

AGENDA

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

PART II

AB 829 (Nazarian) – AB 1493 (Cooper)

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

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Bill Quirk, Chair

AB 829 (Nazarian) – As Amended March 26, 2015

SUMMARY: Outlines procedural due process rights for persons designated for inclusion in a shared gang database. Specifically, **this bill:**

- 1) Require a local law enforcement agency to provide written notice to a person, or if the person is under 18 years of age, his or her parent or guardian, prior to making the gang designation.
- 2) Authorizes a person or his or her parent or guardian, as applicable, to request information regarding the status of the person in a shared gang database, and would require the law enforcement agency to provide that information, subject to specified exceptions.
- 3) Provides that a person, or his or her parent or guardian, as applicable, may contest a gang designation and request removal of information from the database in writing, on the ground that the person is not and has never been a gang member, associate, or affiliate.
- 4) Authorizes a person whose written request for removal is denied to appeal the decision at an administrative hearing conducted by a hearing officer, as specified.
- 5) Permits a person to request a review of an unfavorable decision of the hearing officer, and would authorize that person to commence an action to seek review of an unfavorable decision after review by a court of competent jurisdiction, as specified.
- 6) Requires a local law enforcement agency remove a person designated in a shared gang database based on specified criteria, or if the designation is successfully contested, and to notify the person and his or her parent or guardian, as applicable, upon removal. The grounds for removal are the following:
 - a) The person is designated in the shared gang database, but has not been arrested, charged with, or convicted of a crime in the five-year period after initial entry in the database;
 - b) The person is designated in the database, and was subsequently arrested for, but not charged with or convicted of, a crime in the five-year period after the date of arrest;
 - c) The person is designated in the database as the result of an arrest, but was not charged with or convicted of a crime in the five-year period after the date of the arrest; or
 - d) The person is designated in the database and is subsequently arrested and charged with a crime, but is not convicted of a crime within the five-year period after the date of the arrest.
- 7) States that a law enforcement agency shall remove or cause to be removed a person who is designated as a suspected gang member, associate, or affiliate, and who is subsequently arrested for, charged with, and convicted of a crime, if the person successfully completes his

or her probation or parole and more than five years have passed since the date of the last modification to his or her entry in the database.

- 8) Requires the Department of Justice (DOJ) annually report specified information relating to requests for removal and removal of persons from the CalGang shared gang database system. The report shall include:
 - a) The number of persons added to the CalGang system during the immediately preceding 12 months;
 - b) The number of requests for removal of a person from the CalGang system received during the immediately preceding 12 months;
 - c) The number of approved requests for removal from the CalGang system during the preceding 12 months; and
 - d) The number of automatic removals from the CalGang system during the preceding 12 months.
- 9) Prohibits the Victims Compensation and Government Claims Board from denying an application for compensation on the basis of the applicant's membership in, association with, or affiliation with, a gang, or on the basis of the applicant's designation as a suspected gang member, associate, or affiliate in a shared gang database, as defined.

EXISTING LAW:

- 1) Defines a "criminal street gang" as any ongoing organization, association, or group of three or more persons . . . having as one of its primary activities the commission of one or more enumerated offenses, having a common name or identifying sign or symbol, and whose members individually or collectively engage in a pattern of criminal gang activity. (Pen. Code, § 186.22, subd. (f).)
- 2) Provides that any person who actively participates in a criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity and who promotes, furthers, or assists in any felonious conduct by members of the gang is guilty of an alternate felony-misdemeanor. (Pen. Code, § 186.22, subd. (a).)
- 3) Provides that any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in criminal conduct by gang members, shall receive a sentence enhancement, as specified. (Pen. Code, § 186.22, subd. (b).)
- 4) Provides that any person who is convicted of either a felony or misdemeanor that is committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall be punished by imprisonment in the county jail for up to one year or by 1, 2, or 3 years in state prison. (Pen. Code, § 186.22, subd. (d).)
- 5) Defines "pattern of criminal gang activity" as the commission of two or more of enumerated offenses, provided at least one of the offenses occurred after the effective date of the statute

and the last of the offenses occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons. (Pen. Code, § 186.22, subd. (e).)

- 6) Requires any person who is convicted in criminal court or who has a petition sustained in a juvenile court of one of the specified criminal street gang offenses or enhancements to register with the local Police Chief or Sheriff within 10 days of release from custody or within 10 days of his or her arrival in any city, county, or city and county to reside there, whichever is first. (Pen. Code, § 186.30, subds. (a) & (b).)
- 7) Provides that when a minor has been tried as an adult and *convicted* in a criminal court or has had a petition sustained in a juvenile court for any of the specified criminal street gang offenses or enhancements, a law enforcement agency shall notify the minor and his or her parent that the minor belongs to a gang whose members engage in or have engaged in a pattern of criminal activity as described. (Pen. Code, § 186.32 (a)(1)(B).)
- 8) Requires the court, at the time of sentencing in adult court or dispositional hearing in juvenile court, to inform any person subject to registration detailed above of his or her duty to register and requires that the parole or probation officer assigned to that person to verify that the person has complied with the registration requirements. (Pen. Code, § 186.31.)
- 9) Requires local law enforcement to notify a minor and his or her parent or guardian before designating that minor as a gang member, associate, or affiliate in a shared gang database and the basis for the designation. (Pen. Code § 186.34.)

