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ASSEMBLY COMMITTEE ON
PUBLIC SAFETY
REGINALD BYRON JONES-SAWYER, SR., CHAIR
ASSEMBLYMEMBER, FIFTY-NINTH DISTRICT

AGENDA

9:00 a.m. – July 11, 2017
State Capitol, Room 126

SPECIAL ORDER OF BUSINESS
9:00 a.m. – 9:30 a.m.

Item	Bill No. & Author	Counsel/ Consultant	Summary
1.	SB 10 (Hertzberg)	Ms. Uribe	Bail: pretrial release.

REGULAR ORDER OF BUSINESS

Item	Bill No. & Author	Counsel/ Consultant	Summary
2.	SB 65 (Hill)	Mr. Pagan	Vehicles: alcohol and marijuana: penalties.
3.	SB 185 (Hertzberg)	Mr. Billingsley	Crimes: infractions.
4.	SB 230 (Atkins)	Ms. Anderson	Evidence: commercial sexual offenses.
5.	SB 239 (Wiener)	Ms. Anderson	Infectious and communicable diseases: HIV and AIDS: criminal penalties.
6.	SB 310 (Atkins)	Ms. Uribe	Name and gender change: prisons and county jails.
7.	SB 331 (Jackson)	Ms. Uribe	Evidentiary privileges: domestic violence counselor-victim privilege.

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8.	SB 339 (Roth)	Mr. Pagan	Veterans treatment courts: Judicial Council assessment and survey.
9.	SB 345 (Bradford)	Mr. Pagan	Law enforcement agencies: public records.
10.	SB 421 (Wiener)	Ms. Anderson	Sex offenders: registration: criminal offender record information systems.
11.	SB 625 (Atkins)	Mr. Billingsley	Juveniles: honorable discharge.
12.	SB 641 (Lara)	Ms. Uribe	Controlled Substance Utilization Review and Evaluation System: privacy.
13.	SB 684 (Bates)	Mr. Billingsley	Incompetence to stand trial: conservatorship: treatment.
14.	SB 776 (Newman)	Mr. Billingsley	Corrections: veterans' benefits.
15.	SCR 48 (Skinner)	Ms. Uribe	Criminal sentencing.
16.	SJR 5 (Stone)	Mr. Pagan	Federal rescheduling of marijuana from a Schedule I drug.

Individuals who, because of a disability, need special assistance to attend or participate in an Assembly committee hearing or in connection with other Assembly services, may request assistance at the Assembly Rules Committee, Room 3016, or by calling 319-2800. Requests should be made 48 hours in advance whenever possible.

Date of Hearing: July 11, 2017
Counsel: Sandy Uribe

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Reginald Byron Jones-Sawyer, Sr., Chair

SB 10 (Hertzberg) – As Amended July 5, 2017

SUMMARY: Revises the pretrial release system by limiting pretrial detention to specified persons, eliminating the use of bail schedules, and establishing pretrial services agencies tasked with conducting risk assessments on arrested person and preparing reports with recommendations for conditions of release. Specifically, **this bill**:

1) Contains legislative findings and declarations regarding money bail and pretrial release.

2) States legislative intent to safely reduce the number of pretrial detainees.

3) Repeals Penal Code sections 815a, 1269b, 1270, 1270.1, 1270.2, 1275, 1288, 1289, 1318, and 1319.

4) Provides that if a person is arrested based upon a warrant issued in another county, a magistrate in the county of arrest can release the detainee subject to a release agreement, with or without conditions or release, or set monetary bail.

5) States that specified persons may approve and accept an order authorizing pretrial release or admitting to bail, issue and sign an order for the release of a detainee, and set a time and place for the person's appearance before the court.

6) Requires each county to establish a pretrial services agency that will be responsible for gathering information about newly arrested persons, conducting pretrial risk assessments, preparing individually tailored recommendations to the court, and providing pretrial services and supervision to persons on pretrial release.

7) Requires the pretrial services agency to conduct a pretrial risk assessment of a detainee upon booking into jail, except for those charged with violent felonies, and to prepare a pretrial services report with recommendations for release.

8) Prohibits use of pretrial service reports for any purpose other than for decisions on pretrial release. Copies of the report shall be provided to the court, the prosecutor, defense counsel, or the arrested person if not represented by counsel.

9) Establishes the following pre-arraignment classifications for release:

   a) Prohibits pre-arraignment release of a person charged with a serious felony, a violent felony, felony witness intimidation, spousal rape, domestic violence, stalking, violation of protective orders, or any felony while the person was on pretrial release for a separate

offense;

b) Requires the release of persons charged with all other felonies, either with no conditions of release or with the least restrictive conditions deemed necessary; and,

c) Requires the pretrial release of a person who is arrested and booked for a misdemeanor, rather than cited and released, except if the person is charged with a misdemeanor while on pretrial release. Release is subject to signing a release agreement and no release conditions may be imposed.

10) Establishes the following pre-arraignment procedures for release:

a) The pretrial services agency shall immediately transmit the pretrial services report with recommendations to the court, except as specified;

b) The court shall issue an oral or written order for release, either with or without conditions and subject to a release agreement, no later than six hours after receipt of the risk assessment and pretrial services report have been received; and,

c) The court can release the detainee regardless of the fact that a pretrial services report has not been received.

11) Provides that, when a person is released before arraignment, either the defendant or the prosecutor may file a motion to amend the release order alleging changed circumstances and requesting different or additional conditions of release at the time of arraignment.

12) Authorizes court commissioners to order the pre-arraignment, pre-trial release of arrested persons.

13) Allows an officer arresting a person for a bailable felony offense, or for a misdemeanor violation of a domestic-violence restraining order, to file a declaration alleging that he or she has reasonable cause to believe that pre-arraignment pre-trial release with no conditions of release would be insufficient to either ensure the defendant's appearance in court or the safety of the victim and/or his or her family.

14) Establishes the following rules for pretrial release at arraignment and for detention hearings:

a) Requires the court, in making a decision for pretrial release at arraignment or at a detention hearing, to consider the protection of the public, the seriousness of the charged offense, the defendant's prior criminal record, the probability of appearing in court, and the presumption of innocence; but public safety and that of the victim, along with probability of appearance shall be the primary considerations;

b) States that, in considering the seriousness of the offense, the factors to be considered are the alleged injury to the victim, alleged threats to the victim or a witness, and alleged use of a firearm or other deadly weapon;

c) Imposes upon the court the duty to determine what condition or conditions of release will ensure public safety, the defendant's appearance in court, and facilitate pretrial release.

Upon a finding at a detention hearing that no such conditions will reasonably ensure this, the court's order must provide findings of fact and a statement of reasons;

d) Requires the court to consider the pretrial agency's risk assessment, report, and recommendations of release, except as specified. If the release decision is inconsistent with the recommendations of the pretrial services agency, the court's order must include a statement of reasons; and

e) Requires the court to make a pretrial release or detention decision without undue delay, as specified.

15) Establishes the following protocol for pre-trial release at arraignment:

a) All persons who have not been released before arraignment and who have not been ordered detained will be released using the least restrictive conditions necessary to ensure appearance and public safety;

b) First, the court shall consider the pretrial services report and any relevant information provided by the prosecutor and the defendant and order release without conditions, subject to the signing of a release agreement. The reason for the decision shall be stated on the record;

c) Next, if the court determines that pretrial release without conditions will not reasonably ensure the person's appearance in court, the safety of the victim, or the public safety, the court shall order pretrial release subject to a release agreement with the least restrictive nonmonetary conditions determined reasonable to ensure court appearance and safety. A statement of reasons for the determination is required; and,

d) Lastly, if the court determines that the person cannot be released with non-monetary conditions alone, then the court is authorized to set monetary bail, as specified, or a combination of monetary bail and other conditions to ensure the defendant's appearance. The court must state its reasons for the determination.

16) Requires the court to set money bail be set at the least restrictive amount necessary to ensure the defendant's appearance and to consider the defendant's present ability to pay.

17) Defines "ability to pay" as either: (1) the overall capability of the defendant to reimburse the costs, or a portion of the costs, of the legal assistance provided to him or her, including but not be limited to, the defendant's present financial position, the defendant's reasonably discernible future financial position in the next six months including likelihood of obtaining employment, and any other factor or factors that may bear upon the defendant's financial capability; or (2) as defined by the Judicial Council in a Rule of Court developed for this purpose.

18) Defines "least restrictive" as "those release terms necessary to reasonably ensure the appearance of the specific person, the safety of the victim, and public safety, as determined by the court."

19) Prohibits the judge from setting bail in an amount which results in pretrial detention solely because of inability to pay.

20) Provides that for defendants charged with violent felonies, the risk assessment and report with recommendations will only be prepared if the defendant requests them. If the defendant requests an assessment and report, it must be completed within 12 hours, and the defendant must be considered for release within 24 hours.

21) Provides that a defendant for who conditions of release have been imposed and who, five days after such imposition continues to be detained because of an inability to meet the conditions of release, is entitled to an automatic review of the conditions, unless he or she waives such review.

22) Permits the prosecutor, in cases alleging an aggravated white collar crime enhancement, to seek asset forfeiture in order to preserve property or assets in the defendant's control.

23) Allows the prosecutor to file a motion for pretrial detention at any time alleging any of the following:

   a) The person is charged with a capital crime and the facts are evident or the presumption great;

   b) The person is charged with a violent felony or a felony sexual assault and the facts are evident or presumption great, there is no condition or combination thereof that would reasonably ensure the safety of others, and, there is a substantial likelihood that release would result in great bodily harm to others; or when,

   c) The person is charged with a felony and the facts are evident or presumption great, the defendant has threatened another with great bodily harm, there is no condition or combination thereof that would reasonably ensure the safety of person threatened, and there is substantial likelihood that the person would carry out the threat if released.

24) Requires the court, upon the filing of a motion for pretrial detention, to hold a hearing within 48 hours after the filing of the motion, unless the defendant waives a hearing.

25) Requires the prosecutor to provide notice of a pretrial detention hearing to the alleged victim or victim's next of kin, in cases where the defendant has been arrested for a serious felony.

26) Prohibits the court from considering the results of a pretrial risk assessment at a detention hearing.

27) Allows the court to order pretrial detention of the defendant only if the court makes all of the findings above, which are consistent with the California Constitution. The standard of proof is clear and convincing evidence.

28) Provides that if the person is ordered detained, then the court's order must include findings of fact and a statement of reasons.

29) Provides that if the court does not order pretrial detention after a hearing on a motion to detain, then pretrial services shall conduct a risk assessment and issue a report with recommendations for conditions of release, and the court shall order the person released either with or without conditions.

30) Provides that when money bail is set, a defendant may execute an unsecured appearance bond, as specified, which may be required to be signed by uncompensated third parties, or may execute a secured bond.

31) Defines "unsecured appearance bond" as "an order to release a person upon his or her promise to appear in court and his or her unsecured promise to pay an amount of money, specified by the court, if he or she fails to appear as promised."

32) Allows the court to modify a pretrial release order upon a change in circumstances, to change the conditions of release, including the amount of any money bail. A request for modification may be brought by the prosecutor or the defendant.

33) Requires pretrial services agencies to make every effort to assist pretrial defendant in complying with conditions of release, and must at a minimum, notify defendants of court dates. The agency may also assist defendants in obtaining community services.

34) Permits the court to order a pretrial services agency to supervise and monitor the compliance of released defendants.

35) Authorizes an unnamed agency to oversee pretrial services agencies, to select a statewide pretrial assessment tool, to develop guidelines, and to provide training and assistance on pretrial release to judges, prosecutors, defense counsel, pretrial services agencies, jail staff, and law enforcement.

36) Provides guidelines for the pretrial risk assessment tool which shall be selected by the unnamed agency and for existing pretrial risk assessment tools that comply with these guidelines and that had been in use by counties prior to the effective date of this bill.

37) Requires the risk assessment tool to appropriately weigh risk factors, including criminal history, in a manner that ensures accuracy while minimizing racial and economic disparities.

38) Requires the Board of State and Community Corrections (BSCC), in consultation with the unnamed agency, to develop a plan that establishes statewide requirements for counties related to annual reporting of pretrial release and detention data which must include the percentage of individuals released on pretrial, the percentage of those who fail to appear, those who commit new crimes while on pretrial release, and the rate of judicial concurrence with recommended conditions of release. This data must be disaggregated by race or ethnicity and gender.

39) Requires the unspecified agency to use the data reported by counties to monitor the effectiveness of the county's pretrial release policies, standards, and procedures to ensure compliance with state law.

40) Requires each county to make publicly available its risk assessment tool guidelines, factors, weights, studies, data upon which validation studies rely, and information about how a risk assessment tool was re-normed.

41) Makes conforming changes to other Penal Code provisions.

EXISTING LAW:

1) Prohibits excessive bail. (U.S. Const., 8th Amend. & Cal. Const., art. I, sec. 12.)

2) States that a person shall be granted release on bail except for the following crimes when the facts are evident or the presumption great:

   a) Capital crimes;

   b) Felonies involving violence or sexual assault if the court finds by clear and convincing evidence that there is a substantial likelihood the person's release would result in great bodily harm to others; and,

   c) Felonies where the court finds by clear and convincing evidence that the person has threatened another with great bodily harm and that there is a substantial likelihood that the person would carry out the threat if released. (Cal. Const., art. I, sec. 12.)

3) Lists several factors that the court must consider in setting, reducing, or denying bail: the protection of the public; the seriousness of the charged offense; the defendant's prior criminal record; and, the probability of his or her appearing at trial or hearing of the case. Public safety is the primary consideration. (Pen. Code, § 1275, subd. (a).)

4) States that in considering the seriousness of the offense charged, the judge or magistrate shall include consideration of the alleged injury to the victim, and alleged threats to the victim or a witness to the crime charged, the alleged use of a firearm or other deadly weapon in the commission of the crime charged, and the alleged use or possession of controlled substances by the defendant. (Pen. Code, § 1275, subd. (a).)

5) Requires the court to consider the safety of the victim and the victim's family in setting bail and release conditions for a defendant. (Cal. Const., art. I, sec. 28, subd. (b)(3).)

6) Requires the superior court judges in each county to prepare, adopt, and annually revise a uniform, countywide bail schedule. (Pen. Code, § 1269b, subd. (c).)

7) Requires the countywide bail schedule to contain a list of the offenses and the amounts of bail applicable for each. If the schedule does not list all offenses specifically, then the bail schedule shall contain a general clause for designated amounts of bail for the offenses not specifically listed. (Pen. Code, § 1269b, subd. (f).)

8) Provides that at the time of issuing an arrest warrant, the magistrate shall fix the amount of bail which, in the magistrate's judgment, will be reasonable and sufficient for the defendant to appear, if the offense is bailable. (Pen. Code, § 815a.)

9) Provides that an arrested person must be taken before the magistrate with 48 hours of arrest, excluding Sundays and holidays. (Pen. Code, 825, subd. (a).)

10) Authorizes the officer in charge of a jail, or the clerk of the superior court to approve and accept bail in the amount fixed by the arrest warrant, the bail schedule, or an order admitting to bail in case or surety bond, and to issue and sign an order for the release of the arrested person, and to set a time and place for the person's appearance in court. (Pen. Code, 1269b, subd. (a).)

11) Authorizes a court to release a person who has been arrested for, or charged with, any offense other than a capital offense, on his or her own recognizance (OR). (Pen. Code, § 1270.)

12) Prohibits the release of a defendant on his or her OR for any violent felony until a hearing is held in open court and the prosecuting attorney is given notice and an opportunity to be heard on the matter. (Pen. Code, § 1319.)

13) Specifies conditions for a defendant's release on his or her own recognizance (OR). (Pen. Code, § 1318.)

14) Authorizes a court, with the concurrence of the board of supervisors, to employ an investigative staff for the purpose of recommending whether a defendant should be released on OR. (Pen. Code, § 1318.1, subd. (a).)

15) States that whenever a court has employed investigative staff for the purpose of recommending whether a defendant should be released on OR, an investigative report shall be prepared in all cases involved in a violent felony listed in Penal Code Section 667.5(c), or a felony violation of driving under the influence and causing bodily injury to another person, recommending whether the defendant should be released on OR. The report shall include all of the following:

    a) Written verification of any outstanding warrants against the defendant;

    b) Written verification of any prior incidents where the defendant has failed to make a court appearance;

    c) Written verification of the criminal record of the defendant; and,

    d) Written verification of the residence of the defendant during the past year. (Pen. Code, § 1318.1(b).)

16) Provides that a defendant released on bail for a felony who willfully fails to appear in court, as specified, is guilty of a crime. (Pen. Code, § 1320.5.)

17) Specifies that if an on-bail defendant fails to appear for any scheduled court appearance, the bail is forfeited unless the clerk of the court fails to give proper notice to the surety or depositor within 30 days, or the defendant is brought before the court within 180 days. (Pen. Code, § 1305, subds. (a) & (b).)

FISCAL EFFECT: Unknown.

COMMENTS:

1) **Author's Statement**: According to the author, "California's current money bail system comes at great cost not only to the detained individual and his or her family, but also to California communities. When wealth and charges alone determine whether or not someone will be released pending trial, community safety suffers. Under a wealth-based, bail-schedule-based system, as long as a person can afford the amount of bail set, that person will typically go free even if the person cannot be safely released. Under this same system, people who can be safely released often remain in jail and potentially increasing the likelihood that they will commit new crimes once released. Research has shown that detaining low-and moderate-risk defendants, even for just a few days, is strongly correlated with higher rates of new criminal activity both during the pretrial period and years after case disposition. When held even 2-3 days, low risk defendants are almost 40% more likely to commit new crimes before trial than equivalent defendants held no more than 24 hours. When held for 8-14 days, these defendants are 51% more likely to commit another crime within two years after completion of their cases than equivalent defendants held no more than 24 hours.

   "Unnecessary pretrial detention comes at great cost to taxpayers as well. It costs roughly $114 per day to house a person in jail California. There are 123 jails across the state, with a combined average daily population of 72,500 people. All the while the state and local jurisdictions are wasting taxpayer dollars to detain people who have not yet been convicted of a crime and may not be convicted of a crime, as well as people who, when convicted, will not be sentenced to incarceration. One in three felony arrests did not result in conviction, and only 14% of felony convictions in California result in a prison sentence.

   "Nationwide, people who are unable to meet bail fall within the poorest third of society. In the 75 largest urban counties in the United States, roughly 9 out of every 10 defendants detained pretrial had had a bail amount set but were unable to meet the financial conditions to secure release from jail. When asked whether they could afford an emergency expense costing just $400, 46% of American adults said they could either not cover the expense, or they would have to cover it by selling something or borrowing money. Nationally, the median bail amount is $10,000, which represents eight months of pay for the typical detained defendant.

   "SB 10 seeks to remedy California's failing pretrial system by reducing reliance on money bail, supporting pretrial defendants with pretrial services, focusing detention resources on those who pose a risk of danger, reducing racial disparities, and ensuring that people are not left in jail simply because they cannot afford to pay for their release. Under SB 10, courts will evaluate whether an individual can be safely released from jail pending trial, and if so under what set of conditions to assure that the person will come to court as required and avoid committing crimes.

   "SB 10 draws from successful models around the country and in California. For example, Kentucky utilizes a risk-assessment system and no longer relies on commercial bail and releases 70% of its pretrial defendants (68% on non-financial releases). In Kentucky, 89% of released defendants make all future court appearances, and 92% are not re-arrested while on pretrial release. Santa Clara County has implemented a successful pretrial services model and

has saved $33 million in six months by keeping 1,400 defendants out of jail.

"California should follow the lead of Chief Justice Tani Cantil-Sakauye, the American Bar Association, the U.S. Department of Justice, the Council of Chief Justices, and countless state and local lawmakers, officials, and advocates across the country calling for reform."

2) **Background**: In California, bail is a constitutional right except when the defendant is charged with: (1) a capital crime; (2) a felony involving violence or sex and the court finds that the person's release would result in great bodily harm to another; or (3) when the defendant has threatened another and the court finds it likely that the defendant might carry out that threat. The constitution also allows for an arrestee to be released upon a written promise to appear, known as release on own recognizance. The constitution prohibits excessive bail. (Cal. Const. art. I, § 12.)

   Courts require many defendants to deposit monetary bail in order to be released from custody. Bail is intended to act as a financial guarantee to the court that the defendant will appear for all required court hearings. An arrestee may post bail with his or her own cash, or may post bail using a bail bond.

   Currently, each county sets a bail schedule based exclusively on the charged offense. The bail schedule is used by the arresting officer to allow an arrestee to post bail before his or her court appearance. Once a defendant is brought before the court, there must be an individualized determination of the appropriate amount of bail.

