocol is a standardized and systematic method of examining a Driving Under the Influence of Drugs (DUID) suspect to determine the following: (1) whether or not the suspect is impaired; if so, (2) whether the impairment relates to drugs or a medical condition; and if drugs, (3) what category or combination of categories of drugs are the likely cause of the impairment. The process is systematic because it is based on a complete set of observable signs and symptoms that are known to be reliable indicators of drug impairment. A DRE never reaches a conclusion based on any one element

of the evaluation, but instead on the totality of facts that emerge. The DRE evaluation is standardized because it is conducted the same way, by every drug recognition expert, for every suspect whenever possible. Standardization is important because it makes the officers to be better observers, helps to avoid errors, and promotes professionalism.

<http://www.decp.org/experts/12steps.htm>

6) **Oral Fluid Pilot Programs in Fullerton, Sacramento, Los Angeles and Kern County:**

There have been pilot programs used by law enforcement in Los Angeles, Fullerton, Sacramento and Bakersfield involving oral fluid testing. In those jurisdictions, oral fluid testing was only given during a DUI investigation if the subject agreed to the test. The law enforcement agencies used either the Draeger Drug Test 5000 or the Alere DDS2. The subjects that provided oral fluid samples, also provided blood samples. The results of the oral fluid tests were compared to the results from the blood test to determine the reliability of the oral fluid tests to identify the presence of drugs.

There were 92 subjects in the Fullerton sample using the Alere DDS2. The oral fluid test produced one 1 false positive and 9 false negatives.

There were 34 subjects in the Sacramento tested using the Alere DDS2. The oral fluid test produced 7 false positives, 1 false negative.

In Los Angeles and Kern counties a total of 235 individuals provided oral fluid samples amazed with the Draeger Drug Test 5000. There were 10 false positives and 8 false negatives.

Some false negatives in the oral fluid samples might be explained by the fact that the threshold to trigger a positive result in the oral fluid can be higher than what is tested for, and detected, in the blood analysis.

The Los Angeles Police Department has used the Draeger DT 5000 at sobriety checkpoints to collect oral fluid when subjects consented to the test. The officer gets an immediate printout of the results. The officer takes a second sample for overnight shipping to National Medical Services Labs to conduct confirmation test to later be introduced into court. (For the Road, October 2013, Volume 7, Issue 4, Collecting Oral Fluid Evidence in Drugged Driving Cases, by Phil Rennick, California TSRP and Janette Flintoft, Deputy LA City Attorney.

- 7) **Argument in Support:** According to *We Save Lives*, “While drunk driving continues to be addressed by legislators, 20% of vehicular crashes are caused by drugged driving. In the United States, this translates into an estimated 8,600 deaths, 580,000 injuries, and \$33 billion in property damage each year (Institute for Behavior and Health).

“What you may not know but should is that:

"Drugged drivers frequently escape prosecution which means -

"No conviction which means -

"No punishment or accountability which means -

"No rehabilitation which means -

"No justice for the victim/survivor and –

"No protection for society

“However, there are methods of combatting this crime and one major way is through roadside oral fluid testing. These devices halt drugged drivers in their tracks by providing law enforcement the tools they need to test a suspicious driver quickly, easily and effectively, thereby providing more protection for the innocent driver on the roadway. **We Save Lives does not endorse any particular product.**

“Approximately 13 states allow for oral fluid testing. If we limit the specimens (blood, urine, oral fluids) that can be collected we could be missing the opportunities to utilize new and cost-efficient resources available to law enforcement. Oral fluids are becoming a popular option for law enforcement because the test is less intrusive, and possibly more cost-effective than other standard forensic testing procedures. It eliminates cheating, is non-invasive and it can be conducted at roadside. Oral Fluid testing is currently being utilized in a number of countries, including Great Britain, Australia, Germany, Switzerland, France and Belgium plus these devices are now being used in several states including California, Nevada, Arizona, Vermont and Tennessee. Canada just approved Oral Fluid legislation.