FISCAL EFFECT: Unknown

COMMENTS:

- 1) **Author's Statement:** According to the author, "Since the mid-1980s, law enforcement agencies, throughout California, have increasingly engaged in the collection of personal information to label and track people, overwhelmingly youth and young adults of color, as 'gang members.' This process lacks oversight and transparency. The policies and procedures governing the CalGang Database and other local databases are not clear, not consistent in their application, not widely shared, and not standardized across law enforcement departments and jurisdictions. AB 829 sheds light on the process of including individuals in gang databases. This bill does not prohibit nor limit law enforcement's use of a gang database. This bill simply ensures individuals are notifying and given the opportunity to clear their name.

"Once information is captured by local law enforcement and entered onto either local and/or the statewide CalGang database, a person is considered to be 'known as an active gang member.' Since the databases are used as an internal surveillance tool, information about who is in the database is not shared. Persons under the age of 18 and their parents only won the right to notification, appeal, and removal with SB 458, Chapter 797, Statute of 2013. However, individuals over the age of 17 who are added to CalGang, and individuals of any age, including minors, who are added to other gang databases have no legal right to be notified, and have no opportunity to appeal their designation.

"AB 829 sheds light on the process of including individuals in gang databases. This does not prohibit nor limit law enforcement's use of a gang database. This bill simply conforms to the due process afforded, to individuals, by the 14th and 5th Amendments by notifying and granting individuals the opportunity to clear their name.

"Placement in a gang database can have drastic immigration consequences, including limiting a person's ability to adjust immigration status for residency or citizenship. Specifically, when applying for DACA and the newly created DAPA program. Additionally, those in a gang databases face obstacles obtaining employment and social service benefits. One example of this occurs when a person is a victim of a crime such as robbery, sexual assault, child abuse and domestic violence. The victim would likely be denied the ability to access California's Victim Compensation Program because of their inclusion in the gang database, keeping them from getting the care they need."

- 2) **General Effects of this Bill are to Include Due Process Rights for those Designated:** In general this bill will do the following things as applied to persons who are being added to a CalGang database:
- a) This bill will *provide written notice*, to people who are being designated and added to a CalGang database. Under existing law, the notification is only provided to minors.
 - b) This bill permits persons to *request information* regarding their status, or the status of their dependents, subject to specified public safety exceptions.
 - c) This bill authorizes people to *submit written requests for removal* from a gang database.
 - d) This bill permits a person to *request administrative review* of a denied request, and an *appeal to a court of competent jurisdiction*.
 - e) This bill outlines the process for *grounds for removal* from a gang database.
 - f) This bill requires that DOJ conduct an *annual report* on specified statistics related to who is included in gang databases, numbers or requests for removal, and statistics related to those removed.
 - g) This bill additionally specifies that the *Victims Compensation and Government Claims Board cannot deny an application* on the basis of the person being included on a gang database.
- 3) **History of Shared Gang Databases:** In 1987, the Los Angeles County Sheriff's Department developed the Gang Reporting, Evaluation and Tracking System (GREAT), the nation's first gang database. "Before GREAT existed, police departments collected information on gang members in locally maintained files, but could not access information that had been collected by other law enforcement agencies." (Stacey Leyton, *The New Blacklists: The Threat to Civil Liberties Posed by Gang Databases* (a chapter in *Crime Control and Social Justice: The Delicate Balance*, edited by Darnell F. Hawkins, Samuel L. Myers Jr. and Randolph N. Stone, Westport, CT, 2003. *The African American Experience*,

Greenwood Publishing Group, Mar. 27, 2013.¹ Using GREAT, local law enforcement could collect, store, centralize, analyze, and disperse information about alleged gang members.

In 1988, the Legislature passed the Street Terrorism Enforcement and Prevention (STEP) Act, asserting California to be “in a state of crisis... caused by violent street gangs whose members threaten, terrorize and commit a multitude of crimes against the peaceful citizens of their neighborhoods.” (Penal Code Section 186.21 (1988).) The STEP Act established the nation’s first definitions of “criminal street gang,” “pattern of criminal gang activity,” and codified penalties for participation in a criminal street gang.

In 1997, less than a decade after the regional GREAT database was first created, the regional GREAT databases were integrated into a new unified statewide database, CalGang, with the goals of making the database easier to use and less expensive to access.² CalGang operates pursuant to the 1968 Omnibus Crime Control and Safe Streets Act, which requires that “all criminal intelligence systems ... are utilized in conformance with the privacy and constitutional rights of individuals.”³

- 4) **Required Parental Notification of a Minor’s Duty to Register as a Gang Member:** Prior to 2013, if a minor is convicted when tried as an adult, or had a petition sustained in a juvenile court, his or her parent or guardian was required to be notified of a requirement to register with a local sheriff’s office upon release from custody or moving to a new city or county. (Pen. Code, § 186.32, subd. (a)(1)(B).) Parents were notified when a minor was designated in the CalGang database as a suspected gang member, associate, or affiliate. Although a conviction or declaration of wardship was not required for a minor to be placed in the CalGang database, serious consequences to the minor could flow from that action.