   Another function of the bail system is protection of the community. Arguably, the current bail system does not actually address community safety concerns because there is no assessment of risk, at least when bail is posted before the arrestee appears before the court.

3) **Challenges Presented by Money Bail System**: There are a number of challenges that the bail system faces. A growing number of people acknowledge that the bail system has a negative impact on communities of color and those who come from the lower end of the socio-economic spectrum. In short, those who have money have the ability to confront their criminal charges while free from confinement in county jail. Those who are too poor to post bail are forced to remain incarcerated, and are more likely to plead guilty in order to get out of custody. Prior to the initial court appearance, the determination as to who remains detained while awaiting resolution of criminal charges is made based on money, and not whether the person is a present danger to the community or whether he or she will return to court.

   The ability to be out of custody while facing criminal charges carries a number of inherent advantages. A defendant who is released on bail is able to carry on with his or her life while awaiting the disposition of the criminal case. For instance, criminal defendants who are out on bail are not only able to maintain employment but they are also encouraged to do so.

   The current system results in California jails being crowded with individuals who are occupying jail beds while they are facing criminal charges. Due to overcrowding, jails are often forced to release inmates who have already been convicted and sentenced and should be serving their criminal sentences.

4) **Public Policy Institute of California Report on Jail Capacity and Pretrial Inmates**: In 2015, the Public Policy Institute of California (PPIC) issued a report on pretrial release and jail overcrowding. The report noted that as of September 2014, 62% of jail beds were filled with inmates awaiting either trial or sentencing. The report stated that California uses pretrial detention more than the rest of the country. However, the state's high rates of pretrial detention have not been associated with lower rates of failures to appear or lower levels of felony rearrests. In fact, California has had higher rates of both failures to appear and rearrests for non-violent felonies. (*Pretrial Detention and Jail Capacity in California*, S. Tafoya, July 2015, http://www.ppic.org/main/publication_quick.asp?i=1154.)

   "Given that the legal rationale for pretrial detention is to ensure court appearances and preserve public safety, the data presented here indicate that California may not be getting a good return on the high levels of pretrial detention it has maintained. California's pretrial practices are associated with lower rates of rearrests for violent felonies, but this result may have been achieved at the cost of detaining many defendants who might have safely been released under some form of pretrial supervision. Moreover, as critics of the bail system have long argued, releasing defendants based on their ability to post bail is both inequitable and unnecessarily risky: defendants with financial resources can purchase release even if there is a high risk that they will engage in pretrial misconduct, while low-risk defendants who are poor may be needlessly held in jail." (*Id.*)

   The report found that "pretrial services programs—if properly implemented and embraced by the courts, probation, and the jails—could address jail overcrowding and improve the efficiency, equitability, and transparency of pretrial release decision making." (*Id.*)

5) **Pretrial Services**: According to the California Association of Pretrial Services Website, pretrial services agencies are important because they improve the court's release and detention decision-making process. They also protect public safety by ensuring that only those defendants who can safely be released are released. Use of pretrial services agencies also increases the use of non-financial release alternatives, which reduces the percentage of pretrial detainees in the jail. Finally, pretrial services agencies can save taxpayer dollars by reducing the costs of jailing pretrial defendants (http://pretrialservicesca.org/about)

   Services provided by pretrial services can include: jail screening and interviewing of all arrestees; investigation of the arrestee's ties to the community, past record, potential dangerousness to the community, past history of failures to appear, and the seriousness of the current criminal charges; preparation of a written report to the court and the presiding magistrate, summarizing the defendant's ties to the community and a recommendation for or against release; case monitoring of conditions of release and court date notification system for defendants; supervised release for selected defendants; social services referrals for defendants; and follow-up services to locate defendants who have failed to appear and return them to the court system without the unnecessary costs of an arrest. (http://pretrialservicesca.org/about)

   This bill would require every county to establish a pretrial services agency. The agencies would be tasked with conducting risk assessments on arrested persons, preparing pretrial services reports with recommendation for release. The agencies would also be required to assist pretrial defendants in complying with conditions of release, and must at a minimum,

notify defendants of court dates.

This committee has been unable to determine how many out of the 58 counties have pretrial services agencies. Would each county be able to establish the required pretrial services agency by the effective date? Should the effective date of this legislation be delayed to ensure counties can effectively comply with the mandates imposed, particularly since this is such a broad and sweeping change in pretrial practice?

6) **Preventative Detention**: Consistent with the California Constitution, this bill allows for preventative detention under the following circumstances: (1) if the person is charged with a capital crime; or (2) the person is charged with either a violent felony or a felony sex assault, there is no condition or combination thereof that would reasonably ensure the safety of others, and, there is a substantial likelihood that release would result in great bodily harm to others; or (3) when the person is charged with a felony and the defendant has threatened another person with great bodily harm, and there is substantial likelihood that the person would carry out the threat if released.

Other than those three narrow categories, all other defendants should be released at arraignment using the least restrictive means of release, either with no release conditions, non-financial conditions of release, or on money bail, with or without other conditions, as a last resort. Additionally, if the court chooses money bail, the bail must be set at the least restrictive amount needed to ensure the defendant's appearance in court, and in an amount that the defendant can afford to pay. The bail amount cannot cause hardship to the defendant. The court is prohibited from setting bail in an amount which results in a defendant's pretrial detention only because of inability to pay.

This bill would define "ability to pay" using the current definition of assessing ability to pay costs of legal representation at the end of trial court process. In that context "ability to pay" is defined as:

> "the overall capability of the defendant to reimburse the costs, or a portion of the costs, of the legal assistance provided to him or her, and shall include, but not be limited to, all of the following:
> (A) The defendant's present financial position.
> (B) The defendant's reasonably discernible future financial position. In no event shall the court consider a period of more than six months from the date of the hearing for purposes of determining the defendant's reasonably discernible future financial position. Unless the court finds unusual circumstances, a defendant sentenced to state prison, or to county jail for a period longer than 364 days, including, but not limited to, a sentence imposed pursuant to subdivision (h) of Section 1170, shall be determined not to have a reasonably discernible future financial ability to reimburse the costs of his or her defense.
> (C) The likelihood that the defendant shall be able to obtain employment within a six-month period from the date of the hearing.

(D) Any other factor or factors that may bear upon the defendant's financial capability to reimburse the county for the costs of the legal assistance provided to the defendant." (See Pen. Code, § 987.8, subd. (g)(2).)[1]

As recently amended, this bill appears to allow for preventative detention. While the court is prohibited from setting bail in an amount which results in a defendant's pretrial detention *solely* because of inability to pay, all the court needs do is state other grounds for setting bail in an amount that the defendant cannot afford to pay, for example, based on public safety, the defendant's flight risk, or the safety of the victim.

7) **Arguments in Support**:

a) According to the *American Civil Liberties Union of California*, a Co-sponsor of this bill, "Groups as diverse as the U.S. Department of Justice, the Council of Chief Justices, the American Bar Association, the Movement for Black Lives, the Cato Institute, and Right on Crime have spoken out against discriminatory bail practices across the country. Here in California, in her last two State of the Judiciary addresses, Chief Justice Tani Canti-Sakauye has identified the need for pretrial reform in our state; and a bipartisan coalition of legislators, communities, families, organizations, professors, attorneys, political organizations, judges, and local officials have joined the movement for reform. The time is ripe for change.

"Here in California, about 63% of people in jail in California on any given day (or 46,000 people) are either awaiting trial or sentencing, at a high financial and social cost to taxpayers. Many Californians cannot afford to post bail and so must either stay in jail or pay substantial nonrefundable fees to a bail bond company. These fees are not refunded – even if the court finds that a person is innocent or was wrongfully arrested.

"California's current bail system is likewise punishing whole families and communities. Over-policing of communities of color results in more arrests, exacting a disproportionate price from these communities. Whole families suffer, as they take on long-term debt to purchase the safety and freedom of a loved one, and women are hit the hardest....

"Successful models for reform can be found in California and other states. For example, in Kentucky, about 70% of pretrial defendants are released (68% on non-financial releases), 89% make all future court appearances, and 92% are not re-arrested while on pretrial release. Santa Clara County has implemented a successful pretrial services model and has saved $33 million in six months by keeping 1,400 defendants out of jail. Like with these systems, under the California Bail Reform Act, judges will have access to helpful tools and resources to assist them in their pretrial decision-making. These resources help to protect public safety while reducing the number of people kept in jail after arrest. It is time for California to implement these proven and cost-effective systems across the state."

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[1] The definition of ability to pay for purposes of reimbursing the county for legal services does not fit squarely into the bail context. At a minimum, the references to legal representation and presumptions of inability to pay due to incarceration should be omitted.

b) According to *Ella Baker Center for Human Rights*, another Co-sponsor of this bill, "This bill seeks to significantly reduce the reliance on the money bail system that punishes poverty. In its place, the bill establishes a robust pre-trial services program and the use of a validated risk-assessment tool to determine the safe release of people, pending the resolution of their cases. It is a common sense, practical approach to enhancing public safety in California and is in line with a growing momentum of jurisdictions across the country to reduce the impact of the predatory money bail system.

"In California, nearly 2/3 of the people sitting in jail are either awaiting trial or sentencing, at a significant cost to the state and vulnerable families. The State spends $5 million per day to lock up people who are waiting to go to court—totaling more than $1.8 billion annually. Families are forced to make the difficult decision between covering their basic needs like housing and paying the bail bonds agency. Families that cannot afford the 10% fee often go on payment plans that perpetuate the cycle of poverty. When a person remains in jail because they cannot afford bail, others may need to fill the financial gap he or she leaves behind, forcing family members to drop out of school to get a job, or quitting a job to take care of children that are left behind.

"Further, people forced to stay in jail because they cannot afford bail face a number of additional obstacles. Many people take coercive plea deals in order to avoid waiting for trial so they can get back to their lives and familial obligations. Research has shown that compared to people who are released prior to trial, those held for their entire pretrial detention have a greater likelihood of being sentenced to jail. Studies have also shown a strong correlation between length of detention and recidivism. Compared to people who were held no more than 24 hours, those held for 8 to 14 days were 51% more likely to go back to jail for another crime. Pre-trial detention as a result of inability to pay bail can also result in loss of employment, housing, child custody rights, etc. Black men are not only less likely to be released on their own recognizance, their bail amounts are also 35% higher on average than white men. Most alarmingly, nearly 80% of all jail deaths in California occur among people who are detained pre-trial.

"People of color are already over-represented in the criminal justice system and current pre-trial detention practices exacerbate these disparities. The current system of bail was designed to most severely impact those who can least afford it. SB 10 provides California with the opportunity to decriminalize poverty, reduce racial disparities, and enhances public safety outcomes."

8) **Arguments in Opposition**:

a) According to the *Judicial Council of California*, "The Judicial Council is concerned that SB 10 would infringe on judicial discretion and independence for the following reasons:

"Balance of system interests: The council is concerned that SB 10 does not establish a reasonable or realistic balance between the interest in releasing all defendants who can be safely released pretrial, and a concern for public safety (including safety of victims) and the administration of justice (fleeing jurisdiction/failure to appear). Judges have constitutional and statutory responsibility for implementing the law in ways that ensure appropriate consideration for protecting the rights of the accused, protecting the public and victim(s), and providing for the fair and efficient administration of justice. In that

regard, the council is concerned that SB 10 would require the pre-arraignment release by the pretrial services agency of any person charged with a misdemeanor (unless the defendant is already on pretrial release), without providing an opportunity for a judge to determine whether the defendant (who may be charged with a serious misdemeanor, including domestic violence) is a risk to public safety or the safety of the victim(s), or is likely to flee....

"Information provided to the court: The bill appears to significantly limit information provided to the judge at pre-arraignment as a basis for the release determination....

"Balance between judicial authority and pretrial services authority: Substantial burdens are imposed on judges to justify any departure from recommendations of the pretrial services agency, including requiring courts, if the release decision is inconsistent with the recommendations of the pretrial services agency, to include a statement of reasons....

"The Judicial Council is concerned that the bill would impose unrealistic (and unspecified) timelines on courts. The bill would require informed decision-making on timelines that are unrealistic for courts and criminal justice partners. For example, the bill would: (a) require pretrial services agencies to gather and courts to process a significant amount of information regarding a defendant on very tight timelines; (b) require judges to issue findings of fact and a statement of the reasons for imposing each condition that are specific to the person in each case where conditions are imposed; and (c) require up to five pre-arraignment hearings on very tight timelines....

"Finally, the Judicial Council is concerned that SB 10 would create a non-linear and highly complex system. More specifically, the council is concerned that the operational impact on courts would be profound and, without adequate funding, unachievable. The council is also concerned that SB 10 would attempt to graft at least four different release and detention elements onto the current statutory structure for the bail system: risk-based release; unsecured bonds; ability-to-pay determinations; and preventive detention. Further, in many counties, a significant portion of the pretrial population is ineligible for release due to probation or parole holds, immigration (ICE) holds, holds for multiple failures to appear, or other legal circumstances that prevent their release. The council believes that it would be inefficient to use resources to assess defendants, process paperwork, hold hearings, etc. for defendants who will not be eligible for release due to circumstances that arise from legal issues unrelated to the current charge."

b) According to the *California District Attorneys Association*, "While we agree that California's bail system should be reviewed and opportunities for thoughtful improvement identified, this bill simply goes too far, too fast.

"As you know, Chief Justice Tani Cantil-Sakauye has put together a Pretrial Detention Reform Work Group to study current pretrial detention practices and provide recommendations for potential reforms. This work group is expected to report back to the Chief Justice with recommendations by December 2017. In light of that timeline, we believe that any legislative efforts to repeal and replace the current bail system are premature.

"California's current pretrial release procedures help to ensure that dangerous defendants

are not released to commit new crimes and harm victims and witnesses before trial. Under these procedures, the court already has wide discretion to release a defendant on his or her own recognizance, or to reduce bail for defendants that do not pose such risks. Whatever the deficiencies in the current system, it hardly seems prudent to take it apart and start from scratch.

"SB 10 focuses on the costs of incarceration and hardships to the defendant caused by pretrial detention, but wholesale pretrial release has many other costs. When a defendant fails to appear, there is no bail agent with motivation to go find the defendant. The police have no additional resources to find and arrest defendants who fail to appear – and even those who are apprehended after failing to appear are only be subject to a maximum five-day flash incarceration, following a civil contempt hearing.

"There are also tremendous logistical problems with the proposed pretrial release scheme. Under the bill, when Friday is a court holiday, a Wednesday arrestee must be charged by Thursday. So, when someone is arrested on Wednesday at 11:00 p.m., the police must complete reports, present them to the district attorney on Thursday, and expect the district attorney to make a careful charging decision in time for an afternoon court arraignment. This compressed timeline will undoubtedly result in the release of dangerous individuals.

"Even when given a full two days before arraignment, SB 10 makes it extremely onerous to achieve pretrial detention for dangerous defendants. The district attorney must file a written motion at arraignment, containing myriad required allegations, and be expected to prove those allegations in a contested hearing – all of this within 48 hours of the arrest. The existing bail schedule system allows judges to exercise discretion to raise or lower bail for violent felons, in a sensible period of time.

"Changing the pretrial release system to address actual injustices is a laudable goal. However, these changes should be careful and measured, particularly for offenses greater than misdemeanors and low-level felonies."

c) According to the *Chief Probation Officers of California*, "While we generally support and commend your effort to move California away from a system based heavily on money bail and move toward a system based on risk, we have serious concerns with the legislation in its current form from a procedural and operative perspective. In particular, we are concerned that SB 10 would disrupt, and in many cases undo, successful pre-trial programs currently taking place in many counties. …

"Specifically, SB 10, as currently drafted, inhibits local control and flexibility relative to allowing each jurisdiction to determine who will handle the various parts of the pretrial program including assessments, reports, and monitoring. Rather than a single county pretrial services agency, we believe it is important that each jurisdiction be allowed to determine and assign pre-trial responsibilities through a thoughtful and collaborative process as determined appropriate at the local level….

"Additionally, we are concerned about the provisions that set forth a yet to be named statewide oversight entity for assessment tools. Probation strongly supports the use of research-based, and outcome driven, pretrial assessment tools. While we recognize the importance of making sure there are minimum standards a pretrial assessment tool should

meet, the determinations on the use of tools should be driven by local decisions and not directed on a statewide basis. Further, while it is important to probation to have a tool that is 'validated' to the local jurisdiction, requiring validation immediately upon implementation of an assessment tool is unrealistic.... A research tool can be very effective and still used in accordance with best practices before enough data is available to validate the tool."

9) **Related Legislation**:

a) AB 42 (Bonta) was substantially similar to this bill. AB 42 failed passage on the Assembly Floor.

b) AB 789 (Rubio) allows a court to approve, without a hearing, own recognizance (OR) release under a court-operated or court-approved pretrial release program for arrestees of specified offenses with three or more prior failures to appear. AB 789 is pending a vote on the Senate Floor.

10) **Prior Legislation**:

a) AB 805 (Jones-Sawyer), Chapter 17, Statutes of 2013, provides that in setting bail, a judge or magistrate may consider factors such as the report prepared by investigative staff for the purpose of recommending whether a defendant should be released on his/her own recognizance.

b) AB 2388 (Hagman) of the 2013-2014 Legislative Session, would have required the Judicial Council to prepare, adopt, and annually revise an advisory statewide bail schedule for all bailable felony offenses and for all misdemeanor and infraction offenses, except Vehicle Code infractions, that counties could reference when setting a countywide bail schedule. AB 2388 was held on the Appropriations suspense file.

c) SB 210 (Hancock), of the 2013-2014 Legislative Session, would have revised the criteria for determining eligibility for pretrial release from custody. SB 210 was ordered to the Assembly Inactive File.

d) SB 210 (Hancock), of the 2011-12 Legislative Session, would have required a court to determine, with public safety as the primary consideration, whether a defendant charged with a jail felony is eligible for release on his or her own recognizance (OR). SB 210 failed passage on the Assembly Floor.

e) SB 1180 (Hancock) of the 2011-12 Legislative Session, was substantially similar to SB 210. SB 1180 was ordered to the Senate Inactive File.