“The City of Los Angeles received permission to use oral fluid testing and began a pilot project utilizing them in driving under the influence (DUID) cases. According to an article entitled Collecting Oral Fluid Evidence in Drugged Driving Cases by Phil Rennick, California TSRP and Janette Flintoff, Deputy LA City Attorney, 'The results are measurable: cases filed with oral fluid evidence are pleading out earlier with this additional evidence, which is available at the time of filing, contrasted with cases awaiting blood test results from the lab.' Oral fluid provides officers the opportunity to collect critical evidence close to the time/at the initial contact when the objective signs of impairment are present.

“The National Highway Traffic Safety Administration (NHTSA) has been using these devices since 2007 in National Roadside Surveys and is now providing grant funding for states who wish to purchase them.”

8) **Argument in Opposition:** According to *The Drug Policy Alliance*, “**Oral Fluid Tests are Unreliable and May lead to False-Positives**

“Drug testing, like many other forensic disciplines, is highly technical and imperfect. There are a host of problems with drug testing techniques and analyses, including the substantial risk of false positive test results, false negative test results, specimen contamination, and chain of custody, storage and re-testing issues. As the toxicological literature makes clear, ‘a number of routinely prescribed medications have been associated with triggering false-positive results.’

“Research demonstrates that oral fluid tests may return false positives for THC. For instance, research has found that false positive THC test results have been associated with the passive ingestion (i.e. second-hand) of marijuana smoke.¹ Similarly, other studies have demonstrated that heavy marijuana users who abstain from marijuana use for at least a week have returned

¹ See, e.g., S. Niedbala et al., *Passive cannabis smoke exposure and oral fluid testing*, 28 J ANAL TOXICOL 546 (2004).

positive oral fluid THC tests.² Finally, the use of pharmaceutical drugs, like Marinol and Sativex, typically returns positive oral fluid THC test results.

“Marijuana Intoxication and Crash Risk

“Even if the oral fluid tests were more reliable, it is still unclear how they would measure crash risk. As Jeff Michael, Standards Associate Administrator of research and Program Development for the National Highway Traffic Safety Administration (NHTSA), stated in testimony before the House of Representatives Committee on Oversight and Government Reform. Michael stated in relevant part:

‘The available evidence does not support the development of an impairment threshold for THC which would be analogous to that for alcohol . . . With alcohol, we have considerable body of evidence that can place risk odds at increasing levels of blood alcohol content. For example, 0.08 [percent] blood alcohol content is associated with about four times the crash risk of a sober person . . . Beyond some broad confirmation that higher levels of THC are generally associated with higher levels of impairment, a more precise association of various THC levels and degrees of impairment [is] not yet available.’

“Moreover scientific evidence demonstrates that despite higher levels of THC being generally associated with increased driving impairment, a more precise association between specific levels of THC intoxication and crash risk cannot be supported. For instance, some studies demonstrate that THC’s adverse effects on driving impairment appear relatively small or uncertain. While others show inconsistent results about the effect of marijuana on driving impairment.”

9) Prior Legislation:

- a) SB 289, Correa, Legislative Session of 2013-2014, would have made it unlawful for a person to drive a motor vehicle if his or her blood contains any amount of specified drugs, unless the drug was consumed in accordance with a valid prescription. The bill died in the Senate Public Safety.
- b) AB 1215, Benoit, Legislative Session of 2007-2008, would have prohibited a person who has a measurable amount of specified drugs in his or her blood or urine from driving a vehicle or being in actual physical control of a vehicle on a highway. The bill died in the Assembly Public Safety.

REGISTERED SUPPORT / OPPOSITION:

Support

California Association of Code Enforcement Officers
 California Association of Highway Patrolmen
 California College and University Police Chiefs Association

² HT Andas et al., Detection time for THC in oral fluid after frequent cannabis smoking, 36 THER. DRUG MONIT. 808 (2014).

California Narcotic Officers Association
California Peace Officers' Association
California Police Chiefs Association
Diageo
DUID Victim Voices
Foundation for Advancing Alcohol Responsibility
International Faith Based Coalition
Los Angeles Deputy Sheriffs
Los Angeles Police Protective League
Riverside Sheriffs Association
We Save Lives

Opposition

California Attorneys for Criminal Justice
California Public Defenders Association
Drug Policy Alliance

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