AB 458 (Wright), Chapter 797, Statutes of 2013 required a local law enforcement agency to notify any person under 18 years of age and his or her parent or guardian of the minor’s designation in a shared gang database and the basis for the designation before the minor was designated as a suspected gang member, associate or affiliate in a shared gang database, regardless of conviction status.

- 5) **Application of Shared Gang Databases:** Today, the CalGang system is accessed by over 6,000 law enforcement officers in 58 counties. The database tracks 200 data fields including name, address, physical information, social security number, and racial makeup and records all encounters police have with the individual. (Leyton, *supra*, at 113.) CalGang is a web-based intranet system accessible by police departments by way of computer, telephone, and web browser that allows law enforcement to check an individual’s record in real time. (*Ibid.*) For example, qualified law enforcement personnel may sign on to the CalGang database from a laptop in their patrol car and locate a source document regarding a specific individual about whom law enforcement seeks information.

¹ <http://testaae.greenwood.com/doc_print.aspx?fileID=GM0790E&chapterID=GM0790E-643&path=chunkbook>, citing *GREAT System Overview*, The Eighth Annual Organized Crime and Criminal Intelligence Training Conference, August 23-26, 1994.)

² (Leyton, *supra*, at 113, citing Patrick Thibodeau, *Cops Wield Database in War on Street Gangs*, Computerworld, Sept. 1, 1997, at 4; and Ray Dassault, *GangNet: A New Tool in the War on Gangs*, California Computer News, January 1997 <<http://www.govtech.com/magazines/gt/GangNet-A-New-Tool-in-the.html?page=3>>.)

³ (Criminal Intelligence Systems, Operating Policies, 28 CFR Part 23, <http://www.iir.com/28CFR_Program/28CFR_Resources/ExecOrder12291_28CFRPart23.pdf>.)

Concerns have been raised regarding the secrecy of the CalGang database and the accuracy of records entered into CalGang. For example, in 1999, then-Attorney General Bill Lockyer described the database as “mix[ing] verified criminal history and gang affiliations with unverified intelligence and hearsay evidence, including reports on persons who have committed no crime.” “This database,” he went on “cannot and should not be used, in California or elsewhere, to decide whether or not a person is dangerous or should be detained.” (*Ibid.*) Moreover, with 201,094 people currently listed on CalGang, community groups have expressed concern about transparency, accountability, notification, release of information to policy makers and the public, and independent evaluations regarding the effectiveness of such shared databases in reducing crime.⁴

Youth Justice Coalition states that CalGang “dramatically expands the criminalization of individuals and communities” noting that the database is used routinely to determine who should be served with civil gang injunctions, given gang enhancements during sentencing and targeted for saturation policing. With no notification system, community members say, CalGang has become a “secret surveillance tool,” for monitoring children. This system dramatically impacts the way those children are seen and treated by law enforcement without notifying families who may wish to intervene, move to a new neighborhood or place their child into an intervention program. (*Id.*) Although the exact number of minors designated is unknown, approximately 10% of those listed on the CalGang database are 19 years of age or younger. (*Id.*)

Law enforcement representatives, however, have emphasized that any records which are not modified by the addition of new criteria for five years will be purged. Thus, a person need only avoid gang-qualifying criteria for five years to ensure that he or she will be stricken from the database.

However, as a practical matter, it may be difficult for a minor living in a gang-heavy community to avoid qualifying criteria when the list of behaviors includes items such as “is in a photograph with known gang members,” “name is on a gang document, hit list or gang-related graffiti” or “corresponds with known gang members or writes and/or receives correspondence.” In a media-heavy environment, replete with camera phones and social network comments, it may be challenging for a teenager aware of the exact parameters to avoid such criteria, let alone a teenager unaware of he or she is being held to such standards.

- 6) **Argument in Support:** According to *Asian Americans Advancing Justice*, “Asian Law Caucus (AAAJ-ALC) strongly supports AB 829, which sheds light on the process of including individuals in gang databases. This bill does not prohibit nor limit law enforcement’s use of a gang database. We thank you for introducing this proposal. The mission of AAAJ-ALC is to promote, advance, and represent the legal and civil rights of Asian and Pacific Islander communities. Recognizing that social, economic, political and racial inequalities continue to exist in the United States, AAAJ-ALC is committed to the pursuit of equality and justice for all sectors of our society with a specific focus directed toward addressing the needs of low-income, immigrant, and underserved APIs.

⁴ (See Ana Muniz and Kim McGill, *Tracked and Trapped: Youth of Color, Gang Databases and Gang Injunctions*, Youth Justice Coalition, Dec. 2012 <<http://www.youth4justice.org/wp-content/uploads/2012/12/TrackedandTrapped.pdf>>.)