REGISTERED SUPPORT / OPPOSITION:

Support

American Civil Liberties Union (Co-Sponsor)
Anti-Recidivism Coalition (Co-Sponsor)
Californians for Safety and Justice (Co-Sponsor)

California Public Defenders Association (Co-Sponsor)
Ella Baker Center for Human Rights (Co-Sponsor)
Essie Justice Group (Co-Sponsor)
SEIU California (Co-Sponsor)
Silicon Valley De-Bug (Co-Sponsor)
Western Center on Law and Poverty (Co-Sponsor)
A New Path
A New Way of Life Reentry Project
Access Women's Health Justice
Advokids
Alameda County Democratic Central Committee
All Saints Church
Alliance for Men and Boys of Color
Alliance San Diego
American Academy of Pediatrics
American Friends Service Committee
Amity Foundation
Ann Martin Center
Arts for Incarcerated Youth Network
Asian American Criminal Trial Lawyers Association
Asian Americans Advancing Justice, California
Asian Law Alliance
Bay Area Equal Voice Coalition
Bay Area Resource Generation
Bend the Arc
Black Women for Wellness
Bill Wilson Center
California Association of Alcohol and Drug Treatment Program Executives
California Attorneys for Criminal Justice
California Calls
California Catholic Conference, Inc.
California Coalition for Mental Health
California Coalition for Women Prisoners
California Immigrant Policy Center
California Labor Federation
California Latinas for Reproductive Justice
California Mental Health Planning Council
California Partnership
California Partnership to End Domestic Violence
California State Strong
California Women's Law Center
California Youth Empowerment Network
Center on Juvenile and Criminal Justice
Children's Defense Fund
City and County of San Francisco
Clergy and Laity United for Economic Justice
Coalition for Humane Immigrant Rights
Communities United for Restorative Youth Justice
Community Oriented Correctional Health Services

Contra Costa County Defenders Association
Contra Costa Democratic Party
Contra Costa County Public Defender
Contra Costa County Racial Justice Coalition
Council on American-Islamic Relations, California
Courage Campaign
David Bohnett Foundation
Disability Rights California
Drug Policy Alliance
Fair Chance Project
Financial Justice Project, City and County of San Francisco Office of Treasurer & Tax Collector
Forward Together
Friends Committee on Legislation of California
Further the Work
Future Justice Fund
FWD.us
Greenbridge Corporate Counsel
Harm Reduction Services
Homeboy Industries
Homies Unidos
House Keys Not Handcuffs
Housing and Economic Rights Advocates
Human Impact Partners
Human Rights Watch
Hunger Action Los Angeles
Immigrant Legal Resource Center
Inland Congregation United for Change
John Burton Advocates for Youth
John Gioia, Contra Costa County Supervisor, District One
LA Voice
Law Enforcement Action Partnership
Law Foundation of Silicon Valley
League of Women Voters of California
Legal Aid at Work
Los Angeles Regional Reentry Partnership
Lutheran Office of Public Policy, California
Marijuana Lifer Project
Mental Health America of California
Mental Health America of Los Angeles
Mujeres Unidas y Activas
Napa County Public Defender
National Alliance on Mental Illness, Los Angeles County Council
National Alliance on Mental Illness, Santa Clara County Board
National Association for the Advancement of Colored People, San Jose/Silicon Valley
National Association of Social Workers, California Chapter
National Council of Jewish Women, CA
National Council of La Raza
National Immigration Law Center
National Organization for Women, California

National Organization for Women, Hollywood
Oakland Privacy
Pangea Legal Services
Peace United Church of Christ
People's Life Fund
PICO California
Progressive Christians Uniting
R Street Institute
Religious Action Center of Reform Judaism and Reform CA
Riverside Temple Beth El
Root and Rebound
Rubicon Programs
San Diego Organizing Project
San Francisco Coalition on Homelessness
San Francisco Public Defender
San Francisco Senior and Disability Action
San Jose University Human Rights Watch
Showing Up for Racial Justice, Peninsula Chapter
Solano County Public Defender
Sonoma County Public Defender
Starting Over, Inc.
Steinberg Institute
Strike Debt Bay Area
SURJ Bay Area
Tarzana Treatment Centers
Temple Beth El Jewish Community Center
The Advocacy Fund
The Kitchen
T'ruah: The Rabbinic Call for Human Rights
United Advocates for Children and Families
United Domestic Workers of America, AFSCME Local 3930
United Food and Commercial Workers Union, Western States Council
Urban Habitat
Urban Peace Institute
Voices for Progress Education Fund
W. Haywood Burns Institute
William C. Velasquez Institute
Women's Foundation of California
Youth for Environmental Sanity
Youth Justice Coalition
9to5 Working Women

102 Private Individuals

Opposition

Aladdin Bail Bonds
Association for Los Angeles Deputy Sheriffs
Association of Deputy District Attorneys

Brotherhood Organization of a New Destiny
California Association of Code Enforcement Officers
California Bail Agents Association
California College and University Police Chiefs Association
California District Attorneys Association
California Narcotic Officers Association
California State Association of Counties
California Police Chiefs Association
Chief Probation Officers of California
City of Redding
Congress of Racial Equality
Crime Survivors
Crime Victims United of California
Golden State Bail Agents Association
Judicial Council of California
Los Angeles County Professional Peace Officers Association
Los Angeles Police Protective League
Office of the San Diego District Attorney
Orange County Board of Supervisors
Peace Officers Research Association of California
Professional Bail Agents of the United States
Riverside Sheriffs' Association

Three Private Individuals

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

Date of Hearing: July 11, 2017
Chief Counsel: Gregory Pagan

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Reginald Byron Jones-Sawyer, Sr., Chair

SB 65 (Hill) – As Amended May 11, 2017

SUMMARY: Prohibits the smoking or ingestion of marijuana while driving, or while riding as a passenger in a motor vehicle, and makes a violation punishable as an infraction. Specifically, **this bill**:

1) Prohibits the smoking or ingestion of marijuana, or any marijuana product while driving, or while riding as a passenger in a motor vehicle on a highway, or on any lands, as specified.

2) Makes smoking or ingesting marijuana by a driver or passenger in a motor vehicle an infraction punishable by a fine of $70.

EXISTING LAW:

1) Provides that except in cases where a different punishment is prescribed, ever offense to be declared an infraction is punishable by a fine not to exceed two hundred fifty dollars ($250). (Pen. Code, § 19.8, subd. (b).)

2) States that an infraction is not punishable by imprisonment. A person charged with an infraction shall not be entitled to a jury trial. A person charged with an infraction shall not entitled to have a public defender or other counsel appointed at public expense to represent him of her she is arrested and not released on his or her promise to appear, his or her own recognizance, or a deposit of bail. (Pen. Code, § 19.6.)

3) Prohibits drivers and passengers of motor vehicles from consuming any alcoholic beverage or possessing any open container of alcohol while on a highway, or any lands, as specified. (Veh. Code, §§ 23221 and 23222.)

4) Allows persons 21 or over to possess not more than 28.5 grams of marijuana and allows those individuals to smoke or ingest marijuana. (Health and Saf. Code, § 11362.1.)

5) Prohibits drivers and passengers of motor vehicles from possessing an open container or package of marijuana or marijuana products, treating violations as infractions punishable by up to a $250 fine. (Health and Saf. Code § 11362.3.)

6) Punishes possession of not more than one ounce of marijuana by those under 18 as an infraction, requiring four hours of drug education and up to 10 hours of community service for first-time offenders. (Health and Saf. Code, § 11357.)

7) Provides that possession of not more than one ounce of marijuana by 18 to 21 year olds as an infraction with a $100 fine. (Health and Saf. Code, § 11357.)

8) Requires the Judicial Council to annually adopt a uniform traffic penalty schedule which shall be applicable to all non-parking infractions as specified in the Vehicle Code, unless in a particular case before the court the judge or authorized hearing officer specifies a different penalty……In establishing a uniform traffic penalty schedule, the Judicial Council shall classify the offenses into four or fewer penalty categories, according to the severity of the offenses, so as to permit convenient notice and payment of the scheduled penalty. (Veh. Code, §40310.)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author," SB 65 makes our marijuana while driving laws consistent with drinking while driving. It makes using marijuana while driving an infraction consistent with drinking while driving and it creates an infraction for passengers in a car to smoke marijuana consistent with passenger drinking while driving. From 2007 to 2014, the number of nighttime weekend drivers in the U.S. with marijuana in their system increased nearly 50%. In 2012, the California Office of Traffic Safety (OTS) released a study of weekend nighttime drivers that found more California drivers tested positive for marijuana than alcohol. Over the last 10 years DMV data is available, the two most recent years show that for the first time, drugged drivers and drug combined with alcohol drivers are killing more Californians than alcohol impaired drivers. The AAA Foundation for Traffic Safety's Washington Study found that the percentage of drivers involved in fatal crashes who recently used marijuana more than doubled between 2013 and 2014. "Washington serves as an eye-opening case study for what other states may experience with road safety after legalizing the drug."

2) **Accident Risks of Marijuana vs. Alcohol**: A recent comprehensive review of studies on the health effects of cannabis by the National Academies of Sciences, Engineering, and Mathematics found that, when controlling for confounding factors like alcohol, driving under the influence of cannabis was associated with a 20% - 30% (1.2 – 1.3 times) increased likelihood of a motor vehicle crash. A 2015 NHTSA study of police-reported crashes found that THC-positive drivers, when adjusted for the effects of other risk factors like alcohol, age, gender, and race, were not significantly more likely to be in a crash. For comparison to alcohol, when adjusted for age and gender, drivers with a 0.03 breath alcohol content (BrAC) level were 20% (1.2 times) more likely to be in a crash, drivers at 0.05 BrAC are about twice as likely, and drivers at the legal alcohol limit of 0.08 BrAC are about 4 times as likely. However, according to the National Institute on Drug Abuse, research suggests that risk factors for marijuana use when combined with either alcohol, cocaine, or benzodiazepines are greater than either drug individually.

REGISTERED SUPPORT / OPPOSITION:

Support

California District Attorneys Association
Los Angeles County District Attorney's Office
San Diego County District Attorney's Office
California Police Chiefs Association
California Medical Association
California Driving Under the Influence Treatment Programs
Peace Officers Research Association of California
Association for Los Angeles County Deputy Sheriffs
Association of Deputy District Attorneys
California Association of Code Enforcement Officers
California College and University Police Chiefs Association
California Narcotics officers Association
Los Angeles County Probation Officers Union AFSCME Local 685
Los Angeles County Professional Peace Officers Association
Los Angeles Police Protective League
Foundation for Advancing Alcohol Responsibility
Automobile Club of Southern California
ACIC-Property Casualty Insurance Association of America
Town of Los Gatos

Opposition

California Public Defenders Association

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

Date of Hearing: July 11, 2017
Counsel: David Billingsley

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Reginald Byron Jones-Sawyer, Sr., Chair

SB 185 (Hertzberg) – As Amended May 26, 2017

SUMMARY: Requires a court to determine a defendant's ability to pay traffic violations and make specified accommodations if it determines the defendant to be indigent. Requires the court to send a reminder notice of a defendant's promise of appear on vehicle code violations, as specified. Reduces the penalty when a person, facing a vehicle code violation, willfully violates his or her written promise to appear court, from a misdemeanor to an infraction. Restates the prohibition on suspensions and holds on driver's licenses for failure to pay a fine on a traffic violation. **Specifically,** this bill:

1) Requires the court to mail a courtesy warning notice to the defendant at least 20 days before sending a notice to the Department of Motor Vehicles (DMV) that the defendant failed to appear in court, when the court seeks to notify DMV of a failure to appear, pursuant to specified law.

2) Reduces the penalty when a person, facing a vehicle code violation, willfully violates his or her written promise to appear court, from a misdemeanor to an infraction.

3) Reduces the penalty when a person willfully fails to pay a fine, without a lawful excuse, on or before the date the bail or fine is due, from a misdemeanor to an infraction.

4) States that any person who fails to appear on a traffic violation, and who has not shown good cause for a failure to appear within 20 days of the appearance date, may be deemed to have elected to have a trial by written declaration upon any infraction.

5) Requires the court to send the defendant a reminder notice of his or her promise to appear in court on a vehicle code violation.

6) Requires the court to send this reminder notice, via United States Postal Service mail to the address shown on the notice to appear unless the defendant otherwise notifies the court of a different address.

7) Requires the court to also send the notice electronically, including, but not limited to, by email or text message, to the defendant if he or she provided an email address or telephone number to the court or to the law enforcement officer at the time of signing the written promise to appear.

8) States that failure to receive the reminder notice does not relieve the defendant of his or her obligation to appear in court by the date stated in the notice to appear.

9) Specifies the information that must be contained in the reminder notice.

10) States that if the court refers a case to a comprehensive collection program, as delinquent debt, the comprehensive collection program shall send a notice to the defendant containing specified information.

11) Provides that if a traffic violation case has not been adjudicated, the comprehensive collection program shall send a notice to the defendant containing information about how the defendant can schedule a hearing for adjudication of the underlying charges without payment of the bail amount.

12) States that in any case involving an infraction a defendant is eligible for the court to determine whether the defendant is indigent in order to establish the amount he or she can afford to pay.

13) Specifies that for purposes of this bill, a defendant is indigent if any of the following criteria is satisfied:

    a) The defendant's income is 125% or less of the poverty guidelines, as specified;

    b) The defendant receives specified public benefits; or

    c) The defendant, as individually determined by the court, cannot pay court fees without using money that normally would pay for the common necessities of life for the defendant and his or her family.

14) The defendant can demonstrate that he or she is indigent by providing any of the following information:

    a) Proof of income from a pay stub, bank statement, rent and grocery receipts, or other form of evidence of earnings;

    b) Eligibility cards or electronic benefit cards or other forms of evidence for the programs described above; or

    c) Attesting to his or her indigent status under penalty of perjury.

15) States if the court establishes that the defendant is indigent pursuant to the provisions of this bill, the court shall reduce the base fine, penalty assessments, any state or local fees, and any civil assessments by 80 percent on all charges pending against the defendant.

16) States that if a defendant's indigent status is found to have been willfully fraudulent, his or her fines and fees reduction shall be overturned and the full amount of fines and fees shall be restored.

17) Specifies that this bill does not limit the discretion of a judicial officer to suspend or reduce fines and fees where appropriate or to dismiss actions in the interest of justice under Section 1385 of the Penal Code.

18) Requires the court to conduct the indigency determination as soon as possible prior to determining whether a person willfully failed to pay.

19) Specifies that defendants whose cases are adjudicated in court shall receive a determination on the same day as their court appearance.

20) Requires the court to provide alternatives to immediate payment of the sentence for any infraction violation filed with the court, including a reasonable payment plan option for the remaining amount owed after any reduction due to indigency or other reasons are applied.

21) States that a "Reasonable payment plan" for a person who is not found to be indigent means "monthly payments that are not more than 5 percent of a defendant's family monthly income, excluding deductions for essential living expenses."

22) States that "Essential living expenses" means, for purposes of this bill, "expenses for rent or house payment and maintenance, food and household supplies, utilities and telephone, clothing, medical and dental payments, insurance, school or child care, child or spousal support, transportation and auto expenses, including insurance, gas, and repairs, installment payments, laundry and cleaning, and other extraordinary expenses."

23) Provides that a defendant who is found to be indigent shall be placed on a zero dollar ($0) payment per month until his or her financial circumstances change.

24) The court shall allow payments for more than 90 days if necessary to establish a reasonable plan in cases subject to a traffic school fee.

25) States that if, after 48 months, an indigent defendant's financial circumstances have not changed, the court shall, in the interest of justice, discharge the remaining amount owed.

26) Requires the court to determine the amount a defendant can afford to pay per month by using a payment calculator to be developed by the Judicial Council.

27) Specifies that an administrative fee shall not be assessed to enter into a payment plan or alternatives to payment.

28) States that if a defendant was found indigent whose fines and fees have been reduced or who has entered into a reasonable payment plan under this bill, or both, shall inform the court if his or her income substantially changes before the fines and fees are completely paid or discharged in the interest of justice, whichever occurs first.

29) States that if the court provides community service as an alternative to payment of the fines and fees, any calculation of the requisite number of hours must occur after the appropriate reductions due to indigency have been made.

30) States that sign-up fee shall not be assessed in order to participate in community service and community service shall include participation in programs required to receive public benefits, mental health services, job training, educational programs, or other social services programs deemed eligible by the court.

31) States that number of hours of community service shall be calculated at a rate of 150 percent of the state minimum wage or the local minimum wage, whichever is higher.

32) Requires the court to accept, in full satisfaction of the fine, fee, and assessment, performance of a number of community service hours corresponding to the base fine.

33) Allows a person who enters into a payment plan with the court and whose net income is subsequently reduced, to at any time after the judgment, request from the court a change in the payment plan due to his or her inability to pay the payment currently required.

34) Specifies that a person who has missed the deadline to pay or appear on a citation shall be granted an ability to pay determination that meets the requirements above, without first paying any bail, fine, or fee and if thereafter the person enters into or resumes a payment plan, the magistrate or clerk of the court hearing the case shall sign and file with the department a certificate to that effect and any driver's license hold shall be removed.

35) States that a comprehensive collection program will provide a payment plan option based on the debtor's ability to pay, as specified.

36) Restates language which prevents DMV from suspending a person's driver's license for failure to pay a fine on specified vehicle code offenses.

37) Restates language preventing courts from providing notice to DMV if a defendant has failed to pay a fine on specified vehicle code violations.

38) Prohibits DMV from refusing to issue or renew a driver's license to any person who fails to pay a fine for specified vehicle code violations.

EXISTING LAW:

1) Provides that a person willfully violating his or her written promise to appear in court or before a person authorized to receive a deposit of bail is guilty of a misdemeanor regardless of the disposition of the charge upon which he or she was originally arrested. (Veh. Code, § 40508.)

2) Provides that a person willfully failing to pay bail in installments as agreed to or a lawfully imposed fine for a traffic violation within the time authorized by the court and without lawful excuse having been presented to the court on or before the date the bail or fine is due is guilty of a misdemeanor regardless of the full payment of the bail or fine after that time. (Veh. Code, § 40508, subd. (b).)

3) Specifies that if a person violates the promise to appear in court on a vehicle code violation or fails to pay a fine on a vehicle code violation the court may give notice of the failure to appear to DMV. (Veh. Code, §§ 40509 and 40509.5.)

4) Requires DMV to suspend the driving privilege of an individual if they receive notification from the court that the individual has failed to appear in court or failed to pay a fine on a traffic violation. (Veh. Code 13365, subd. (a).)

5) States that a suspension of driving privileges based on failure to appear in court shall not be effective before a date 60 days after the date of receipt by DMV of the notice from the court. (Veh. Code, § 13365, subd. (b).)

6) Specifies that the suspension of driving privileges shall continue until the suspended person's driving record does not contain any notification of a failure to appear in court. (Veh. Code, § 13365, subd. (c).)

7) Existing law provides that any person who fails to appear (FTA) as provided by law may be deemed to have elected to have a trial by written declaration upon any alleged infraction, as charged by the citing officer. (Veh. Code, § 40903, subd. (a).)

8) States that DMV shall not issue or renew a driver's license to any person when a license previously issued to the person has been suspended until the expiration of the period of the suspension, unless cause for suspension has been removed. (Veh. Code, § 12807, subd. (a).)

9) States that the department shall, before issuing or renewing any license, check the record of the applicant for notices of failure to appear in court filed with it and shall withhold or shall not issue a license to any applicant who has violated his or her written promise to appear in court unless the department has received a certificate issued by the magistrate or clerk of the court hearing the case in which the promise was given showing that the case has been adjudicated or unless the applicant's record is cleared as provided. (Veh. Code, § 12808, subd. (b).)

10) Provides that in addition to any other penalty in an infraction, misdemeanor, or felony the court may impose a civil penalty up to $300 against any defendant who fails to appear in court for any proceeding or fails to pay any portion of the fine ordered by the court. (Pen. Code, § 1214.1, subd. (a).)

11) Specifies that if a civil assessment is imposed under this section, no bench warrant or warrant of arrest shall be issued with respect to the failure to appear at the proceeding for which the assessment is imposed or the failure to pay the fine or installment of bail. (Pen. Code, § 1214.1, subd. (c).)

12) States that in any case when a person appears before a traffic referee or judge of the superior court for adjudication of a violation of this code, the court, upon request of the defendant, shall consider the defendant's ability to pay. (Veh. Code, § 42003, subd. (c).)

13) Specifies that in making a determination of whether a defendant has the ability to pay, the court shall take into account the amount of any fine imposed upon the defendant and any amount the defendant has been ordered to pay in restitution. (Veh. Code, §42003, subd. (c).)

14) Provides that the court may hold additional hearings during the probationary period. If practicable, the court or the probation officer shall order payments to be made on a monthly basis. Execution may be issued on the order in the same manner as a judgment in a civil action. The order to pay all or part of the costs shall not be enforced by contempt. (Veh. Code, §42003, subd. (c).)

15) States that at any time during the pendency of the judgment rendered according to the terms of this section, a defendant against whom a judgment has been rendered may petition the rendering court to modify or vacate its previous judgment on the grounds of a change of circumstances with regard to the defendant's ability to pay the judgment. (Veh. Code, §42003, subd. (e).)

16) Provides rules for counties to operate comprehensive collection program to collect delinquent fines. (Pen. Code, § 1463.007.)

17) States that when the defendant fails to make an installment payment, the court may charge a failure to appear or pay and impose a civil assessment as specified, or issue an arrest warrant for a failure to appear. (Veh. Code, § 40510.5, subd. (e).)

18) Specifies that courts must provide defendants with notice of their right to request an ability-to-pay determination and make available instructions or other materials for requesting an ability-to-pay determination. (Rule of Court 4.335, subd. (b).)

19) States that based on the ability-to-pay determination, the court may exercise its discretion to:

a) Provide for payment on an installment plan (if available); (Rule of Court 4.335, subd. (c)(4)(A).)

b) Allow the defendant to complete community service in lieu of paying the total fine (if available); (Rule of Court 4.335, subd. (c)(4)(B).)

c) Suspend the fine in whole or in part; or (Rule of Court 4.335, subd. (c)(4)(C).)

d) Offer an alternative disposition. (Rule of Court 4.335, subd. (c)(4)(D).)

20) States that if a defendant has already had an ability-to-pay determination in the case, a defendant may request a subsequent ability-to-pay determination only based on changed circumstances. (Rule of Court 4.335, subd. (c)(6).)

21) Requires a notice of a civil assessment to inform the defendant of his or her right to petition that the civil assessment be vacated for good cause and must include information about the process for vacating or reducing the assessment. (Rule of Court 4.106, subd. (c)(1).)

22) States that the court must vacate the assessment upon a showing of good cause, as specified, for failure to appear or failure to pay. (Rule of Court 4.106, subd. (c)(5).)

23) Requires courts, on traffic violations, to send a reminder notice to the address shown on the *notice to appear*, unless the defendant otherwise notifies the court of a different address. (Rule of Court 4.107, subd. (a).)

24) Allows that court to satisfy the reminder notice by sending the notice electronically, including by e-mail or text message, to the defendant. (Rule of Court 4.107, subd. (a).)

25) States that the failure to receive a reminder notice does not relieve the defendant of the obligation to appear by the date stated in the *notice to appear*. (Rule of Court 4.107, subd. (a).)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "Several high-profile studies have shown how damaging it is to low-and moderate-income families who are unable to resolve administrative and non-safety related driving offenses. Thousands of Californians were plunged deep into debt and lost their drivers licenses and income. The Legislature and Governor, in an attempt to resolve some $10 B in uncollected court-ordered debt, established an amnesty program. That program, which concluded in April, helped hundreds of thousands of people resolve their court debts. However, amnesty didn't distinguish between those *unwilling* to pay their fines and those who were *unable to*. SB 185 makes part of amnesty permanent, so those individuals who are *unable* to pay high fines up front are given an opportunity to make amends without being punished simply for being poor. Because your access to justice shouldn't be measured by the size of your wallet."

2) **Traffic Tickets and License Suspensions:** A traffic ticket is a citation to appear in traffic court. The citation requires you to appear in court on, or before a specific date. A person that receives a traffic citation does not need to appear in court if they pay the full amount of the fine.

   Until recently, when people with traffic tickets failed to pay the fine, the court notified DMV of the failure to pay. On the basis of that notification, DMV suspended the person's driver's license. Once the DMV suspended someone's license, there was no way to lift the suspension and restore the license until after the court notified the DMV that the fine has been fully paid. (http://www.lccr.com/wp-content/uploads/Not-Just-a-Ferguson-Problem-How-Traffic-Courts-Drive-Inequality-in-California-4.20.15.pdf.) The passage AB 103 (Committee on Budget), Chapter 17, Statutes of 2017, eliminated the ability for the court's and DMV to suspend an individual's license based on a failure to pay the traffic fine. AB 103 went into effect on June 27, 2017. Courts retain the power to notify DMV of *a failure to appear* in court and DMV will continue to suspend driver's licenses on receipt of such information.

   Based on a cumulative analysis of suspension and reinstatement actions reported by the DMV, currently an estimated 4.2 million drivers in California have suspended licenses. That number includes license suspensions for reasons other than failure to pay. According to the DMV Newsroom, as of January 1, 2014 there were 24,643,432 driver's licenses in California. Based on the above estimate of total suspensions, the data indicates that 17%, or approximately 1 in 6 licenses is suspended in California. (http://www.lccr.com/wp-content/uploads/Not-Just-a-Ferguson-Problem-How-Traffic-Courts-Drive-Inequality-in-California-4.20.15.pdf.)

3) **AB 103 (Committee on Budget), Chapter 17, Statutes of 2017, Eliminates License Suspensions When a Person Fails to Pay Their Traffic Fine:** AB 103 was the public safety budget trailer bill for the 2017-2018 budget. AB 103 was signed by the Governor on June 27, 2017. AB 103 prohibits the use of driver's license holds and suspensions when a person fails to pay a fine on a traffic ticket. The Budget Summary related to the prohibition on driver's license suspensions for failure to pay a fine note such suspensions were not necessarily effective at meeting the purported goals. The Budget Summary noted that "there

does not appear to be a strong connection between suspending someone's driver's license and collecting their fine or penalty." The Budget Summary mentioned that the primary consequence of a license suspension is the inability to legally drive to work or take one's children to school. (Governor's Budget Summary, Public Safety, 2017-2018, p. 84.) Because AB 103 was a budget trailer bill its provisions went into effect immediately.

The provisions of this bill which prohibit the use of license suspension because of failure to pay a traffic fine, are nearly identical to the provisions in AB 103 related to the same issue.

4) **Use of Driver's License Suspension to Collect Revenues, Prior to AB 103:** Given the impacts that a license suspension has on an individual's license, such a suspension is a significant incentive to pay fines and fees which have been imposed by the court. However, the same reasons that the suspension of a driver's license provide an incentive to pay, create negative impacts on those individuals who are not in a financial position to pay the fines and fees imposed by the court. Individuals lacking the ability to pay the fine experience a punishment that results in further economic disruption which makes it even less likely that they will be able to pay in the future.

   There is concern that since an individual's license can no longer be suspended for a failure to pay, there will be a drop in revenue collected on outstanding fines. If that is the case, it is appropriate to consider whether the drop in revenue is worth avoiding further economic disruption for Californians caused by suspension of their driving privileges for failure to pay the fine. Avoiding the negative economic consequences of a license suspension might allow individuals to meet the economic obligations of their outstanding court fine.

   Even without the ability to suspend a driver's license for failure to pay (FTP), the courts have other tools ensure payment of fines from individuals that are working and bringing in income. Courts can pursue recovery through Franchise Tax Board (FTB). The FTB Court-Ordered Debt Program identifies a debtor's assets through automated searches of wage, employment, and financial records in order to administratively issue wage garnishments or bank levies. Courts are also authorized to operate comprehensive collection programs to collect delinquent fines.

   The provisions of this bill maintain courts' authority to impound a person's driver's license for up to 30 days for failure to pay a fine. This bill allows the courts to charge an individual with new infraction if the individual willfully fails to pay the fine on their traffic violation. Courts can also impose a civil assessment of up to $300 if an individual willfully fails to pay their fine.

5) **Debt Collection of Outstanding Fines**: Criminal fines, fees, and assessments have climbed steadily in recent decades. Government entities tasked with collecting this debt have realized diminishing returns from collection efforts. Government resources can be wasted in futile collection attempts. A San Francisco Daily Journal article noted, "When it comes to collecting fines, superior court officials in several counties describe the process as 'very frustrating,' 'crazy complicated' and 'inefficient.'" (See *State Judges Bemoan Fee Collection Process*, San Francisco Daily Journal, 1/5/2015 by Paul Jones and Saul Sugarman.)

   Simply put, criminal defendants can generally not produce a substantial flow of money for fines. That well will quickly run dry. In the same Daily Journal article, the Presiding Judge

of San Bernardino County was quoted as saying "the whole concept is getting blood out of a turnip." (*Daily Journal, supra.*) The annual growth in delinquent debt partly reflects a supply of money that doesn't exist to be collected." (*Ibid.*)

More recently, in her March 2016 State of the Judiciary address to the Legislature, Chief Justice Cantil-Sakauye also addressed concerns with increasing fines and fees:

> "We have a system of fines and fees that has morphed from a system of accountability to a system that raises revenue for essential government services. For example, we raise approximately 1.7 billion dollars in fines, fees, and assessments. More than 60 percent of that money goes to fund programs and services at the local and state level. The rest goes to the court system.
>
> "This is an inequity when we have taken a fines, fees, and assessment accountability system and turned it into a revenue-generating system for government services." (http://www.courts.ca.gov/34477.htm.)

In the majority of counties across the state, the responsibility for collecting traffic court debt has been delegated by the counties to the courts. When an individual fails to pay a ticket, the courts are empowered to immediately take two punitive measures: imposition of a late-penalty fine of $300, called a "civil assessment," and suspension of the driver's license. These measures are part of a broader scheme called the "comprehensive collection program," which is set out in state law. Counties and courts that follow the "comprehensive collection program" scheme are authorized by law to recover the costs associated with the collection effort.

This bill establishes guidelines for courts to determine whether a defendant on a traffic violation is indigent. This bill requires comprehensive collection programs to have a payment plan option based on the debtor's ability to pay. This bill requires courts to reduce the fines of indigent defendants by 80%. This bill also provides that the fines of an indigent defendant will be discharged after four years if the defendant remains indigent.

6) **Collection Revenues Based on Lower Fine Amounts:** This bill provides for more robust notice to individuals regarding their right to have an ability to pay determination on a traffic tickets and options for fine reductions than are currently provided for in the rule of court. If SB 185 becomes law, the increased use of such provisions would likely result in a lower amount of fines ordered by the court in connection with traffic violations. If fine amounts are lowered, that might result in decreased revenues for the state and counties from traffic violations.

There is some California data showing that if low-income Californians are given a reduced debt and the option of a payment plan, the state could possibly collect more in revenue. The California Traffic Tickets / Infractions Amnesty Program collected three times more delinquent debt per case ($151 per amnesty case) than other criminal court-ordered delinquent debt collections ($45 per case). While in operation, the California Traffic Tickets / Infractions Amnesty Program reduced certain fines and fees for traffic infractions filed prior to 2013 with greater reductions for very low-income individuals. Debt is more costly and difficult to collect once it becomes delinquent. Even when accounting for the cost of collections, the ratio of collections per traffic amnesty case is 2.5 times greater than other

delinquent court-ordered debt collections per case. A number of counties cited the California Traffic Tickets / Infractions Amnesty Program as a reason for increased collections. These initial results suggest that assessing ability to pay, providing more proportional sanctions and manageable installment payments, as well as hope for an end to punishment, facilitates greater delinquent debt collection. Paying More for Being Poor: Bias and Disparity in California's Traffic Court System, LCCR Report, Based on analysis of collections reported by county for FY2015-2016 in Judicial Council of California, Report on the Statewide Collection of Delinquent Court-Ordered Debt for Fiscal Year 2015-2016 (Feb. 3, 2017), (http://www.courts.ca.gov/documents/lr-2017-JC-StatewideCollection-of-Delinquent-Court-Ordered-FY2015-16.pdf)

7) **Argument in Support**: According to the *Ella Baker Center for Human Rights*, "Current law allows for the suspension of drivers' licenses based on inability to pay fines related to minor traffic tickets. This bill is aligned with the Governor's January 2017-2018 budget proposal to eliminate license suspensions for failures to pay. SB 185 will strengthen the economic security of low-income people by restoring license suspensions for non-public safety violations.

"Studies have shown that when an individual's driver's license is suspended, that person often loses his or her job, which significantly hinders the person's ability to earn the money necessary to make financial amends on the ticket. Further exacerbating the economic drain caused by current traffic court practices, unnecessary driver's license suspensions increase law enforcement expenses and further strain our overcrowded courthouses.

"Across the country, rising court fines, fees, and penalties for minor infractions have proved especially burdensome to low income people, who can end up losing their licenses, jobs, and freedom – sometimes going to jail – simply because they could not afford a traffic fine or missed a court hearing. SB 185 ensures that all people, regardless of their income level, can satisfy court debt and move forward with their lives."

8) **Argument in Opposition:** According to the *California Association of County Treasurers and Tax Collectors*, "In many counties, the County Treasurer also serves as the revenue recovery department and is tasked with collecting fines and fees such as those in your measure. It is the ongoing experience of these offices that without meaningful consequences such as losing a driver's license, it is difficult to compel payment. It is one of the few tools available to enforce collection. The elimination of this tool means that less revenue will be recovered and there will be little to no real consequence for failure to appear or to pay.

"Additionally, the bill lacks language that specifically governs the standards of determining how the ability to pay will be assessed and then reassessed. Once that amount is set, the bill does not lay out what steps can be taken locally to enforce that, and setting up those payment plans may actually cost more at the County level than the revenue they would then recover. And finally, in the event that the driver's license is reinstated, and then the individual does not meet the terms of the payment plan, there is no ability to reinstate the suspension."

9) **Related Legislation**:

a) AB 103 (Committee on Budget), Chapter 17, Statutes of 2017, prohibits the use of driver's license holds and suspensions when a person fails to pay a fine on a traffic ticket,

among other things.

b) AB 412 (Ting), would have required the court to vacate a civil assessment(monetary fine) imposed for failure to appear in court or pay a fine, if the defendant establishes that he or she had good cause to not appear or not pay a fine, or is unable to pay the assessment. AB 412 was held in the Assembly Appropriations Committee.

10) **Prior Legislation**:

a) SB 405 (Hertzberg), Chapter 385, Statutes of 2015, provided that payment of bail, fines, penalties, fees, or a civil assessment is not required in order for the court to vacate the assessment at the time the person makes an appearance, as specified. SB 405 also provided that payment of a civil assessment is not required to schedule a court hearing on a pending underlying charge.

b) SB 881 (Hertzberg), Chapter 779, Statutes of 2016, required a court, when notifying the DMV that an individual with a suspended license has appeared in court, paid the fine, or otherwise satisfied the requirements of the traffic amnesty program, to do so within 90 days;

c) SB 85 (Budget Bill), Chapter 35, Statutes of 2013, created the traffic amnesty program. The program expired on March 31, 2017.

d) SB 366 (Wright), of the Legislative Session of 2013-2014, would have given courts more discretion to consider defendants ability to pay in setting fines and fees. SB 366 was held in the Senate Appropriations Committee.

e) AB 2724 (Bradford), of the Legislative Session of 2013-2014, would have allowed defendants to get their driving privileges back when the driver's license had been suspended for failing to pay a fine, if they agree to pay in installments. SB 2724 was held in the Assembly Appropriations Committee.

REGISTERED SUPPORT / OPPOSITION:

Support

American Civil Liberties Union of California (Co-Sponsor)
Californians for Safety and Justice (Co-Sponsor)
Legal Services for Prisoners with Children (Co-Sponsor)
Western Center on Law & Poverty (Co-Sponsor)
A New Way of Life Re Entry Project
Alameda County Public Defender
Alliance for Children's Rights
Bay Area Legal Aid
Black Women Organized for Political Action
California Attorneys for Criminal Justice
California Department of Insurance
California Opportunity Youth Network
California Partnership

California Public Defenders Association
Children's Defense Fund-California
Coalition on Homelessness San Francisco
Coleman Advocates for Children and Youth
Community Housing Partnership
Contra Costa County Defenders Association
Courage Campaign
East Bay Community Law Center
Ella Baker Center for Human Rights
Equal Justice Society
Filipino Bar Association of Northern California
First Place for Youth
Foster Care Counts
Friends Committee on Legislation of California
Homeboy Industries
Jobs with Justice San Francisco
Law Enforcement Action Partnership
Law Foundation of Silicon Valley
Legal Aid Association of California
Legal Services of Northern California
Los Angeles Conservation Corps
Los Angeles County Professional Peace Officers Association
Mental Health Advocacy Services, Inc.
Monterey County Public Defender's Office
National Association of Social Workers, California Chapter
National Center for Lesbian Rights
National Center for Youth Law
National Employment Law Project
Prison Policy Initiative
Riverside Temple Beth El
Root & Rebound
Rubicon Programs
Santa Cruz County Board of Supervisors
San Diego Volunteer Lawyer Program, Inc
San Francisco Public Defender
Silicon Valley Community Foundation
Supportive Housing Providers Network
W. Haywood Burns Institute
Women Organizing Resources Knowledge and Services
Young Women's Freedom Center

Three private individuals

Opposition

California Association of County Treasurers and Tax Collectors
California District Attorneys Association

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

Date of Hearing: July 11, 2017
Counsel: Cheryl Anderson

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Reginald Byron Jones-Sawyer, Sr., Chair

SB 230 (Atkins) – As Amended April 27, 2017

SUMMARY: Allows the introduction of evidence of another commercial sex offense to prove conduct in a trial where the defendant is accused of committing a commercial sex offense. Specifically, **this bill**:

1) Provides that in a criminal action in which the defendant is accused of a commercial sex offense, evidence of his or her commission of another commercial sex offense is not inadmissible character evidence, if the evidence is not otherwise inadmissible under the general balancing test weighing probative value against the danger of undue prejudice.

2) States that an action in which evidence is to be offered under this provision, the people shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered in compliance with the provisions for disclosures of criminal discovery.

3) States that this provision shall not be construed to limit the admission or consideration of evidence under any other section of the Evidence Code.

4) Defines "commercial sexual offense" as pimping, pandering, and human trafficking for sexual purposes, or any conduct committed outside of this state that, if committed in this state, would constitute a violation of these offenses.

EXISTING LAW:

1) Provides that a court may in its discretion exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time or create substantial danger of undue prejudice, confusing the issues, or misleading the jury. (Evid. Code, § 352.)

2) Provides that, with certain exceptions, evidence of a person's character or a trait of his or her character, whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct, is inadmissible when offered to prove his or her conduct on a specified occasion. (Evid. Code, § 1101, subd. (a).)

3) Provides for the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove a fact such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act did not reasonably and in good faith believe that the victim consented. (Evid. Code, § 1101, subd. (b).)

4) Provides that in a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense is not inadmissible character evidence if the probative value of the evidence is not outweighed by a substantial danger of undue prejudice. (Evid. Code, §§ 1108, subd. (a), 352.) Defines a sexual offense, for purposes of this provision, as a crime that involved any of the following:

   a) Sexual battery;

   b) Rape;

   c) Statutory rape;

   d) Spousal rape;

   e) Rape in concert;

   f) Inducing another to engage in a sexual act by fraud or fear;

   g) Aggravated sexual assault of a child;

   h) Sodomy;

   i) Child sexual abuse;

   j) Oral copulation by force or with a minor;

   k) Sending harmful matter to a minor;

   l) Continuous sexual abuse of a child;

   m) Forcible acts of penetration;

   n) Distribution or possession for distribution of obscene matter;

   o) Developing, duplicating, or exchanging child pornography;

   p) Employment of a child to assist in obscene matter;

   q) Advertisement of child pornography for sale or distribution;

   r) Possession of child pornography;

   s) Indecent exposure;

   t) Annoying or molesting a minor;

   u) Assault with intent to commit specified sex offenses;

v) Contact, without consent, of any part of defendant's body or an object and the genitals or anus of another;

w) Contact, without consent, between the genitals or anus of the defendant and any part of another person's body;

x) Deriving sexual pleasure from the infliction of death, bodily injury or physical pain on another person; or,

y) An attempt or conspiracy to engage in any of the above conduct. (Evid. Code, § 1108, subd. (d)(1).)

5) Provides that, with certain exceptions, in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not inadmissible character evidence, if the probative value of the evidence is not outweighed by a substantial danger of undue prejudice. (Evid. Code, § 1109, subd. (a)(1).) Other acts of dependent or elder abuse are similarly admissible in a prosecution for dependent or elder abuse (Evid. Code, § 1109, subd. (a)(2)), as are other acts of child abuse in a prosecution for child abuse (Evid. Code, § 1109, subd. (a)(3)). Evidence of acts of abuse occurring more than 10 years before the charged offense is inadmissible under this provision, unless the court determines that the admission of this evidence is in the interest of justice. (Evid. Code, § 1109, subd. (e).)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "The heinous crime of sex trafficking is committed in cities big and small, as well as rural areas, up and down our state. That is why we must do everything we can to combat this modern day slavery. SB 230 does this by adding the crimes of sex trafficking, pimping, and pandering to the lists of exceptions to the rule against character evidence at trial.

"SB 230's long overdue amendments to the Evidence Code acknowledge that the challenges with prosecuting crimes of sex trafficking are similar to the challenges with prosecuting the other crimes that are already exceptions to this rule: sexual offenses, crimes of domestic violence, elder and dependent abuse, and child abuse.

"Sex traffickers and pimps establish an intimate relationship of dominance and control over their victims, much like the perpetrators of crimes of domestic violence, elder and dependent abuse, or child abuse. Sex traffickers and pimps typically control their victims' cell phones, their whereabouts, and any money they earn. Worse, they often control victims with drugs or violence.

"Additionally, like child molesters or other predators committing sexual offenses, sex traffickers and pimps use psychological recruitment: grooming their victims, isolating them from their families or social networks, and controlling them. As a result, many victims do not see themselves as victims – at least not initially. Also, many victims are threatened with

violence if they agree to testify at trial. For all of these reasons, securing victim testimony in sex trafficking and pimping/pandering trials is incredibly difficult.

"Finally, SB 230 does not require that these prior acts be admitted in any defendant's trial. Instead, it provides judges with the discretion to determine whether such evidence should be admitted on a case by case basis."

2) **Evidence Of Other Crimes Or Wrongful Acts And The Propensity Rule:** Under Evidence Code section 1101, subdivision (a), evidence of a person's character or of a trait of his or her character is inadmissible in criminal proceedings to prove his or her conduct on a specified occasion. "This statutory provision makes inadmissible specific evidence that has historically been inadmissible under English and American law." (21 Cal.Jur.3d (2017) Criminal Law: Trial § 519 [citations omitted].)

"It follows from this general rule that evidence of the defendant's prior bad acts, including other crimes, is inadmissible to show the defendant's bad character or predisposition to criminality, that is, to show a propensity to commit crimes in general or a particular class of crimes, or a predisposition to commit the charged offense. Thus, the commission of a crime or of a wrongful act short of a crime cannot be proved by evidence of commission of an unrelated similar crime or wrongful act by the same person at another time and under other circumstances." (21 Cal.Jur.3d, *supra*, § 524 [citations omitted].)