"Since the mid-1980s, law enforcement agencies throughout California have increasingly engaged in the collection of personal information to label and track people – overwhelmingly youth and young adults of color – as 'gang members.' This process lacks oversight and transparency. AB 829 is a follow-up to SB 458, Chapter 797, Statute of 2013, which required law enforcement to notify persons under the age of 18 and their parents if the minor was included in the CalGang database. SB 458 also provides for the right to appeal and to remove a name from CalGang. However, people over the age of 17 who are added to CalGang, and individuals of any age, including minors, who are added to local gang databases have no legal right to be notified, and have no opportunity to appeal their designation.

"Specifically, AB 829 accomplishes the following:

- Requires that all persons entered into the gang database be notified of their inclusion in the database.
- Allows individuals the opportunity to contest their inclusion in the database.
- Requires the notification to specify the petition process to remove the name of the individual, if he or she feels they have been wrongly identified.
- Requires law enforcement agencies to respond to all petitions within 60 days.
- Requires the state to report, by county, on the number of names added to the gang database each year, how many requests to remove were received and how many requests were approved.

"AB 829 grants individuals the basic fundamental right to clear their name. Placement in a gang database can have drastic immigration consequences, including limiting a person's ability to adjust immigration status for residency or citizenship; can eliminate a person's and even their family's access to public housing and Section 8; can limit access to employment and educational opportunities; and can lead to increased penalties, such as gang enhancements in court."

- 7) **Argument in Opposition:** According to the *California District Attorneys Association*, "This bill would create a notification process for anyone whose name is placed in a law enforcement shared gang database, as well as three opportunities for appeal, during which law enforcement agencies would be required to share sensitive information with the suspected gang member.

"Under AB 829, once a suspected gang member is notified of his or her placement in a shared gang database, they can contest the designation (new PC 186.44). If the law enforcement agency denies that request, they must state the reasons for the suspect's inclusion in the database. This is tantamount to allowing a suspect to view sensitive intelligence that the law enforcement agency has collected. The subject would then be able to request an administrative hearing (new PC 186.460), which the law enforcement agency would be *required* to grant. During that hearing (which would be considerably delayed in light of the two continuances that the agency would be required to grant), the suspect may subpoena officers, documents, and other sensitive information. If the hearing officer finds that the suspect should not be removed from the database, the suspect may request another

review of that decision (new PC 186.472), which the law enforcement agency is again required to grant.

"In addition to the policy concerns that AB 829 raises, the cost of preparing and staffing these hearings would be overwhelming.

"It's hard to imagine any other instance in which we would let a suspect, during an investigation, invade police deliberations with a hearing (or, in this case, three) on whether he or she should continue to be a suspect."

8) Prior Legislation:

- a) SB 458 (Wright), Chapter 797, Statutes of 2013, required local law enforcement to notify a minor and his or her parent or guardian before designating that minor as a gang member, associate, or affiliate in a shared gang database and the basis for the designation.
- b) AB 177 (Mendoza), Chapter 258, Statutes of 2011, expanded the authority of the juvenile court to order the parent or guardian of a minor to attend anti-gang violence parenting classes.
- c) SB 296 (Wright), of the 2011-12 Legislative Session, would have created a process whereby a person subject to a gang injunction could petition for injunctive relief if the person met certain criteria. SB 296 was vetoed by the Governor.
- d) AB 1392 (Tran), of the 2009-10 Legislative Session, would have established the Graffiti and Gang Technology Fund, in which vandalism fines were to be deposited, to be continuously appropriated to the Department of Justice exclusively for the costs of technological advancements for law enforcement in the identification and apprehension of vandals and gang members, as specified. AB 1392 was held on the suspense file of the Assembly Committee on Appropriations.
- e) AB 1291 (Mendoza), Chapter 457, Statutes of 2007, authorized anti-gang violence classes for parents of juveniles found in violation of specified gang-related offenses.
- f) AB 1630 (Runner), of the 2007-08 Legislative Session, would have required those who are convicted of a street gang crime and to annually register and re-register upon changing his or her residence. AB 1630 failed passage in this committee.
- g) AB 2562 (Fuller), of the 2007-08 Legislative Session, would have increased the penalty from a misdemeanor to a felony punishable by 16 months or two or three years in the state prison for failing to register as a member of a criminal street gang under specified circumstances. AB 2562 failed passage in this committee.

REGISTERED SUPPORT / OPPOSITION:

Support

American Civil Liberties Union
Asian Americans Advancing Justice

California Attorneys for Criminal Justice
California Immigrant Policy Center
California Public Defenders Association
Immigrant Legal Resource Center
Immigrant Youth Coalition
Korean Resource Center
Legal Services for Prisoners with Children
National Day Laborer Organizing Network
National Immigration Law Center
Native Hawaiian and Pacific Islander Alliance
Youth Justice Coalition

Opposition

California District Attorneys Association

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

Date of Hearing: April 14, 2015
Counsel: Stella Choe

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Bill Quirk, Chair

AB 844 (Bloom) – As Introduced February 26, 2015

SUMMARY: Authorizes a foreign corporation and foreign limited liability company to consent to service of process for a search warrant by email or submission to a designated Internet Web portal.