3) **The Rationale For Excluding Propensity Evidence – Inherent Danger Of Prejudice**: "Evidence of a defendant's other crimes or wrongful acts is deemed objectionable, not because it has no appreciable probative value, but because it has too much; that is, the probative value of such evidence is outweighed by its prejudicial effect. The general rule that evidence of other crimes is inadmissible when offered solely to prove criminal disposition or a propensity by the accused to commit the crime charged recognizes that the probative value of such evidence is outweighed by its prejudicial effect. Thus, the basis of the general rule that such evidence is inadmissible is the danger that the trier-of-fact may give excessive weight to evidence of prior criminality, by either allowing it to bear too strongly on the present charge or viewing it as a justification for condemnation *irrespective of present guilt*." (21 Cal.Jur.3d, *supra*, § 525 [citations omitted, emphasis added].)

"The purposes of the general rule... are to avoid placing the defendant in a position of having to defend against crimes with which he or she has not been charged; to guard against the probability that evidence of other criminal acts having little bearing on the question whether the defendant actually committed the crime charged would assume undue proportions and unnecessarily prejudice the defendant in the minds of the jury; and to promote judicial efficiency by restricting proof of extraneous crimes, by avoiding protracted mini-trials to determine the truth or falsity of the prior charge." (21 Cal.Jur.3d, *supra*, § 525 [citations omitted].)

"The prejudice which the rule governing the admission of other crimes evidence is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence; rather, the prejudice the rule is designed to avoid applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues." (21 Cal.Jur.3d (2017 supp.) Criminal Law: Trial §

525.)

4) **Evidence of Other Crimes Or Wrongful Acts To Prove A Disputed Fact Other Than A Defendant's Propensity To Commit Such Acts**: The general rule excluding evidence of other crimes or wrongful acts is not without exception. Evidence Code section 1101, subdivision (b), provides: "Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act." (Evid. Code, § 1101, subd. (b).) Thus, under Evidence Code section 1101, subdivision (b), evidence that a defendant committed crimes other than those for which he or she is on trial is admissible "when it is logically, naturally, and by reasonable inference relevant to prove some fact at issue, such as motive, intent, preparation, or identity." (21 Cal.Jur.3d, *supra*, § 534 [citations omitted].)

   Because of the inherent danger of prejudice to the defendant when evidence of an uncharged offense is given to the jury, this type of evidence must be received with caution, and admitted only when its probative value outweighs its prejudicial effect under Evidence Code section 352. (21 Cal.Jur.3d, *supra*, § 534 [citations omitted]; *People v. Ewoldt* (1994) 7 Cal.4th 380, 404.) The court must consider whether the probative value of the uncharged acts evidence outweighs the danger it would "'create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.'" (*Ibid.*, citing Evid. Code, § 352.) The court should also consider whether the jury will use the evidence for an improper purpose such as punishing the defendant for an uncharged act. (See *People v. Ewoldt, supra,* 7 Cal.4th at p. 404.)

   The prosecution must prove the other crimes or uncharged acts by a preponderance of the evidence. (21 Cal.Jur.3d, *supra*, § 552 [citations omitted].) Thus, other uncharged acts evidence is admissible, subject to Evidence Code section 352, even where a defendant has been acquitted of the act constituting the evidence. (California Criminal Defense Practice, § 83.12[1][c] (Matthew Bender).)

5) **Narrowly Drawn Exceptions To The General Rule Prohibiting Propensity Evidence (Evidence Code Sections 1108 & 1109)**: The Legislature has enacted two narrow exceptions to the general rule prohibiting propensity evidence. In 1996, Evidence Code section 1108 was added to allow introduction of evidence of other acts of sexual misconduct in a prosecution for a sex offense. (Evid. Code, § 1108; AB 882 (Rogan) Chapter 439, Statutes of 1996.) Evidence Code section 1108 was modeled on Rule 413 of the Federal Rules of Evidence (28 U.S.C.), adopted in 1994, which provided in pertinent part that "(a) In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant." (*People v. Falsetta* (1999) 21 Cal.4th 903, 912.) Federal rule 414 permits similar "propensity" evidence in child molestation cases. (*Ibid.*)

   In addressing the constitutionality of Rule 414, the Ninth Circuit Court of Appeal noted that courts had historically shown a willingness to relax evidentiary rules in sex cases and allow propensity evidence to reach jurors, while not allowing it in other criminal prosecutions. (*United States v. LaMay* (9th Cir. 2001) 260 F.3d 1018, 1025-1026.) The court further noted

that in states without an evidentiary rule comparable to Rule 414, courts were either willing to stretch exceptions to the ban on character evidence or "resort[ed] to the so-called 'lustful disposition' exception, which, in its purest form, is a rule allowing for propensity inferences in sex crime cases. See, e.g., Thomas J. Reed, Reading Gaol Revisited: Admission of Uncharged Misconduct Evidence in Sex Offender Cases, 21 AM. J. CRIM. L. 127, 188 (1993)." (*United States v. LaMay, supra*, 260 F.3d at pp. 1025-1026.)

In following the federal lead and enacting Evidence Code section 1108, the Legislature "declared that the willingness to commit a sexual offense is not common to most individuals; thus, evidence of any prior sexual offenses is particularly probative and necessary for determining the credibility of the witness." (*Review of Selected 1995 Cal. Legislation* (1996) 27 Pacific L.J. 761, 762; see also *United States v. Cunningham* (7th Cir. 1996) 103 F.3d 553, 556 ["Most people do not have a taste for sexually molesting children."].) "The Legislature has determined the need for this evidence is 'critical' given the serious and secretive nature of sex crimes and the often resulting credibility contest at trial." (Lungren, Stopping Rapists and Child Molesters by Giving Juries All the Facts--Reforms in Federal and California Law (1995) 17 Prosecutor's Brief 13, 13-14, 23.)' (*People v. Fitch* (1997) 55 Cal. App. 4th 172, 181-182 [63 Cal. Rptr. 2d 753], fn. omitted (*Fitch*)...." (*People v. Falsetta, supra,* 21 Cal.4th at pp. 912-913.)

In 1996, the Legislature added a similar provision to allow the admission of evidence that the defendant committed other acts of domestic violence in domestic violence cases. (See Evid. Code, § 1109; SB 1876 (Solis) Chapter 261, Statutes of 1996.) The bill analysis for SB 1876 states that "[t]his section is modeled on the recently enacted Evidence Code 1108, which accomplishes the same for evidence of other sexual offenses, in sexual offense prosecutions." (Assem. Com. on Public Safety, Analysis of Sen. Bill No. 1876 (1995-1996 Reg. Sess.) June 25, 1996, p. 3.) The analysis goes on to state, "Proponents argue that in domestic violence cases, as in sexual offense cases, special evidentiary rules are justified because of the distinctive issues and difficulties of proof in this area. Specifically, evidence of other acts is important in domestic violence cases because of the typically repetitive nature of domestic violence crimes, and because of the acute difficulties of proof associated with frequently uncooperative victims and third-party witnesses who are often children or neighbors who may fear retaliation from the abuser and do not wish to become involved." (*Id.* at p. 4 [emphasis added].) In addressing the constitutional validity of Evidence Code section 1109, *People v. Hoover* (2000) 77 Cal.App.4th 1020, 1027-1028, quoting the Assembly Committee on Public Safety analysis of SB 1876, *supra*, at pages 3-4, noted, "The propensity inference is particularly appropriate in the area of domestic violence because on-going violence and abuse is the norm in domestic violence cases. Not only is there a great likelihood that any one battering episode is part of a larger scheme of dominance and control, that scheme usually escalates in frequency and severity. Without the propensity inference, the escalating nature of domestic violence is likewise masked."

The Legislature has similarly enacted laws allowing propensity evidence of abuse of an elder or dependent person (AB 2063 (Zettel) Chapter 517, Statutes of 2000) or child abuse (AB 114 (Cohn) Chapter 464, Statutes of 2005). (See Evid. Code, § 1109, subd. (a)(2) & (3).) The bill analysis for AB 2063 states, "This approach is consistent with California's evidentiary scheme for combating domestic violence." (Assem. Com. on Public Safety, Analysis of Ass. Bill No. 2063 (1999-2000 Reg. Sess.) April 11, 2000, p. 3.) The bill analysis for AB 114 states, "This recognizes the prevalence of domestic violence perpetrated

against all family members, not just children or adults but both." (Assem. Com. on Public Safety, Analysis of Ass. Bill No. 114 (2005-2006 Reg. Sess.) March 8, 2005, p. 3.)

6) **Constitutional Considerations**: California courts have upheld the validity of both Evidence Code sections 1108 and 1109. In *People v. Falsetta*, *supra*, 21 Cal.4th 903, the California Supreme Court held that propensity evidence may be considered in sex crime cases under section 1108 without violating the due process clause because section 1108's incorporation of the section 352 balancing test prevents an unfair trial. (*People v. Brown* (2000) 77 Cal.App.4th 1324, 1328 [Evid. Code, §§ 1108 & 1109 are complimentary provisions of the same statutory scheme]; *People v. Williams* (2008) 159 Cal.App.4th 141 [not unconstitutional to admit propensity evidence in elder abuse case].) The United States Supreme Court has not yet ruled on the issue.

7) **Need for this Bill and Other Practical Considerations**: SB 230 creates an additional exception to the general rule excluding propensity evidence. It allows evidence of other commercial sex offenses to be introduced to prove conduct in a commercial sex offense case. The author states this bill is needed because, as with sex and domestic abuse cases, commercial sex cases are difficult to prove. While Evidence Code section 1108 was prompted in part by proof problems in sex cases, the uncharged sex offense exception has historic roots in the "*lustful disposition*" exception. (*United States v. LaMay, supra*, 260 F.3d at pp. 1025-1026 [emphasis added].)While the rationale for the domestic abuse exception in Evidence Code section 1109 was based in part on difficulties of proof, courts denying constitutional challenges to the statute note the *repetitive nature* of these types of cases, as well as the *special nature* of these types of cases where "*on-going violence and abuse is the norm.*" (*People v. Hoover, supra*, 77 Cal.App.4th 1027-1028 [emphasis added]; see also *People v. Brown* (2000) 77 Cal.App.4th 1327, 1333.)

   Commercial sex offenses are distinguishable. They are economic crimes which are typically motivated by money and not the result of a character-based disposition to commit or repeat commercial sex offenses, in particular. In San Diego, for example, human trafficking is the second largest underground economy, estimated at $810-million per year. (Carpenter and Gates (Jan. 2016). *The Nature and Extent of Gang Involvement in Sex Trafficking in San Diego County*, San Diego, CA: University of San Diego and Point Loma Nazarene University. at pp. 11, 57 <https://www.ncjrs.gov/pdffiles1/nij/grants/249857.pdf [as of June 30, 2017]>.) More than 100 gangs in San Diego are involved in commercial sex offenses. (*Id.* at pp. 11-12.) Of those interviewed as sex trafficking facilitators, eighty-percent were affiliated with a gang. (*Id.* at p. 64.)

   Proponents of this bill also state that because commercial sex offenders move from jurisdiction to jurisdiction, the prosecution can be precluded from using the offender's prior activities to prove up his or her current ones. However, current law permits the consolidation of commercial sex offenses occurring in different counties into a single trial if all district attorneys in the counties with jurisdiction agree. Thus it is possible for commercial sex offenses from different jurisdictions to be tried together. (Pen. Code, § 784.7, subd. (c).)

   Further, to the extent other commercial sex offenses are relevant to a disputed fact (other than propensity), and subject to Evidence Code sections 352's balancing test, the evidence is already admissible. (Evid. Code, § 1101, subd. (b).)

SB 230 raises important questions. Should the historical ban on propensity evidence be further eroded to allow evidence of other commercial sex offenses to be introduced as propensity evidence based on the difficult to prove rationale? Is the difficult to prove rationale a slippery slope to creating an exception for all difficult to prove cases, an exception that will all but swallow the rest of the general rule? After all, "[o]pportunities for victim/witness intimidation and other forms of witness tampering exist in almost every criminal case." (Long, J.D. and Garvey, J.D. (Nov. 2012) *No Victim? Don't Give Up: Creative Strategies in Prosecuting Human Trafficking Cases Using Forfeiture by Wrongdoing and Other Evidence-Based Techniques, Strategies: The Prosecutors' Newsletter on Violence Against Women Act,* at p. 2 <http://www.aequitasresource.org/S_Issue_7_No_Victim-Dont_Give_Up.pdf [as of June 30, 2017]>.) Will further erosion of the prohibition against propensity evidence continue to withstand constitutional scrutiny because it is subject to the balancing test of Evidence Code section 352?

8) **Arguments in Support**:

a) According to the *San Diego County District Attorney*, a Co-sponsor of this bill, "Cases of human trafficking, pimping, and pandering can be notoriously difficult to prosecute because the victims often do not, at least initially, see themselves as such. These victims have been brainwashed by their traffickers and many times recant their previous statements by the time their trafficker's case reaches court. These crimes often continue for a long period of time before being brought to light.

"Existing law recognizes the same type of difficulties in the prosecution of domestic violence and other sex crimes where the perpetrators also have emotional if not physical control over the victims. As a result, while Evidence Code section 1101 ordinarily precludes prosecutors from using a prior incident of conduct to prove the charged crime, Evidence Code sections 1108 and 1109 give the court the discretion to allow evidence of prior acts to be considered in the prosecution of charged sex and domestic violence crimes. This effectively lifts a barrier to the prosecution of sex crimes and domestic violence crimes – crimes where the perpetrators also have often been operating in the dark, long before their charged crimes are brought to the light.

"SB 230 enacts a new Evidence Code section 1110, which simply gives judicial officers the same discretion to allow prosecutors to present evidence of a defendant's prior acts of human trafficking, and pimping and pandering, in the prosecution of charged human trafficking, and pimping and pandering cases. SB 230 does not mandate that these prior acts be admitted in any defendant's criminal trial, and it does not give the judicial officer unfettered discretion. Rather, the evidence is subject to Evidence Code section 352, which requires the court to exclude such evidence where its 'probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or misleading the jury.'"

b) According to the *California District Attorneys Association*, "SB 230 is necessary to combat the tactics of pimps and human traffickers who will often move to different jurisdictions or secure new victims in order to thwart detection. Human traffickers and pimps often move their victims from jurisdiction to jurisdiction ('the circuit') in order to stay one step ahead of

law enforcement. Once in a new jurisdiction, they can deny knowledge of their victim's involvement in prostitution, or secure new victims, disclaiming involvement in any such activities.

"Once in a new jurisdiction, or having secured a new victim, the prosecution can be precluded from using the trafficker's prior activities to prove up his current ones. This state of the law gives traffickers a distinct advantage – one which perpetrators of other sex crimes, enumerated in EC 1108, do not have. SB 230 will hold the more egregious traffickers, the ones who operate across jurisdictions with multiple victims, accountable by letting the trier of fact consider their entire corporation, not just the carefully parceled out subsidiaries, when assessing a case."

9) **Arguments in Opposition**:

a) According to the *American Civil Liberties Union*, "Current law prohibits the use of character evidence, including prior 'bad acts,' for the purpose of proving propensity to commit a crime, with the narrow exception that such evidence is allowed in cases charging sexual or intimate family violence. (*See* Evidence Code section 1101, 1108, and 1109.) SB 230 would allow the use of propensity evidence to prove the charges of human trafficking, pimping and pandering, for the first time allowing propensity evidence to prove a crime motivated by money.

"SB 230 proposes a sharp break from long-standing legal practice. As the California Supreme Court has stated:

> From the standpoint of historical practice, unquestionably the general rule against admitting [character] evidence is one of long-standing application. [...] The rule excluding evidence of criminal propensity is nearly three centuries old in the common law.

(*People v. Falsetta* (1999) 21 Cal.4th 903, 915.)

"Likewise, the Ninth Circuit stated 'it seems clear that the general ban on propensity evidence has the requisite historical pedigree to qualify for constitutional status.' (*United States v. LeMay* (9th Cir. 2001) 260 F.3d 1018, 1025.) Any change from this long-standing practice raises serious due process concerns.

"The U.S. Supreme Court has not decided whether allowing propensity evidence in sexual assault and intimate family violence cases is constitutional. The California Supreme Court and the Ninth Circuit Court of Appeals have found this to be constitutional, given that the historical record actually supports the conclusion that a 'lustful exception' to the rule against admitting propensity evidence was long recognized. The Ninth Circuit observed:

> courts have routinely allowed propensity evidence in sex-offense cases, even while disallowing it in other criminal prosecutions. [...] As early as 1858, the Michigan Supreme Court noted that "courts in several of the States have shown a disposition to relax the rule [against propensity evidence] in cases where the offense consists of illicit intercourse between the sexes." Today, state courts that [do not have an explicit rule

> allowing admission do so] by resorting to the so-called "lustful disposition" exception, which, in its purest form, is a rule allowing for propensity inferences in sex crime cases.

(*Id.* at pp. 1025-26.)

"The theory behind allowing propensity evidence in sexual assault and intimate family violence cases is, in part, based on the belief that the nature of these offenses makes propensity evidence more relevant. (*See Id.* at p. 915.) The California Supreme Court noted that in the legislative history of the bill allowing the use of propensity evidence in sexual assault cases, [*sic*] [t]he Legislature "declared that the willingness to commit a sexual offense is not common to most individuals; thus, evidence of any prior sexual offenses is particularly probative and necessary for determining the credibility of the witness." (*Ibid.*) Similarly, in assessing the constitutionality of the rule allowing propensity evidence in cases of intimate family violence, the California Courts of Appeal noted, 'evidence of other acts is important in domestic violence cases because of the typically repetitive nature of domestic violence crimes.' (*People v. Brown* (2000) 77 Cal.App.4th 1327, 1333.)

"Similar reasoning does not apply to allowing propensity evidence in the types of cases proposed by SB 230. We can find no historical evidence that propensity evidence has been permitted to prove human trafficking, pimping or pandering in the past 300 years. The bill seeks to permit the use of propensity evidence to prove crimes motivated purely by the desire to make money, where there is no evidence of character-based compulsion behind the offense. Indeed, the fact sheet in support of SB 230 states, "more than 100 gangs in San Diego County are engaged in human trafficking, making it the second largest underground economy in the County, estimated at $810 million per year." Criminal gangs make calculated, financial choices about which criminal enterprise to engage in, pursuing human trafficking and prostitution alongside drug sales and other illegal enterprises. These criminal, commercial enterprises are not pursuing these offenses because they have a particular drive or propensity to engage in sexual exploitation. Rather, they do so purely to make money.

"It is important to note that while current law prevents the use of uncharged acts to prove propensity, it does not preclude prosecutors from presenting other 'prior bad acts' evidence for other purposes. One guide for prosecutors working on human trafficking cases advises:

> While evidence of a defendant's other 'bad acts' or criminal activity is not admissible to show actions in conformity with that behavior, competent evidence can be admissible to show motive, identity, intent, absence of mistake or accident, planning, common plan or scheme.[1]

"Prosecutors thus can continue to present character evidence to prove many elements of their case. While we understand the desire to make it even easier for prosecutors to prove these cases, we cannot allow the core principles of due process to be abrogated, no matter

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[1] "Jennifer Gentile Long and Teresa Garvey (November 2012) *No Victim? Don't Give Up: Creative Strategies in Prosecuting Human Trafficking Cases Using Forfeiture by Wrongdoing and Other Evidence-Based Techniques*, Strategies: The Prosecutors' Newsletter on Violence Against Women Act, available at http://www.aequitasresource.org/S_Issue_7_No_Victim-Dont_Give_Up.pdf"

how good the intentions."

b) According to the *California Public Defender's Association*, "....As a policy matter, courts and lawmakers have long recognized that the integrity of our criminal justice system is dangerously compromised in a system of laws which permits a criminal defendant to be convicted of a current charge because of the kind of person he was or because of conduct unrelated to the crime on trial. (E.g., State v. McClain, 240 N.C. 171, 173, 81 S.E.2d 364, 365 (1954) (citing cases going back as far as 1869); State v. Williams, 303 N.C. 507, 513, 279 S.E.2d 592, 596 (1981).)

"But over the past two decades, in response to public outcry regarding high-profile emotionally- charged cases involving domestic violence and sexual assaults and misconceptions about the difficulty prosecutors have securing convictions in these types of cases, the Legislature has permitted exceptions to this rule to be created. Under current law, character evidence can be introduced to prove propensity in cases involving charges of domestic violence (§1109) and in cases involving charges of sexual offenses (§ 1108.) The statute's definition of a "sexual offense" is already extensive, including every known sexually-motivated crime: "Any conduct proscribed by Section 243.4, 261, 261.5, 262, 264.1, 266c, 269, 286, 288, 288a, 288.2, 288.5, or 289, or subdivision (b), (c), or (d) of Section 311.2 or Section 311.3, 311.4, 311.10, 311.11, 314, or 647.6, of the Penal Code, "Any conduct proscribed by Section 220 of the Penal Code, except assault with intent to commit mayhem," "Contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person," "Contact, without consent, between the genitals or anus of the defendant and any part of another person's body." "Deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person," or "An attempt or conspiracy to engage in conduct described in this paragraph." (Evid. Code, § 1108, subd. (d)(1).)

"Senate Bill 230 proposes to add Penal Code section 236.1, subdivisions (b) and (c) (trafficking involving an adult or a minor), 266h (pimping involving an adult or a minor), and 266i (pandering involving an adult or a minor), crimes committed for a mercenary, rather than a sexual purpose, to that already extensive list. There is simply no reason for this. There is no justification for further eviscerating the common-law prohibition against propensity evidence [sic] There is no basis, in research or fact, to believe that such an amendment serves any legitimate government interest."

10) **Prior Legislation**:

a) AB 114 (Cohn) Chapter 464, Statutes of 2005, allowed evidence of uncharged acts of child abuse to be introduced as propensity evidence in another child abuse case.

b) AB 141 (Cohn) Chapter 116, Statutes of 2004, expanded the definition of domestic violence, thus allowing use of propensity evidence of uncharged child abuse in the prosecution of another child abuse case.

c) AB 2252 (Cohn) Chapter 194, Statutes of 2002, added specified sex crimes to the list of uncharged sex offenses admissible as propensity evidence in another sex offense case.

d) AB 380 (Wright) Chapter 517, Statutes of 2001, added aggravated sexual assault of a child to the list of uncharged sex offenses admissible as propensity evidence in another sex offense case.

e) AB 2063 (Zettel) Chapter 97, Statues of 1999, allowed evidence of uncharged acts of elder or dependent adult abuse to be introduced as propensity evidence in another elder or dependent adult abuse case, subject to various evidentiary restrictions.

f) SB 1876 (Solis) Chapter 261, Statutes of 1996, allowed evidence of uncharged domestic violence to be introduced as propensity evidence in another domestic violence case, as specified.

g) SB 882 (Rogan) Chapter 439, Statutes of 1995, allowed evidence of uncharged sex offenses to be introduced as propensity evidence in another sex offense case.

REGISTERED SUPPORT / OPPOSITION:

Support

California District Attorneys Association (Co-sponsor)
The Office of the San Diego County District Attorney (Co-sponsor)
Alameda County District Attorney
Association of Deputy District Attorneys
Association for Los Angeles Deputy Sheriffs
Association of Orange County Deputy Sheriffs
Bilateral Safety Corridor Coalition
California Alliance of Child and Family Services
California Association of Code Enforcement Officers
California College and University Police Chiefs Association
California Correctional Peace Officers Association
California Police Chiefs Association
California Narcotic Officers Association
California Statewide Law Enforcement Association
California State Sheriffs' Association
Children's Advocacy Institute of the University of San Diego School of Law
Coalition to Abolish Slavery & Trafficking
County of San Diego
Crime Victims United of California
End Violence Against Women International
Fraternal Order of Police
Long Beach Police Officers Association
Los Angeles County District Attorney's Office
Los Angeles County Probation Officers Union AFSCME Local 685
Los Angeles County Professional Peace Officers Association

Los Angeles Police Protective League
Narika
Peace Officers Research Association of California
Sacramento County Deputy Sheriffs' Association
State Coalition of Probation Organizations
The Junior League of San Diego

Opposition

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

Analysis Prepared by: Cheryl Anderson / PUB. S. / (916) 319-3744

Date of Hearing: July 11, 2017
Counsel: Cheryl Anderson

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Reginald Byron Jones-Sawyer, Sr., Chair

SB 239 (Wiener) – As Amended June 21, 2017

SUMMARY: Reforms criminal penalties related to the human immunodeficiency virus (HIV) which specify harsher punishment than that which applies to other communicable diseases. Specifically, **this bill**:

1) Repeals the provisions which make it a felony to expose another to HIV and a misdemeanor to expose another to other contagious, infectious, or communicable diseases.

2) Creates a new misdemeanor offense for intentional transmission of an infectious or communicable disease where all of the following apply:

   a) The defendant knows that he or she or a third party is afflicted with an infectious or communicable disease;

   b) The defendant acts with the specific intent to transmit or cause an afflicted third party to transmit that disease to another person;

   c) The defendant or the afflicted third party engages in conduct that poses a substantial risk of transmission to that person;

   d) The defendant or the third party transmits the infectious or communicable disease to the other person; and,

   e) If exposure occurs through interaction with the defendant and not a third party, the person exposed to the disease during voluntary interaction with the defendant did not know that the defendant was afflicted with the disease. A person's interaction with the defendant is not involuntary solely on the basis of his or her lack of knowledge that the defendant was afflicted with the disease.

3) States that a person who attempts to intentionally transmit an infectious or communicable disease, but does not actually transmit it, by engaging in the conduct described above, is guilty of a misdemeanor punishable by imprisonment in a county jail for not more than 90 days.

4) States that a defendant does not act with the intent required, as described above, if the defendant takes, or attempts to take, practical means to prevent transmission, but that failure to take means to prevent transmission alone is insufficient to prove intent.

5) Creates a new misdemeanor offense for reckless exposure of another to an infectious or communicable disease where a health officer, acting under circumstances that make securing a quarantine or health officer order infeasible, has instructed the defendant not

to engage in particularized conduct that poses a substantial risk of transmission of an infectious or communicable disease, and the defendant engages in that conduct within 96 hours of the instruction. If a second such instruction is given and the defendant engages in that conduct within 96 hours of the second instruction, the defendant is guilty of reckless exposure to an infectious or communicable disease. A defendant who engages in the particularized conduct after a third or subsequent instruction is not guilty of reckless exposure to an infectious or communicable disease.

6) Provides that becoming pregnant while infected with an infectious or communicable disease, continuing a pregnancy while infected with an infectious or communicable disease, or declining treatment for an infectious or communicable disease during pregnancy does not constitute a crime for purposes of this new section.

7) Provides the following definitions for purposes of the new misdemeanor offenses:

   a) "Conduct that poses a substantial risk of transmission" means "an activity that has a reasonable probability of disease transmission as proven by competent medical or epidemiological evidence. Conduct posing a low or negligible risk of transmission as proven by competent medical or epidemiological evidence does not meet the definition of conduct posing a substantial risk of transmission;"

   b) "Infectious or communicable disease" means a disease that spreads from person to person, directly or indirectly, that has significant public health implications;" and

   c) "Practical means to prevent transmission" means "a method, device, behavior, or activity demonstrated scientifically to measurably limit or reduce the risk of transmission of an infectious or communicable disease, including, but not limited to, the use of a condom, barrier protection or prophylactic device, or good faith compliance with a medical treatment regimen for the infectious or communicable disease prescribed by a health officer or physician."

8) Imposes various requirements upon the court in order to prevent the public disclosure of the identifying characteristics, as defined, of the complainant and the defendant.

9) Requires a court, upon a finding of probable cause that an individual has violated this new section, to order the production of the individual's medical records or the attendance of a person with relevant knowledge thereof, so long as the return of the medical records or attendance of the person pursuant to the subpoena is submitted initially to the court for an in-camera inspection. Only upon a finding by the court that the medical records or proffered testimony are relevant to the pleading offense shall the information produced pursuant to the court's order be disclosed to the prosecuting entity and admissible if otherwise permitted by law.

10) Specifies that the medical records, medications, prescriptions, or medical devices of the defendant shall not be used as the sole basis of establishing the specific intent required under the new intentional transmission offense. Surveillance reports[1] and records maintained by

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[1] "The annual HIV Surveillance Report provides an overview on the current epidemiology of HIV disease in the United States and dependent areas. CDC funds state and territorial health departments to collect surveillance data on persons diagnosed with HIV infection; all personal identifiers are removed from these data before being transmitted

state and local health officials shall not be subpoenaed or released for purposes of establishing the required specific intent.

11) Requires a court to take judicial notice of any fact establishing an element of the offense upon the defendant's motion or stipulation.

12) Provides that a defendant is not prohibited from submitting medical evidence to show the absence of the stated intent required for the new intentional transmission offense.

13) Provides that before sentencing, a defendant shall be assessed for placement in one or more community-based programs that provide counseling, supervision, education, and reasonable redress to the victim or victims.

14) Specifies that the new misdemeanor offenses do not apply to a person who donates an organ or tissue for transplantation or research purposes, or a person who donates breast milk to a medical center or breast milk bank that receives breast milk for purposes of distribution.

15) Deletes reference to the "Guidelines for Reducing Risk of Viral Transmission During Fertility Treatment" and instead refers to the most relevant and up-to-date recommendations published by the American Society for Reproductive Medicine.

16) Repeals the statute making it a felony to commit prostitution or solicitation if the person has a prior conviction for a specified sex offense and a positive AIDS test. A prior conviction for a violation of this repealed provision is invalid and vacated. All charges alleging a violation of this repealed provision are dismissed and all arrests based on a violation of this repealed provision are deemed to never have occurred.

17) Provides that a person who is serving a sentence for the repealed felony prostitution/solicitation statute may petition for a recall or dismissal of the sentence before the trial court that entered the judgment of conviction in his or her case.

18) Repeals provisions related to the AIDS education programs.

19) Repeals the felony provision related to donating blood, tissue or semen by a person who has been diagnosed with AIDS or HIV.

20) Requires a court, upon first conviction of a defendant for prostitution, to refer the defendant where appropriate to a welfare-to-work or drug diversion program, or both.

21) Makes other conforming changes.

EXISTING LAW:

1) Makes it a felony punishable by imprisonment for three, five, or eight years in the state prison to expose another person to HIV by engaging in unprotected sexual activity when the infected person knows at the time of the unprotected sex that he or she is infected with HIV,

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to CDC via a secure data network. Data are analyzed by CDC and then displayed by age, race, sex, transmission category, and jurisdiction (where appropriate)." (<https://www.cdc.gov/hiv/library/reports/hiv-surveillance.html> [as of July 3, 2017].)

has not disclosed his or her HIV-positive status, and acts with the specific intent to infect the other person with HIV. The court shall make an order protecting the identity of the victim, unless the victim requests otherwise. (Health & Saf. Code, § 120291, subd. (a).)

2) Makes it a misdemeanor for any person afflicted with any contagious, infectious, or communicable disease to willfully expose himself or herself to another person, and for any person to willfully expose another person afflicted with the disease to someone else. (Health & Saf. Code, § 120290.)

3) States that, except as provided, tissues shall not be transferred into the body of another person by means of transplantation, unless the donor of the tissues has been screened and found nonreactive by laboratory tests for evidence of infection with HIV, agents of viral hepatitis, and syphilis. (Health & Saf. Code, § 1644.5, subd. (a).)

4) Makes references to the "Guidelines for Reducing Risk of Viral Transmission During Fertility Treatment" as published by the American Society for Reproductive Medicine in provisions of law related to the Department of Health Services' duties to regulate facilities that perform sperm processing. (Health & Saf. Code, § 1644.5, subd. (d).)

5) Requires if a defendant has been previously convicted of prostitution or of another specified sexual offense, and in connection with the conviction a blood test was administered with positive test results for AIDS antibodies, of which the defendant was informed, the previous conviction and positive blood test results are to be charged in any subsequent accusatory pleading charging a violation of prostitution. If the previous conviction and informed test results are found to be true by the trier of fact or are admitted by the defendant, the defendant is guilty of a felony. (Pen. Code, § 647f.)

6) Requires the court to order a defendant convicted for a violation of prostitution for the first time to complete instruction in the causes and consequences of AIDS and to submit to testing for AIDS. Requires such a defendant, as a condition of either probation or participating in a drug diversion program, to participate in an AIDS education program, as specified. (Pen. Code, §§ 1001.10 & 1202.6.)

7) Requires the health department in each county to select an agency, or agencies, in the county that shall provide AIDS prevention education to those persons sentenced to probation or a drug diversion program and provides that specified criminal fines shall be used to fund the program. (Pen. Code, §§ 1001.11 & 1463.23.)

8) Provides that it is a felony punishable by two, four, or six years in county jail for any person to donate blood or tissue, semen to any medical center or semen bank that receives semen for purposes of artificial insemination, or breast milk to any medical center or breast milk bank that receives breast milk for purposes of distribution, whether he or she is a paid or a volunteer donor, who knows that he or she has AIDS, as diagnosed by a physician and surgeon, or who knows that he or she has tested reactive to HIV. (Health & Saf. Code, § 1621.5, subd. (a).)

9) Provides a three-year enhancement for a violation of specified sex offenses committed when the person has knowledge that he or she has AIDs or HIV. (Health & Safe. Code, §

12022.85.)

10) Provides that except where otherwise specified, a misdemeanor is punishable by imprisonment in the county jail not exceeding six months, or by a fine not exceeding $1,000, or by both. (Pen. Code, § 19.)

11) Provides that except where otherwise specified, a felony is punishable by imprisonment for 16 months, two or three years in state prison, unless the offense is punishable in the county jail. (Pen. Code, § 18.)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "Beginning nearly thirty years ago, several laws were passed in California that criminalized behaviors of people living with HIV or added penalties to existing crimes for those with HIV. These laws were based on fear and the limited medical science of the time. In 1988, when most of these laws were passed, there were no effective treatments for HIV and discrimination towards people living with HIV was extremely high.

"In the decades since these laws were passed, societal and medical understanding of HIV has greatly improved, and there are now effective treatments that lengthen and improve the quality of life for people living with HIV. Successfully treated, people living with HIV have a near average life expectancy. According to Dr. Carl Dieffenbach, Director of the Division of AIDS at the National Institutes of Health (NIH), 'Once you begin therapy and you stay on therapy, with full virologic suppression, you are not capable of transmitting HIV to a sexual partner. With successful ART [anti-retroviral therapy] that individual is no longer infectious.' In addition, it has recently been definitively established that when HIV-negative people regularly take certain HIV medications, known as pre-exposure prophylaxis (PrEP), they can almost entirely eliminate the risk of acquiring HIV. These scientific advances should inform our laws, the manner in which we address our public health response to HIV/AIDS, and our thinking with respect to the equally shared responsibility between partners for maintaining sexual health.

"Furthermore, there is no evidence that laws criminalizing sexual activity on the part of people living with HIV accomplish their intended goal of improving public health. A 2017 analysis from the Centers for Disease Control and Prevention 'found no association between HIV or AIDS diagnosis rates and criminal exposure laws across states over time, suggesting that these laws have had no detectable HIV prevention effect.' Instead, research suggests that these laws may act as a disincentive for testing and disclosure of HIV status and may create a barrier to those seeking care. According to the National Association of County & City Health Officials, 'Disease-specific laws and policies that result in criminal prosecution fuel stigma and discrimination against persons living with communicable diseases…Ending the stigma and discrimination faced by people living with communicable diseases is an important step to improving individual health and protecting the public's health.' Today, HIV criminalization laws only increase stigmatization of people living with HIV and disproportionately impact women and people of color.

"Consistent with guidelines from the U.S. Department of Justice, SB 239 would maintain criminal penalties for individuals who intentionally transmit or attempt to transmit HIV, or any other serious infectious or communicable disease, to another person. SB 239 would bring parity with existing laws regarding other communicable diseases by making it a misdemeanor, rather than a felony, to transmit any disease that is determined to have significant public health implications. To be charged with the misdemeanor, the defendant must have: (1) known that he or she has the communicable disease at issue; (2) acted with the specific intent to transmit the disease to another person; (3) engaged in conduct that poses a substantial risk of transmission; and (4) actually transmitted the communicable disease to the other person. The bill also clarifies that taking practical means to prevent transmission—such as using a condom or being on treatment—is incompatible with the intention to transmit HIV or any other infectious or communicable disease. These changes will ensure that California law reflects a science-based understanding of HIV prevention, treatment, and transmission.

"The bill would also repeal other outdated provisions of law that significantly increase penalties for sex workers living with HIV. Lastly, SB 239 would repeal unnecessary laws regarding donation of blood, tissue, or, in certain circumstances, semen or breast milk, by those living with HIV."

2) **Current Criminal Laws Related To HIV:** California has four HIV-specific criminal offenses: (1) prostitution or solicitation if the person was previously convicted of the same offense and was tested for AIDS with a positive result and the person knew of the result (Pen. Code, § 647f); (2) exposing another person to HIV by engaging in unprotected sexual activity when the infected person knows at the time of the unprotected sex that he or she is infected with HIV, has not disclosed his or her HIV-positive status, and acts with the specific intent to infect the other person with HIV (Health & Saf. Code, § 120291); (3) donating blood, body organs or other tissue, or, under specified circumstances, semen or breast milk, if the person knows that he or she has AIDS, or that he or she has tested reactive to HIV (Health & Saf. Code, § 1621.5); and (4) committing specified sex crimes with the knowledge that he or she has AIDS or HIV at the time of the commission of those offenses (Health & Safe. Code, § 12022.85). There is also a non-HIV statute that makes it a crime to willfully expose another to any contagious, infectious or communicable disease. (Health & Safe. Code, § 120290.)

3) **Enforcement Of HIV Criminal Laws And Patterns Indicating That Certain Groups Have Been Disproportionately Affected By These Laws:** A 2015 report conducted by the Williams Institute of the University of California, Los Angeles, reviewed data on all law enforcement contacts for these HIV-related offenses and the general statute that criminalizes willful exposure to any communicable disease if it could be determined that the contact with law enforcement was HIV related, from 1988 to 2014 in California. Of these crimes, the felony solicitation offense was by far the most common reason for law enforcement contact making up about 94% of all of the contacts, or 1,113 people. The next most common offense was committing specified sex crimes which made up about 2% of all of the contacts, or 35 people. (Hasenbush, et al., *HIV Criminalization in California*, Williams Institute, UCLA School of Law (June 2015) at pp. 14-15 < https://williamsinstitute.law.ucla.edu/wp-content/uploads/HIV-Criminalization-California-Updated-June-2016.pdf> [July 3, 2017].)

The report also looked at the demographics of the individuals who came in contact with the criminal justice system and found patterns that indicate that certain groups have been disproportionately affected by these laws. Black women, while only making up 4% of the population of people diagnosed with HIV in California, made up 21% of the population of people who had contact with the criminal justice system related to their HIV status. White women, while only making up 3% of the population of people diagnosed with HIV in California, made up 15% of the population of people who had contact with the criminal justice system related to their HIV status. By comparison, white men make up 40% of the population of people in California diagnosed with HIV, but only 16% of those who had contact with the criminal justice system related to their HIV status. (*HIV Criminalization in California*, *supra*, at p. 17.)

4) **How This Bill Reforms Current Law:** SB 239 repeals the felony solicitation statute, which is the most commonly enforced of the HIV-related criminal laws. SB 239 also provides post-conviction relief for anyone who was previously convicted of a violation of this statute. Specifically, SB 239 vacates any conviction, dismisses any charge, and legally deems that an arrest under the repealed provision never occurred. SB 239 also authorizes a person serving a sentence as a result of a violation of the repealed provision to petition for a recall or dismissal of sentence before the trial court that entered the judgment of conviction in his or her case.

   Additionally, SB 239 repeals the other HIV-related crimes as well as the misdemeanor statute that prohibits willful exposure to a communicable disease. It creates two new misdemeanor crimes, instead. One prohibits the intentional transmission of an infectious or communicable disease, including HIV. The other prohibits recklessly exposing another to an infectious or communicable disease, including HIV.

   SB 239 does not change the existing law that imposes a three-year sentence enhancement if a person commits specified sex crimes while being HIV-positive.

5) **Argument in Support**:

   a) According to *APLA Health*, a Co-sponsor of this bill, "During the 1980s and 1990s, fear and ignorance about HIV and its transmission led California to enact discriminatory criminal laws targeting people living with HIV. These laws created unique restrictions on and harsher punishment for people living with HIV compared to people living with other communicable diseases. Since then, effective treatments have been developed that dramatically lengthen and improve the quality of life for people living with HIV. Successfully treated, people living with HIV have a near normal life expectancy and the risk of transmission to others is negligible to nonexistent.

      "Current HIV-specific criminal laws in California fail to reflect a science-based understanding of HIV prevention, treatment and transmission. Research suggests that criminal laws targeting HIV have done nothing to further public health, as they have not been found to influence people's behaviors or reduce the number of new infections. Instead, these laws have been found to disproportionately impact women and people of color in California. While women living with HIV comprise only 13 percent of people living with HIV, they make up 43 percent of those criminalized under California's HIV-specific criminal laws. Furthermore, while about half of people living with HIV in California are Black or Latino, two thirds of people criminalized under HIV specific laws

are Black or Latino. Thus, criminal prosecution under these laws serves only to fuel continued stigma and discrimination against people living with HIV and communities disproportionately impacted by HIV.