EXISTING LAW:

- 1) Requires, when properly served with a search warrant issued by the California court, a foreign corporation subject to this section to provide to the applicant, all records sought pursuant to that warrant within five business days of receipt, including those records maintained or located outside this state. (Pen. Code, § 1524.2, subd. (b)(1).)
- 2) Defines a "search warrant" as an order in writing in the name of the People, signed by a magistrate, directed to a peace officer, commanding him or her to search for a person or persons, a thing or things, or personal property, and in the case of a thing or things or personal property, bring the same before the magistrate. (Pen. Code, § 1523.)
- 3) States that a California corporation that provides electronic communication services or remote computing services to the general public, when served with a warrant issued by another state to produce records that would reveal the identity of the customers using those services, data stored by, or on behalf of, the customer, the customer's usage of those services, the recipient or destination of communications sent to or from those customers, or the content of those communications, shall produce those records as if that warrant had been issued by a California court. (Pen. Code, § 1524.2, subd. (c).)
- 4) Provides that the terms "electronic communication services" and "remote computing services" shall be construed in accordance with applicable federal law. (Pen. Code, § 1524.2, subd. (a)(1).)
- 5) Defines "properly served" as a search warrant has been delivered by hand, or in a manner reasonably allowing for proof of delivery if delivered by United States mail, overnight delivery service, or facsimile to a person or entity listed. (Pen. Code, § 1524.2, subd. (a)(6).)
- 6) States that a provider of wire or electronic communication services or a remote computing service, upon the request of a peace officer, shall take all necessary steps to preserve records and other evidence in its possession pending the issuance of a search warrant or a request in writing and an affidavit declaring an intent to file a warrant to the provider. Records shall be retained for a period of 90 days which shall be extended for an additional 90-day upon a renewed request by the peace officer. (Pen. Code, § 1524.3, subd. (d).)

- 7) Requires any domestic or foreign corporation, before it may be designated as the agent for the purpose of service of process of any entity, to file a certificate executed in the name of the corporation by an officer thereof stating all of the following:
 - a) The complete street address of its office or offices in this state, wherein any entity designating it as such agent may be served with process;
 - b) The name of each person employed by it at each such office to whom it authorizes the delivery of a copy of any such process; and
 - c) Its consent that delivery thereof to any such person at the office where the person is employed shall constitute delivery of any such copy to it, as such agent. (Corp. Code, § 1505.)
- 8) Provides that delivery by hand of a copy of any process against the corporation (a) to any natural person designated by it as agent or (b), if a corporate agent has been designated, to any person named in the latest certificate of the corporate agent filed with the Secretary of State at the office of such corporate agent shall constitute valid service on the corporation. (Corp. Code, § 1701.)
- 9) Prohibits a foreign corporation from transacting intrastate business without having first obtained from the Secretary of State a certificate of qualification. To obtain that certificate it shall file, on a form prescribed by the Secretary of State, a statement and designation signed by a corporate officer or, in the case of a foreign association that has no officers, signed by a trustee stating:
 - a) Its name and the state or place of its incorporation or organization;
 - b) The street address of its principal executive office;
 - c) The street address of its principal office within this state, if any;
 - d) The mailing address of its principal executive office, if different from the addresses specified above;
 - e) The name of an agent upon whom process directed to the corporation may be served within this state, as specified;
 - f) Its irrevocable consent to service of process directed to it upon the agent designated and to service of process on the Secretary of State if the agent so designated or the agent's successor is no longer authorized to act or cannot be found at the address given; and
 - g) If it is a corporation which will be subject to the Insurance Code as an insurer, it shall so state that fact. (Corp. Code, § 2105, subd. (a).)
- 10) Specifies that consent extends to service of process directed to the foreign corporation's agent in California for a search warrant issued pursuant to Section 1524.2 of the Penal Code, or for any other validly issued and properly served search warrant, for records or documents that are in the possession of the foreign corporation and are located inside or outside of this

state. This subparagraph shall apply to a foreign corporation that is a party or a nonparty to the matter for which the search warrant is sought. For purposes of this subparagraph, "properly served" means delivered by hand, or in a manner reasonably allowing for proof of delivery if delivered by United States mail, overnight delivery service, or facsimile to a person or entity listed as specified. (Corp. Code, § 2105, subd. (a)(6)(B).)