"California criminal law should take the same approach to HIV as it does to other serious communicable diseases."

b) According to the *California Public Defenders Association*, "SB 239 is good public policy. In the early days of the AIDS crisis, many laws were enacted making the intentional transmission of AIDS a felony. Those laws reflected the stigma, panic and lack of effective treatment for HIV. As Dr. Edward Machtinger, director of the Women's HIV Program of the University of California, San Francisco, noted, '[T]world has changed for someone living with HIV since these laws were enacted. Now these law just institutionalize misinformation and discrimination. It's the very embodiment of stigma, codified into the law.' (*San Francisco Chronicle*, March 19, 2017.)"

6) **Argument in Opposition**: According to a *private individual*, "I cannot imagine for a moment, someone who would be careless with a certain status of any kind, unless the person had no social ethics and a vengeful agenda of his/her own....To possibly expose someone to a disease and not disclose it, is unethical. This is not meningitis or a cold. It is transmitted through sexual intercourse."

7) **Prior Legislation**: SB 1408 (Allen), Chapter 18, Statutes of 2016, eliminated criminal penalties for HIV-positive individuals to donate organs and tissue to be used for transplantation in HIV-positive patients.

REGISTERED SUPPORT / OPPOSITION:

Support

American Civil Liberties Union of California (Co-sponsor)
APLA Health (Co-sponsor)
Black AIDS Institute (Co-sponsor)
Equality California (Co-sponsor)
Lambda Legal (Co-sponsor)
Positive Women's Network – USA (Co-sponsor)
A New Path
A New Way of Life Re-Entry Project
Access Women's Health Justice
ACT for Women and Girls
AIDS Legal Referral Panel
AIDS Project of the East Bay
Alliance of Boys and Men of Color
Asian Law Alliance
Bay Area Lawyers for Individual Freedom
Being Alive
Billy DeFrank LGBTQ Community Center
Black Women for Wellness
California Immigrant Policy Center

California Immigrant Youth Justice Alliance
California In-Home Supportive Services Consumer Alliance
California Pan-Ethnic Health Network
California Partnership
California Public Defenders Association
California Women's Law Center
Californians for Safety and Justice
Center for Health Justice, Inc.
Child Care Law Center
Citizens for Choice
Consumer Attorneys of California
Courage Campaign
Desert AIDS Project
East Bay Community Law Center
Equal Justice Society
Equality Federation
Forward Together
Free Speech Coalition
Friends Committee on Legislation of California
Friends of Project 10 Inc.
Genders & Sexualities Alliance Network
GLMA: Health Professionals Advancing LGBT Equality
GroundSpark
Harm Reduction Coalition
HIV Medicine Association
HIV Modernization Movement - Indiana
HIVE
Human Rights Watch
If/When/How: Lawyering for Reproductive Justice
Imperial Valley LGBT Resource Center
Justice Now
Latino Equality Alliance
Los Angeles HIV Law & Policy Project
Los Angeles LGBT Center
Mexican American Legal Defense and Educational Fund
NARAL Pro-Choice California
National Alliance of State & Territorial AIDS Directors
National Black Justice Coalition
National Compadres Network
National Council of Jewish Women, CA
National Day Laborer Organizing Network
National Immigration Law Center
North County LGBTQ Resource Center
Pacific Pride Foundation
Pangea Legal Services
Planned Parenthood Affiliates of California
PolicyLink
Project Inform
Queer LifeSpace

Rainbow Community Center of Contra Costa County
Sacramento LGBT Community Center
SF LGBT Center
San Francisco AIDS Foundation
Sero Project
Sex Workers Outreach Project Los Angeles
St. John's Well Child and Family Center
Stonewall Democratic Club
The Center for HIV Law and Policy
The Center for LGBTQ and Gender Studies in Religion
The Fellowship of Affirming Ministries
The Gay and Lesbian Services Center of Orange County
The LGBTQ Center of Long Beach
The San Diego LGBT Community Center
The Spahr Center
The St. James Infirmary
Trans Student Educational Resources
Transgender Law Center
TransLatin@Coalition
The Women's Foundation of California
Voices for Progress Education Fund
Western Center on Law & Poverty
Western Regional Advocacy Project

Opposition

2 Private Individuals

Analysis Prepared by: Cheryl Anderson / PUB. S. / (916) 319-3744

Date of Hearing: July 11, 2017
Counsel: Sandy Uribe

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Reginald Byron Jones-Sawyer, Sr., Chair

SB 310 (Atkins) – As Amended June 22, 2017

SUMMARY: Establishes the right of inmates under the jurisdiction of the California Department of Corrections and Rehabilitation (CDCR) or serving a sentence in a county jail to petition the court to obtain a name or gender marker change. Specifically, **this bill**:

1) Entitles a person under the jurisdiction of the CDCR or sentenced to county jail to petition the court to obtain a name or gender change provided under existing law.

2) Requires a person under the jurisdiction of CDCR or sentenced to county jail to provide a copy of the petition for a name change to the respective department, in a manner prescribed by the department, at the time the petition is filed.

3) Requires CDCR and county jails to use the person's new name in all documentation, and requires prior names to be listed as an alias.

4) Makes several legislative findings and makes technical and conforming changes.

5) Requires an inmate to provide a copy of a petition for a name change to CDCR, in a manner prescribed by CDCR, at the time a petition is filed.

EXISTING LAW:

1) Provides that a petition for name change must be filed in the superior court and signed by the person whose name is to be changed. (Code Civ. Proc., § 1276.)

2) Provides that a petition for name change for a person under 18 years of age is signed by one or both of the person's parents, or by any guardian of the person. If not signed by one or both parents, the petition shall name, as far as known to the person proposing the name change, the parent(s) of the person and their place of residence. (Code Civ. Proc., § 1276.)

3) Prohibits a person imprisoned in the state prison and under the jurisdiction of the Director of CDCR from filing a petition for change of name, except as permitted at the discretion of the Director. (Code Civ. Proc., § 1279.5, subd. (b).)

4) Requires a court to deny a petition for a name change made by a person who is under the jurisdiction of the CDCR, unless that person's parole agent or probation officer grants prior written approval. Before granting that approval, the parole agent or probation officer is required to determine that the name change will not pose a security risk to the community. (Code Civ. Proc., § 1279.5, subd. (c).)

5) Requires a court to deny a petition for a name change made by a person who is required to register as a sex offender, unless the court determines that it is in the best interest of justice to grant the petition and that doing so will not adversely affect the public safety. (Code Civ. Proc., § 1279.5, subd. (d).)

6) Requires a registered sex offender who has been granted a petition for name change to notify the chief of police of the city in which he or she is domiciled, or the sheriff of the county if he or she is domiciled in an unincorporated area, and also the chief of police of a campus of a University of California or California State University, if he or she is domiciled upon the campus or in any of its facilities, as specified. (Code Civ. Proc., § 1279.5, subd. (d).)

7) States that whenever a person has undergone clinically-appropriate treatment for the purpose of gender transition, the person may file a petition with the superior court in any county seeking a judgment recognizing the change of gender. (Health & Saf. Code, § 103425.)

FISCAL EFFECT:

COMMENTS:

1) **Author's Statement**: According to the author, "SB 310 will simply ensure that incarcerated transgender people have access to the courts to petition for name or name-and-gender change court orders by removing the possibility for arbitrary or retaliatory denials by corrections officials.

   "If corrections officials have concerns over the name change request of a particular prisoner, they will be able to file objections with the court. A judge will consider their objections at a hearing before deciding whether to grant or deny a prisoner's petition for a name change. Thus, while likely rare, issues involving problem prisoners will be addressed with this legislation and, therefore, the exceptions should not determine the rule.

   "Transgender people who are incarcerated should have the same right as anyone else to legally change their name or gender and to be recognized for who they are. Thus, SB 310 also requires state prisons and county jails to use the new name of a prisoner who has successfully obtained a name change.

   "Finally, SB 310 will increase the chances for transgender prisoners to successfully reenter society. Life after incarceration is difficult for most people. However, transgender people face added difficulties – especially in finding employment – when their gender presentation does not match their identification documents. SB 310 will enable prisoners to get a head start on these important documents while incarcerated."

2) **Background on Name Change Procedures**: A person seeking a name change files a petition with the court and the court thereafter issues an order to show cause—an order that provides other parties notice about the opportunity to object to the name change petition at a scheduled hearing. In many cases, the order to show cause must be published in a newspaper of general circulation. If there are no objections filed with the court, the court may grant the petition for name change without a hearing.

   Name change procedures are slightly different for certain individuals (e.g., minors, victims of

domestic violence, transgender persons). In 2013, the Legislature enacted AB 1121 (Atkins), Chapter 651, which reduced burdens for transgender and nonbinary individuals seeking a name change. To that end, AB 1121—among other things—exempted the publication requirements for persons seeking a name change if the name change was to conform with the petitioner's gender identity, and required the court to grant a petition for a name change without a hearing if the case was uncontested.

Persons who are incarcerated in CDCR may only change their names upon permission of the warden and are not allowed to file a name change petition without CDCR's approval. Specifically, existing law requires the court to deny a name change petition by a state prisoner unless the prisoner's parole agent or probation officer grants prior written approval. Existing law also prohibits the court from granting a name change to certain prisoners who have committed specific sex offenses, unless it is in the best interest of justice to grant the name change and doing so will not adversely affect public safety.

3) **Background on gender change procedures:** Existing law allows a person to petition the court for a judgment to recognize a change of gender. Currently, the petition must include an affidavit of a physician attesting that the person has undergone clinically appropriate treatment for the purpose of gender transition. Generally, the court is required to grant the petition if the court determines that the physician's affidavit shows that the person has undergone clinically appropriate treatment for the purpose of gender transition. Existing law also allows Californians born-in state to file for a gender marker change through an administrative application to the State Registrar. This process also requires the physician's affidavit.

4) **Inmate Litigation**: In *Norsworthy v. Beard* (N.D.Cal. 2014) 74 F.Supp.3d 1100, Michelle Norsworthy, a transgender woman held in a California men's prison was denied sex reassignment surgery, even though her treating psychologist had repeatedly concluded that it was medically necessary to treat her gender dysphoria. She was also denied a legal name change because the name she wanted to use is a traditionally feminine name. CDCR denied the change request on the basis that it was not appropriate "to approve a name change to the feminine until [she] is determined to meet the criteria to be assigned to an institution for female offenders." (*Id.* at 1105.) Additionally, CDCR denied her sex-reassignment surgery on because the department determined that it was not medically-necessary. (*Ibid.*)

Norsworthy filed a federal suit against CDCR, alleging—among other things—violations of the Eight Amendment and the Equal Protection Clause of the United States Constitution. (*Norsworthy v. Beard, supra*, 74 F.Supp. at 1106.) CDCR sought to dismiss the lawsuit. The motion to dismiss was granted in part and dismissed in part. The court held that Norsworthy had sufficiently alleged deliberate indifference to the her serious medical needs in violation of the Eighth Amendment by ignoring a treating psychologist's opinion that sex reassignment surgery was medically necessary. (*Id.* at 1112.) The court also found that Norsworthy had sufficiently alleged that the denial of both the surgery and the name change violated the Equal Protection Clause. (*Id.* at p. 1116.) However, the court concluded that Norsworthy's claim for violation of the Eighth Amendment based on CDCR's failure to allow her to pursue a legal name change should be dismissed. (*Id.* at p. 1117.)

In a subsequent case, the court concluded that Norsworthy was likely to succeed on the merits of her Eighth Amendment deliberate-medical-indifference claim and issued a

preliminary injunction requiring CDCR to provide sex reassignment surgery on that basis. (*Norsworthy v. Beard* (N.D.Cal. 2015) 87 F.Supp.3d 1164, 1192, 1194-1195.) As a result, the court did not consider her likelihood of success on the Equal Protection claim. (*Id.* at p. 1192.)[1] The case also did not resolve Norsworthy's claim for name change.

By allowing inmates to petition for a name change without the approval of CDCR or the sheriff, if the inmate is sentenced to county jail, this bill will potentially avoid equal protection challenges on that ground.

5) **Argument in Support**: According to the *Transgender Law Center*, a co-sponsor of this bill, "Under existing law, an incarcerated transgender person seeking a name and gender change court order must first obtain approval from the warden of their facility and then the approval of the Division of Adult Institutions Regional Administrator as well as a Corrections Case Manager before filing a petition with the court. This belabored process almost always results in either a denial or with no response from corrections officials.

"Transgender people face extreme difficulties when they reenter society when their gender presentation does not match their identification documents, including employment, housing, healthcare and government subsidies. A significant number of transgender people have reported verbal harassment, denial of benefits or services, being asked to leave, or being assaulted after presenting identification documents that do not match their gender identity.

"SB 310 establishes the right of people imprisoned in state or county facilities to obtain a name or gender change. It also requires CDCR and county jails to use the new name of a person who obtains a name change, and to refer to the prior name as an alias. Ensuring that incarcerated transgender people have access the name and gender change court process and ensuring that they are referred to by their new name and gender provides a baseline of dignity and respect for prisoners while they are incarcerated and will help ensure their successful reentry into society."

6) **Argument in Opposition**: According to the *California State Sheriff's Association*, "While we are sensitive to the issues highlighted by this bill, it raises numerous logistical concerns. SB 310 provides no limit on the number of times a person may petition for a name and/or gender change. SB 310 includes no requirement that a person actually be transgender to undertake the name change process contemplated by this bill. Gender changes that happen during incarceration will ostensibly create classification and housing issues within the jail.

"Additionally, allowing inmates to change names and gender while in the facility could complicate identification issues when it comes to other pending criminal matters, interactions with other government agencies like those responsible for health services and child welfare, or reconciling criminal history data with other agencies. In addition, SB 310 creates the obligation for counties to undertake more unfunded local mandates."

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[1] CDCR appealed to the Ninth Circuit, which issued a stay. The case ultimately became moot because Norsworthy was granted parole. (See *Norsworthy v. Beard* (9th Cir. 2015) 802 F.3d 1090.)

7) **Related Legislation**: SB 179 (Atkins) would permit anyone to petition the courts for legal recognition of a gender change, with the option of obtaining a new birth certificate reflecting that change, based on the petitioner's expressed gender identity and without regard as to whether or not the petitioner has "undergone clinically appropriate treatment for the purpose of gender transition." SB 179 is currently pending in the Assembly Judiciary Committee.

8) **Prior Legislation**:

   a) AB 433 (Lowenthal), Chapter 718, Statutes of 2011, permits anyone who has "undergone clinically appropriate treatment for the purpose of gender transition" to petition the courts for legal recognition of a gender change, with the option of requesting issuance of a new birth certificate reflecting the updated gender and any accompanying name change.

   b) AB 2782 (Boland), Chapter 557, Statutes of 1994, prohibits inmates from seeking a name change without the permission of CDCR.

REGISTERED SUPPORT / OPPOSITION:

Support

Californians for Safety and Justice (Co-Sponsor)
Equality California (Co-Sponsor)
Transgender Law Center (Co-Sponsor)
Western Regional Advocacy Project (Co-Sponsor)
Women's Foundation of California, Women's Policy Institute (Co-Sponsor)
American Civil Liberties Union
Access Women's Health Justice
ACT for Women and Girls
Asian Prisoner Support Committee
API Equality
Bay Area Women Against Rape
Beam Inc
Black and Pink
BYP100, Bay Area Chapter
California Coalition for Women Prisoners
California Latinas for Reproductive Justice
California Prison Focus
California Public Defenders Association
Californians United for a Responsible Budget
Captive Genders Anthology Collective, University of California, Riverside
Center on Gender Equity and Health, University of California, San Diego
Coyote RI
Critical Resistance
Courage Campaign
Ella Baker Center for Human Rights
Essie Justice Group
House Keys Not Handcuffs
Justice Now
Los Angeles Community Action Network

National Association of Social Workers, California Chapter
National Center for Lesbian Rights
National Lawyers Guild, San Francisco Bay Area Chapter
Our Family Coalition
Prison Law Office
Prison Policy Initiative
Riverside Temple Beth El
Sacramento Homeless Organizing Committee
Sacramento Regional Coalition to End Homelessness
San Diego LGBT Community Center
San Francisco Coalition on Homelessness
St. Mary's Center
Transgender Variant Intersex Justice Project
Voices for Progress Education Fund
W. Haywood Burns Institute

One Private Individual

Opposition

California Family Council
California State Sheriffs' Association

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

Date of Hearing: July 11, 2017
Counsel: Sandy Uribe

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Reginald Byron Jones-Sawyer, Sr., Chair

SB 331 (Jackson) – As Amended May 15, 2017

SUMMARY: Expands the definition of a "domestic violence victim services organization" for purposes of the domestic violence victim-counselor evidentiary privilege. Specifically, **this bill**: Adds organizations that operate on the campus of a public or private college or university with the primary mission to provide services to victims of domestic violence to the definition of "domestic violence victim service organization" in current law so that communications between a victim and counselor at such an organization are covered by the privilege.

EXISTING LAW:

1) Provides, generally, that no person has a privilege to refuse to be a witness or to refuse to disclose any matter or to refuse to procedure any writing, object or other thing. (Evid. Code, § 911.)

2) Provides that communications made in the context of specified relationships (husband-wife, lawyer-client, physician-patient, clergy member-penitent, sexual assault victim-counselor, domestic violence victim-counselor, human trafficking caseworker-victim) are privileged, entitling the holder of the privilege to refuse to disclose, and to prevent another from disclosing, the communication. (Evid. Code, §§ 954, 980, 994, 1014, 1033, 1037.5, 1038.)

3) Provides that the right of any person to claim a privilege provided in statute is waived with respect to a communication protected by the privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to disclosure made by anyone. (Evid. Code, § 912, subd. (a).)

4) Requires a domestic violence counselor who received or made a communication subject to the domestic violence victim-counselor privilege to claim the privilege whenever he or she is present when the communication is sought to be disclosed. (Evid. Code, § 1037.6.)

5) Defines "domestic violence counselor" to mean a person who is employed by a domestic violence victim service organization, as defined, whether financially compensated or not, for the purpose of rendering advice or assistance to victims of domestic violence and who has at least 40 hours of training, as specified. (Evid. Code, §1037.1, subd. (a)(2).)

6) Defines "domestic violence victim service organization" to mean a nongovernmental organization or entity that provides shelter, programs, or services to victims of domestic violence and their children, including, but not limited to the following:

   a) Domestic violence shelter-based programs; and,

b) Other programs with the primary mission to provide services to victims of domestic violence whether or not that program exists in an agency that provides additional services. (Evid. Code, §1037.1, subd. (b).)

FISCAL EFFECT: Unknown.

COMMENTS:

1) **Author's Statement**: According to the author, "The special relationship of trust developed between a victim of domestic violence and a domestic violence counselor is supported by the confidential nature of their communications and preserved through counselor-victim privilege. Currently, this privilege is provided for campus sexual assault counselors in California's colleges and universities, but it does not exist for campus domestic violence counselors.

"In 2015, California took a significant step forward in its efforts to respond to sexual harassment and gender-based violence impacting students as they worked to achieve a college education. Senate Bill 967, the nation's first Yes Means Yes law, required California's institutions of higher education to adopt victim-centered sexual assault, domestic violence, dating violence, and stalking policies.

"Additionally, SB 967 required campuses to implement comprehensive prevention, outreach, and support programs addressing sexual violence, domestic violence, dating violence, and stalking, and – at a minimum – inform the student body, campus organizations, athletic programs and student groups about the rights and responsibilities of students under these policies.

"In recent years, colleges have increased support services to their students and taken additional steps to ensure accessibility and improve quality. Institutions of higher education have enhanced on-campus counseling support services, and these services are being utilized by an increasing number of students.

"In order to preserve the integrity of the relationship of trust between victims and survivors of domestic violence and their on-campus counselors, an assurance of confidentiality must be present, and this confidentiality must be protected in law as a counselor-victim privilege. Absent an assurance of confidentiality, communications may be chilled or guarded, thus impacting the effectiveness of counseling and the progression of healing."

2) **Evidentiary Privileges**: In general, a person who is subject to a legal proceeding must disclose any matter or produce any writing, object or other thing requested of the person. There are exceptions which include the constitutional right not to incriminate oneself (U.S. Const., 5th Amend.; Pen. Code, §§ 930, 940) and confidential communications between persons with certain professional relationships, such as communications made between a lawyer and his or her client.

Under existing law, communications between specified counselors and victims are confidential communications, and may not be disclosed to third persons unless the privilege is waived or the court compels disclosure. These privileges apply to communications between a counselor or caseworker and a victim of sexual assault, domestic violence, or

human trafficking. A victim may refuse to disclose and may prevent another from disclosing a confidential communication if the privilege is claimed by the holder of the privilege or a person authorized to claim the privilege or by the counselor. (Evid. Code, §§ 1035 et seq. and 1037 et seq.) In order to establish this privilege, the counselor or caseworker must have completed the required training and must be employed by a qualifying organization that provides specified services. (Evid. Code, § 1037.1.)