- 11) States that delivery by hand of a copy of any process against a foreign corporation (a) to any officer of the corporation or its general manager in this state, or if the corporation is a bank to a cashier or an assistant cashier, (b) to any natural person designated by it as agent for the service of process, or (c), if the corporation has designated a corporate agent, to any person named in the latest certificate of the corporate agent filed with the Secretary of State shall constitute valid service on the corporation. (Corp. Code, § 2110.)
- 12) Provides that a foreign limited liability company may apply for a certificate of registration to transact business in this state by delivering an application to the Secretary of State for filing on a form prescribed by the Secretary of State. The application shall state all of the following:
 - a) The name of the foreign limited liability company, or an alternate name, as specified;
 - b) The state or other jurisdiction under whose law the foreign limited liability company is organized and the date of its organization in that state or other jurisdiction, and a statement that the foreign limited liability company is authorized to exercise its powers and privileges in that state or other jurisdiction;
 - c) The street address of the foreign limited liability company's principal office and of its principal business office in this state, if any;
 - d) The name and street address of the foreign limited liability company's initial agent for service of process in this state who meets the qualifications specified. If a corporate agent is designated, only the name of the agent shall be set forth;
 - e) A statement that the Secretary of State is appointed the agent of the foreign limited liability company for service of process if the agent has resigned and has not been replaced or if the agent cannot be found or served with the exercise of reasonable diligence; and
 - f) The mailing address of the foreign limited liability company if different than the street address of the principal office, or principal business office in this state. (Corp. Code, § 17708.02, subd. (a).)

EXISTING FEDERAL LAW: The Stored Communications Act regulates access to electronic communications from providers of electronic communications services. Under the Act a person is prohibited from (1) intentionally accessing without authorization a facility through which an electronic communication service is provided; or (2) intentionally exceeding an authorization to access that facility; and thereby obtaining, altering or preventing the authorized access to a wire or electronic communication while in electronic storage in such a system. The Act requires governmental entities to obtain a warrant prior to requiring a provider of electronic communication service or remote computing service to disclose a record or other information

pertaining to a subscriber to or customer of such service. (18 U.S.C. § 2701 et seq.)

FISCAL EFFECT: Unknown

COMMENTS:

- 1) **Author's Statement:** According to the author, "AB 844 would amend the definition of 'properly served' in PC§1524.2(a)(6) to reflect the common and increasingly prevalent practice of communications and computing service companies to insist on electronic service of process. Such policies may request that service be by email, or via a web portal provided by the company."
- 2) **Service of Process:** Existing law requires both a domestic and foreign corporation to designate an agent for the purpose of service of process when the corporation files a certificate in the office of the Secretary of State to transact business in California. (Corp. Code, §§ 1505 and 2105.) An agent for service of process is an individual who resides in the state, or a corporation, designated to accept court documents if the business entity is sued. Designating a person or an entity to receive service of process ensures that the corporation has formal notice of a law suit and any related court documents. The designated agent for service of process is also the entity upon whom a search warrant would be served for records or documents that are in the possession of the foreign corporation.

In order to be "properly served," the applicable statutes require the court documents to be "delivered by hand, or in a manner reasonably allowing for proof of delivery if delivered by United States mail, overnight delivery service, or facsimile to a person or entity listed as specified." (Pen. Code, § 1524.2, subd. (a)(6); Corp. Code, § 2105, subd. (a)(6)(B).) This bill adds other means of notice as specified by the foreign corporation or the foreign limited liability company, including email or submission via an Internet web portal designated by the corporation for the purpose of service of process. According to the author of this bill, this addition reflects the common and increasingly prevalent practice of communications and computing service companies to insist on service of process through electronic means.

- 3) **Argument in Support:** According to the *Los Angeles County District Attorney's Office*, the sponsor of this bill, "Federal law governs the collection of electronic communications from providers of electronic communications services (ECS) and remote computing services (RCS). The Stored Communications Act governs the collection of such evidence when it is in storage (i.e., in situations other than a wiretap). The SCA requires covered entities to honor government requests to preserve and turn over information about subscribers and their transactions and stored communications. The SCA requires that a covered entity honor a properly issued search warrant from any state court of 'general criminal jurisdiction' authored by the law of that State to issue search warrants.

"California has a complimentary statute governing the collection of such evidence from remote computing and electronic communication services. California Penal Code Section 1524.2 requires that California corporations and foreign corporations qualified to do business in our state to honor search warrants for information about subscribers and their transactions and stored communications, wherever those records are stored. For good measure, California Corporations Code Section 2105 specifically requires foreign corporations to consent to

service pursuant to Penal Code Section 1524.2.

"A problem is that the statute's definition of 'properly served' is out-of-date. The following forms of service are permitted: 'delivery by hand, or in a manner reasonably allowing for proof of delivery if delivered by the United States mail, overnight delivery service, or facsimile...' It is becoming increasingly common for ISP's and others to insist on electronic service, either by email or via a web portal established for this purpose.

- 4) **Related Legislation:** SB 178 (Leno) would prohibit a government entity from compelling the production of or access to electronic communication information or electronic device information, as defined, without a search warrant or wiretap order, except for emergency situations, as defined. SB 178 is pending hearing by the Senate Committee on Appropriations.
- 5) **Prior Legislation:**
 - a) SB 467 (Leno), of the 2013-2014 Legislative Session, would have required a search warrant when a governmental agency is seeking the contents of a wire or electronic communication that is stored, held or maintained by a provider, as specified. AB 467 was vetoed.
 - b) SB 1980 (McPherson), Chapter 864, Statutes of 2002, created state procedures, similar to those in federal law, for a governmental entity to gather specified records, not including the contents of stored communications, from a provider of electronic communication service or a remote computing service by search warrant.
 - c) SB 662 (Figueroa), Chapter 896, Statutes of 1999, established a procedure for obtaining and serving a search warrant on a foreign corporation that provides electronic communication services or remote computing service to the general public and is registered to do business in California.

REGISTERED SUPPORT / OPPOSITION:

Support

Los Angeles County District Attorney's Office (Sponsor)
California District Attorneys Association
California State Sheriffs' Association

Opposition

None

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

Date of Hearing: April 14, 2015
Counsel: Stella Choe

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Bill Quirk, Chair

AB 909 (Quirk) – As Introduced February 26, 2015

SUMMARY: Requires law enforcement agencies responsible for taking or processing rape kit evidence to annually report to the Department of Justice (DOJ) specified information pertaining to the processing of rape kits. Specifically, **this bill:**

- 1) Provides that a law enforcement agency responsible for taking or processing rape kit evidence shall annually report, by July 1 of each year, all of the following information to the Department of Justice:
 - a) The number of rape kits the law enforcement agency collects;
 - b) The number of rape kits the law enforcement agency collects that are tested; and
 - c) The number of rape kits the law enforcement agency collects that are not tested and the reason the rape kit was not tested.
- 2) Requires, beginning January 1, 2017, and each January 1 after that date, DOJ to submit a report to the appropriate policy committees of the Legislature summarizing the information DOJ receives pursuant to the provisions in this bill.
- 3) States that the report shall be submitted in compliance with requirements in existing statutes relating to submission of reports by state or local agencies.

EXISTING LAW:

- 1) Establishes the Sexual Assault Victims' DNA Bill of Rights which provides victims of sexual assault with the following rights:
 - a) The right to be informed whether or not a DNA profile of the assailant was obtained from the testing of the rape kit evidence or other crime scene evidence from their case;
 - b) The right to be informed whether or not the DNA profile of the assailant developed from the rape kit evidence or other crime scene evidence has been entered into DOJ Data Bank of case evidence; and
 - c) The right to be informed whether or not there is a match between the DNA profile of the assailant developed from the rape kit evidence or other crime scene evidence and a DNA profile contained in the DOJ Convicted Offender DNA Data Base, provided that disclosure would not impede or compromise an ongoing investigation. (Pen. Code, § 680, subd. (c)(2).)

- 2) States the Legislative finding that law enforcement agencies have an obligation to victims of sexual assaults in the proper handling, retention, and timely DNA testing of rape kit evidence or other crime scene evidence and to be responsive to victims concerning the developments of forensic testing and the investigation of their cases. (Pen. Code, § 680, subd. (b)(4).)
- 3) Specifies that law enforcement should do one of the following for any sexual assault forensic evidence received by the law enforcement agency on or after January 1, 2015:
 - a) Submit sexual assault forensic evidence to the crime lab within 20 days after it is booked into evidence; or
 - b) Ensure that a rapid turnaround DNA program is in place to submit forensic evidence collected from the victim of a sexual assault directly from the medical facility where the victim is examined to the crime lab within five days after the evidence is obtained from the victim. (Pen. Code, § 680, subd. (b)(7)(A).)
- 4) Specifies that the crime lab should do one of the following for any sexual assault forensic evidence received by the crime lab on or after January 1, 2016:
 - a) Process sexual assault forensic evidence, create DNA profiles when able, and upload qualifying DNA profiles into the Combined DNA Index System (CODIS) as soon as practically possible, but not later than 120 days after initially receiving the evidence; or
 - b) Transmit the sexual assault forensic evidence to another crime lab as soon as practically possible, but no later than 30 days after initially receiving the evidence for processing of the evidence for the presence of DNA. If a DNA profile is created, the transmitting crime lab should upload the profile into CODIS as soon as practically possible, but no later than 30 days after being notified about the presence of DNA. (Pen. Code, § 680, subd. (b)(7)(B).)
- 5) Provides that the above provisions establishing timelines for testing DNA do not require a lab to test all items of forensic evidence obtained in a sexual assault forensic evidence examination. A lab is considered to be in compliance with the guidelines set forth in those provisions when representative samples of the evidence are processed by the lab in an effort to detect the foreign DNA of the perpetrator. (Pen. Code, § 680, subd. (b)(7)(C).)
- 6) Defines "rapid turnaround DNA program" as a program for the training of sexual assault team personnel in the selection of representative samples of forensic evidence from the victim to be the best evidence, based on the medical evaluation and patient history, the collection and preservation of that evidence, and the transfer of the evidence directly from the medical facility to the crime lab, which is adopted pursuant to a written agreement between the law enforcement agency, the crime lab, and the medical facility where the sexual assault team is based. (Pen. Code, § 680, subd. (b)(7)(E).)
- 7) States if the law enforcement agency elects not to analyze DNA evidence within 6 months prior to the established time limits, a victim of a sexual assault offense as specified, shall be informed, either orally or in writing, of that fact by the law enforcement agency. (Pen. Code, § 680, subd. (d).)