Generally, evidentiary privileges are disfavored because it prevents the disclosure of otherwise relevant and admissible information in a criminal case. "For more than three centuries it has now been recognized as a fundamental maxim that the public . . . has a right to every man's evidence. When we come to examine the various claims of exemption, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule." (*Jaffee v. Redmond* (1996) 518 U.S. 1, citing *United States v. Bryan* (1950) 339 U.S. 323, 331.) Because it creates exceptions to the general rule that information cannot be withheld from being disclosed, privileges must be narrowly construed. (*Sullivan v. Superior Court for San Mateo County* (1972) 29 Cal.App.3d 64.)

The Legislature has recognized that certain relationships should be protected under statutory privilege, generally a professional who provides counseling services with a person who receives those services. The purpose of this privilege is to foster the effective rendering of the professional service offered by the counselor.

3) **Domestic Violence Victim-Counselor Privilege**: Relevant to this bill, in 1986 the Legislature created a privilege between victims and domestic violence counselors. (SB 2040 (Morgan), Chapter 854, Statutes of 1986). The Senate Judiciary Committee analysis of the bill explained the purpose of the bill was to encourage full and free disclosure between a victim and counselor in domestic violence situations. Victims who are aware that the counselor cannot guarantee confidentiality may not use the service.

   A domestic violence victim, whether or not a party to an action, has a privilege to refuse to personally disclose, and to prevent a domestic violence counselor from disclosing, a confidential communication between the victim and the counselor. (Evid. Code, § 1037.5.) The domestic violence counselor who was a party to the communication is under a duty to claim the privilege when he or she is present and the communication is sought to be disclosed. (Evid. Code, § 1037.6.)

   Under existing law "a domestic violence counselor" is defined as a person who is employed by a domestic violence victim service organization, whether financially compensated or not, for the purpose of rendering advice or assistance to victims of domestic violence and who has specified training. (Evid. Code, § 1037.1, subd. (a).) Further, the "domestic violence victim service organization" must be "nongovernmental" in order for the communications between a counselor working at such an organization and a victim being counseled there to be covered by the domestic violence counselor-victim privilege. (Evid. Code, § 1037.1, subd. (b).)

   This bill would expand that definition to include organizations operating on the campus of a public or private college or university who's primary mission is to provide services to domestic violence victims.

The expanded definition of "domestic violence victim service organization" proposed by this bill is consistent with the broader definition of organizations that qualify for the sexual assault counselor-victim privilege. In that context, "sexual assault counselor" is defined to mean any person who has specified training and experience and who is engaged or employed in either: (1) an office, hospital, institution, or center commonly known as a "rape crisis center," and whose primary purpose is the rendering of advice or assistance to victims of sexual assault; or, (2) in a public or private non-profit organization providing victim services which is eligible to receive funds through the Office of Emergency Services for the purpose of counseling and assisting sexual assault victims. (Evid. Code, § 1035.2.)

The definition of a sexual assault counselor does not require that either the office or the organization where the counselor is employed is "non-governmental." Therefore, sexual assault counselors employed by a public college or university are entitled to hold the privilege and the confidentiality of their communications with victims of sexual assault that are made in the course of the relationship and in confidence, are protected.

It is inconsistent for the communications between a college student who is the victim of a sexual assault and a counselor to be protected, but for the communications between a college student who is the victim of domestic violence and the same counselor not to be protected. This bill would fix that inconsistency.

4) **Argument in Support**: The *California State University* (CSU) states, "SB 331 authorizes 'a public or private institution of higher education' to qualify under the law as a 'domestic violence victim service organization.' Each CSU campus employs at least one confidential Sexual Assault Victim Advocates (SAVA) counselor who enjoys privileged communication rights per the California Evidence Code. These communications must be kept confidential and could not be forced to be disclosed or used as evidence in a court setting. SB 331 would allow CSU employed counselors to act as a Domestic Violence Counselor with the same privilege as our SAVA counselors.

"This bill supports the CSU's effort to ensure a victim-centered policy regarding sexual assault, domestic violence, dating violence, and stalking policies as envisioned by SB 967 (De Leon, 2014). It would fill an important and troubling gap in the services offered on our campuses and we believe it would encourage more students to come forward regarding issues they might not otherwise disclose. It would also create greater parity between on-campus sexual assault and domestic violence counselors."

5) **Prior Legislation**:

a) SB 668 (Leyva), of the 2015-2016 Legislative Session, would have modified the definition of the term "sexual assault counselor" for purposes of the sexual assault counselor-victim privilege. SB 668 was referred to the Senate Public Safety Committee, but was not heard.

b) SB 407 (Romero), Chapter 206, Statutes of 2007, made a number of changes to the domestic violence victim-counselor evidentiary privilege including, changing the definition of "domestic violence counselor" and defining a "domestic violence victim

service organization."

c) SB 2040 (Morgan), Chapter 854, Statutes of 1986, established the domestic violence victim-counselor privilege.

REGISTERED SUPPORT / OPPOSITION:

Support

University of California (Sponsor)
California Partnership to End Domestic Violence
California State University
Faculty Association of California Community Colleges
Santa Barbara Women's Political Committee

Opposition

None

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

Date of Hearing: July 11, 2017
Chief Counsel: Gregory Pagan

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Reginald Byron Jones-Sawyer, Sr., Chair

SB 339 (Roth) – As Amended June 22, 2017

SUMMARY: Requires the Judicial Council, if funding is provided, to report to the Legislature on a study of veterans and veteran's treatment courts, as specified. Specifically, **this bill**:

1) Requires the Judicial Council, if funding is provided, to conduct a study of veterans and veteran's treatment courts that includes all of the following:

   a) A statewide assessment of the veteran's treatment courts currently in operation that includes the number of veteran participation in the program, services available, and program outcomes, including successful completion or program terminations. The assessment shall evaluate the impact of a sample of veterans treatments courts on participant outcomes, including, not limited to, program recidivism, mental health, homelessness, employment social stability, and substance abuse;

   b) A survey of counties that do not operate veteran's treatment courts that identifies barriers to program implementation and assesses the need for veteran's treatment courts in those jurisdictions based on the veterans involved in the local criminal justice system. The survey shall identify alternative resources that may be available to veterans, such as community courts or other collaborative justice courts; and,

   c) On or before June 1, 2020, report to the Legislature on the results of the study, including recommendations regarding the expansion of veteran's treatment courts or services to counties without veteran's treatment courts and shall explore the feasibility of designing regional model veterans treatment courts through the use of service coordination or technological resources.

   2) States that the above provisions shall only remain in effect until January 1, 2021, and as of that date is repealed unless a statute enacted before that date deletes or extends that date.

EXISTING LAW:

1) Vests in the superior courts the judicial power of California. (Cal. Const. art. VI, § 1.)

2) Establishes the Judicial Council and authorizes them to improve the administration of justice, to survey judicial business and make recommendations to the courts to the Governor and Legislature, and adopt rules for court administration, practice and procedure, and perform other functions prescribed by statue. (Cal. Const. art. VI§ 6(d).)

3) Allows courts to make rules for the administration of the courts so long as they are not otherwise prohibited by the Constitution, statute or rules adopted by the Judicial Council. (Gov. Code, § 68070; *Wisniewski v. Clary* (1975) 46 Cal.App.3d 499.)

4) Requires judges to identify veteran defendants suffering from sexual trauma, post-traumatic stress disorder, traumatic brain injury, substance abuse, or mental health problems as a result of his or her service and use this status as a factor in favor of granting probation and/or ordering participation in approved treatment programs. (Pen. Code, § 1170.9.)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "A veterans' court is a problem-solving court intended to serve veterans who are involved with the justice system and whose court cases are affected by issues such as addiction, mental illness, and co-occurring disorders. These courts promote sobriety, recovery, and stability through a coordinated response involving cooperation and collaboration with prosecutors, defense lawyers, probation departments, county veterans service offices, the California Department of Veterans Affairs, health-care networks, employment and housing agencies and groups, volunteer mentors who are usually also veterans, and family support organizations. This bill aims to provide greater access for these courts so all Veterans can get the treatment they need."

2) **Background**: Under California law, every court has the authority to make rules for its own government. This is an inherent power of the courts, but this power has also been codified in the Government Code. This power is limited only by any conflict with the California Constitution, statute or rules adopted by the Judicial Council of California.

   Nothing in California's Constitution or statutes prohibits or requires the development of veterans' courts. However, under the Penal Code, courts are required to identify veteran defendants suffering from post-traumatic stress disorder, traumatic brain injury, and other issues for purposes of sentencing. For this and other reasons, the Judicial Council has encouraged the development of veterans' courts.

   The Judicial Council has authority under the California Constitution to make rules governing California courts and to make recommendations to the Legislature and Governor regarding the operation of the courts. Under this authority, the Judicial Council created the Collaborative Justice Court Advisory Committee to make recommendations to the Judicial Council on criteria for identifying and evaluating collaborative justice courts and for improving the processing of cases in these courts, which include drug courts, domestic violence courts, youth courts, community courts, veterans' courts and other collaborative justice courts. Currently, at least 12 counties in California have established veterans' courts and two have established community courts.

   Collaborative justice courts primary purpose is to connect criminal defendants with mental health, drug treatment and other rehabilitative services to reduce recidivism. In general, community courts have similar aims –in terms of connecting defendants with rehabilitative services- with the additional aims of promoting principles of community involvement, balanced and restorative justice, and accountability. Community courts can channel required

community service hours to help meet community needs. In practice, community courts may differ little or not at all from other collaborative justice courts. For example, in Orange County the Community Court is the umbrella court for all of Orange County's collaborative justice courts, including their veterans' court.

Veterans' courts are hybrid drug and mental health courts that use the drug court model to serve veterans struggling with addiction, serious mental illness and/or co-occurring disorders. They promote sobriety, recovery and stability through a coordinated response that involves cooperation and collaboration with the traditional partners found in drug and mental health courts in addition to the United States (U.S.) Department of Veterans Affairs health care networks, the Veterans' Benefits Administration, and, in some programs, volunteer veteran mentors and veterans' family support organizations.

Veterans' Treatment Courts are responses to the growing trend of veterans appearing before the courts to face charges stemming from substance abuse or mental illness. Drug and mental health courts frequently serve veteran populations. Research has shown that traditional services do not always adequately meet the needs of veterans. Many veterans are entitled to treatment through the Veterans' Administration and veterans treatment courts help connect them with these benefits.

According to government reports, there are 23,440,000 veterans in the United States and approximately 1.7 million veterans of Iraq and Afghanistan. The U.S. Department of Veterans Affairs estimates that as many as one third of the adult homeless population have served in the military and that at any given time there are as many as 130,000 homeless veterans. This population mirrors the general homeless population in that 45% suffer mental illness and 75% suffer from substance abuse problems. Veterans are not more likely to be arrested than the general population. But there are significant numbers of veterans involved with the criminal justice system, many of whom struggle with mental health and/or substance abuse illnesses. A 2000 Bureau of Justice Statistics Report found that 81% of all justice involved veterans had a substance abuse problem prior to incarceration, 35% were identified as suffering from alcohol dependency, 23% were homeless at some point in the prior year, and 25% were identified as mentally ill.

While there have been studies on the benefits of many collaborative justice courts, as well as studies on best practices for those courts, there has not been an extensive study on the impact of veterans' courts. However, the studies conducted on other collaborative justice courts have been encouraging. For example, drug courts have seen recidivism reductions of 85% and annual savings of $90 million among participating counties. This bill would determine if similar positive impacts can be extended to veterans involved in the criminal justice system.

3) **Prior Legislation**:

a) AB 1672 (Mathis), of the 2015-16 Legislative Session, was substantially similar to this bill in that it required to study the impact of veteran' courts, or the lack thereof, on veterans involved in the criminal justice system. AB 1672 was held on the Senate Appropriations suspense file.

b) AB 2098 (Levine), Chapter 163, Statutes of 2014, requires the court to consider a defendant's status as a veteran suffering from post-traumatic stress disorder (PTSD) or

other forms of trauma when making specified sentencing determinations.

c) AB 201 (Butler), of the 2011-12 Legislative Session, would have authorized superior courts to develop and implement veterans' courts. This bill would have established standards and procedures for veterans' courts and would have specified that county participation in the veterans' courts program is voluntary. AB 201 was vetoed.

d) AB 1925 (Salas), of the 2009-10 Legislative Session, would have authorized superior courts to develop and implement veterans' courts for eligible veterans of the United States (U.S.) military. AB 1925 was vetoed. The Governor's veto message stated "authorizing legislation is not required for the superior courts to establish specialized courts with dedicated calendars. I would urge the Judicial Council to examine the need for veterans' courts, however, and establish appropriate guidelines for the superior courts to follow."

REGISTERED SUPPORT / OPPOSITION:

Support

Judicial Council of California
California Public Defenders Association
Educate Advocate
Rural County Representatives of California
National Association of Social Workers, California Chapter
American G.I. Forum of California
AMVETS-Department of California
American Legion – Department of California
California Association of County Veterans Service Officers
California State Commanders Veterans Council
Military Officers Association of America, California Council of Chapters
Vietnam Veterans of America-California Council

Opposition

None

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

Date of Hearing: July 11, 2017
Chief Counsel: Gregory Pagan

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Reginald Byron Jones-Sawyer, Sr., Chair

SB 345 (Bradford) – As Amended May 26, 2017

SUMMARY: Requires that, commencing January 1, 2019, the Department of Alcoholic Beverage Control (ABC), the Department of the California Highway Patrol (CHP, the Department of Corrections and Rehabilitation (CDCR), the Department of Fish and Wildlife (DFW), the Department of Justice (DOJ), the Commission on Peace Officer Standards and Training (POST), and each local law enforcement agency to, to the extent not prohibited by the California Public Records Act (CPRA), conspicuously post on their Internet Web site, in a searchable manner, all current standards, policies, practices, operating procedures, education and training materials.

EXISTING LAW:

1) Declares, under the California Constitution, the people's right to transparency in government. ("The people have the right of access to information concerning the conduct of the people's business, and therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny....") (Cal. Const., Art. I, Sec. 3.)

2) Provides, generally, under the CPRA, that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state. (Gov. Code, § 6250 et. seq.)

3) Provides that public records are open to inspection at all times during the office hours of the state or local agency and every person has a right to inspect any public record, except as provided. Any reasonably segregable portion of a record shall be available for inspection by any person requesting the record after deletion of the portions that are exempted by law. (Gov. Code, § 6253.)

4) Provides that there are 30 general categories of documents or information that are exempt from disclosure, essentially due to the character of the information, and unless it is shown that the public's interest in disclosure outweighs the public's interest in non-disclosure of the information, the exempt information may be withheld by the public agency with custody of the information. (Gov. Code, § 6254 et seq.)

5) Does not require, under the CPRA, disclosure of investigations conducted by the office of the Attorney General and the Department of Justice, the Office of Emergency Services and any state or local police agency, or any investigatory or security files compiled by any other state or local police agency, or any investigatory or security files compiled by any other state or local agency for correctional, law enforcement, or licensing purposes. (Gov. Code, § 6254, subd. (f).)

6) Requires that any reasonably segregable portion of a record shall be available for inspection by any person requesting the record after deletion of the proportions that are exempted by law. (Gov. Code, § 6253, su8bd. (a).)

7) Provides that for records not subject to an exemption, may be withheld if the agency demonstrates that on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record. (Government Code § 6255.)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "Although existing law provides that members of the public may use the California Public Records Act ('CPRA') to request an opportunity to inspect police department training, policies and procedures, there are currently wide gaps in compliance. Moreover, community groups and individuals have voiced frustration that these orders are not all currently available online. Unless these state and local regulations are publicly available online, individual state and local law enforcement agencies must spend considerable staffing and time to respond to requests for access to police regulations, which are already covered under CPRA.

   "This legislation is, essentially, *low hanging fruit*. It covers no more and no less than what is already covered by CPRA while (1) improving access and transparency in policing in the State of California, (2) saving law enforcement agencies valuable time and staffing, and (3) enhancing police-community relations consistent with Pres. Obama's Task Force on 21st Century Policing.

2) **Background**: On December 18, 2014, amid protests in Ferguson, Missouri, where a grand jury declined to criminally charge police officer Darren Wilson in the fatal shooting of Michael Brown, President Barack Obama signed an Executive Order establishing the Task Force on 21st Century Policing. "The mission of the task force was to examine how to foster strong, collaborative relationships between local law enforcement and the communities they protect and to make recommendations to the President on how policing practices can promote effective crime reduction while building public trust. The president selected members of the task force based on their ability to contribute to its mission because of their relevant perspective, experience, or subject matter expertise in policing, law enforcement and community relations, civil rights, and civil liberties." (U.S. Department of Justice's Office of Community Oriented Policing Service, *Interim Report of the President's Task Force on 21st Century Policing* (Mar. 2015), at 1.) In addressing the issue of transparency, the task force recommended that law enforcement agencies make all department policies available for public review. (*Id.* at 11.) This legislation implements this recommendation by requiring law enforcement agencies to post a variety of department policies on-line. The California Public Defenders Association, who is the sponsor of this legislation, explains:

   > SB 345 will enhance the transparency of each law enforcement agency, assist in educating the public about law enforcement department policies and procedures, and allow statewide and local law enforcement agencies to promote best policies and greater accountability in law enforcement, thereby enhancing police-community

relations consistent with President Obama's Task Force on 21st Century Policing.

SB 345 codifies and clarifies existing state law. On March 2, 2017, in a unanimous decision, the California Supreme Court emphasized the breadth and depth of the California Public Records Act ["CPRA"] in *City of San Jose v. Sup. Court (Smith)* (S218066) [broad reading of CPRA includes private emails of public officials.] The Court highlighted CPRA's strong presumption that all public records are open for inspection and copying, except those categories of records specifically designated as "exempt" from disclosure. (Gov't Code sections 6253(b), 6254):

Given the strong public policy of the people's right to information concerning the people's business (Gov. Code,§ 6250), and the constitutional mandate to construe statutes limiting the right of access narrowly (Cal. Const., art. I,§ 3, subd. (b)(2)), 'all public records are subject to disclosure unless the Legislature has expressly provided to the contrary.' [Smith, supra, at p. 5, citing Sierra Club v. Superior Court (2013) 57 Cal.4th 157, 166, emphasis in original.]

SB 345 sets a uniform standard in statewide and local CPRA compliance. Although existing law provides that members of the public may use the CPRA to request department training, policies and procedures, there are currently wide gaps in compliance with such requests. Moreover, community groups and individuals have voiced frustration that these orders are not all currently available online. Unless these state and local trainings and regulations are publicly available online, individual state and local law enforcement agencies will continue to spend considerable staffing and time responding to requests for access to police regulations already covered under CPRA. [Footnotes omitted.]

3) **Argument in Support**: According to the, *California Attorneys for Criminal Justice*, "At a time when there has been much scrutiny from the public with law enforcement not following proper procedures during investigations and arrests, it is imperative that there be as much transparency as possible. SB 345 is a common sense measure that ensure the public has immediate access to information regarding law enforcement training, rules and regulations.

"Current law requires the California Department of Justice Police Officer Standards and Training Committee (POST) to set forth policies and procedures for all peace officers. It also requires state and local law enforcement policies be made available per the California Public Records Act. However, the information still needs to go through the request process. This leads to unnecessary delays and frustration when the requests are not answered in a timely manner, especially during police misconduct investigations."

4) **Argument in Opposition**: According to the *California State Sheriffs' Association,* "While we understand the desire for transparency, this bill casts a wide net and could require the public disclosure of potentially sensitive information. Based on the provisions of the bill, documents that detail tactical procedures, investigative techniques, and specific training methods could be required to be made public.

"Many law enforcement standards and policies are already publicly available, but SB 345 potentially jeopardizes operational and investigative security of sensitive information that should not be accessible by the public. To the extent any of the items contemplated by the bill are already public records, SB 345 represents an additional, unfunded mandate to provide an alternative method of access. For these reasons, CSSA must respectfully oppose SB 345."

REGISTERED SUPPORT / OPPOSITION:

Support

California Public Defenders Association
California Attorneys for Criminal Justice
Association for Los Angeles County Deputy Sheriffs
Association of Deputy District Attorneys
California Association of Code Enforcement Officers
California College and University Police Chiefs Association
California Narcotics officers Association
Los Angeles County Probation Officers Union AFSCME Local 685
Los Angeles County Professional Peace Officers Association
Los Angeles Police Protective League
Electronic Frontier Foundation

Opposition

California State Sheriffs' Association

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