- 8) States notwithstanding any other limitation of time described, a criminal complaint may be filed within one year of the date on which the identity of the suspect is conclusively established by DNA testing, if both of the following conditions are met:
- a) The crime is one that requires the defendant to register as a sex offender; and
 - b) The offense was committed prior to January 1, 2001, and biological evidence collected in connection with the offense is analyzed for DNA type no later than January 1, 2004, or the offense was committed on or after January 1, 2001, and biological evidence collected in connection with the offense is analyzed for DNA type no later than two years from the date of the offense. (Pen. Code, § 803, subd. (g)(1).)

FISCAL EFFECT: Unknown

COMMENTS:

- 1) **Author's Statement:** According to the author, "Over the last several years, hundreds of thousands of unanalyzed rape kits have been discovered nationwide. In response, several states have passed legislation that sets timelines for analyzing the kits in a timely manner. Others passed measures to track and report rape kits.

"An October 2014 California State Auditor report highlighted the pressing need for California to more adequately track and report rape kits and recommended that law enforcement agencies report this information annually.

"Tracking and reporting rape kits is essential to fully understanding why investigators choose to send some kits to be analyzed and not others. It is essential to understand how large the backlog really is in order to tackle the problem effectively.

"Law enforcement agencies are not required to track or report the number of rape kits they collect or how many go unanalyzed. Further, investigators are not required to document their reasons for not submitting a rape kit to be tested. Due to the lack of tracking and reporting requirements, the total number of unanalyzed kits statewide is unknown. The unknown number of unanalyzed kits that are sitting in evidence rooms across the state allow perpetrators to walk free and deprive victims of justice.

"AB 909 will require local law enforcement agencies to track and report on the number of rape kits they collect, test and how many go untested. For untested rape kits, law enforcement agencies will be required to document the reason for not submitting the kit to be tested. Law enforcement agencies will also be required to submit this information to the Department of Justice annually."

- 2) **Tracking of Rape Kit Tests:** A recent report by the California State Auditor found that law enforcement agencies rarely document reasons for not analyzing sexual assault evidence kits. (California State Auditor, *Sexual Assault Evidence Kits* (Oct. 2014).) Specifically, the report found that "[i]n 45 cases . . . reviewed in which investigators at the three agencies we visited did not request a kit analysis, the investigators rarely documented their decisions. As a result, we often could not determine with certainty why investigators decided that kit analysis was not needed. Among the 15 cases we reviewed at each of the three locations, we found no

examples of this documentation at either the Sacramento Sheriff or the San Diego Police Department, and we found only six documented explanations at the Oakland Police Department. Investigative supervisors at both the Sacramento Sheriff and the San Diego Police Department indicated that their departments do not require investigators to document a decision not to analyze a sexual assault evidence kit. The lieutenant at the Oakland Police Department's Special Victims Section stated that, during the period covered by our review, the section expected such documentation from its investigators in certain circumstances, but that it was not a formal requirement at that time." (*Id.* at p. 23.)

Upon a more in-depth review of the individual cases, the report found that analysis of the kits would not have been likely to further the investigation of those cases. The "decisions not to request sexual assault evidence kit analysis in the individual cases we reviewed appeared reasonable because kit analysis would be unlikely to further the investigation of those cases. We reviewed specific cases at each agency in which investigators did not request analysis. Our review included 15 cases from each of the three agencies we visited with offenses that occurred from 2011 through 2013, for a total of 45 cases. In those cases, we did not identify any negative effects on the investigations as a result of decisions not to request analysis. We based our conclusions on the circumstances present in the individual cases we reviewed, as documented in the files for the 45 cases and as discussed with the investigative supervisors." (*Id.* at p. 21.)

Even though the individual reasons for not testing the kits was found to be reasonable, the report still stressed the need for more information about why agencies decide to send some kits but not others. It would benefit not only investigators, but the public as well, because requiring investigators to document their reasons for not requesting kit analysis would assist agencies in responding to the public concern about unanalyzed kits. Doing so would allow for internal review and would increase accountability to the public. (*Id.* at pp. 23-24.)

Specifically, the report recommended the Legislature to "direct law enforcement agencies to report to Justice annually how many sexual assault evidence kits they collect and the number of kits they analyze each year. The Legislature should also direct law enforcement agencies to report annually to Justice their reasons for not analyzing sexual assault evidence kits. The Legislature should require an annual report from Justice that details this information." (*Id.* at p. 4.)

- 3) **Argument in Support:** The *National Association of Social Workers, California Chapter* supports AB 909 "which will require local law enforcement agencies to track and report on the number of rape kits they collect, how many they test and how many go untested. For untested rape kits, law enforcement agencies will be required to document the reason for not submitting the kit to be tested. Law enforcement agencies will also be required to submit this information to the DOJ by July 1 of each year. This measure will also require the DOJ to submit an annual report to the appropriate legislative committees beginning January 1, 2017.

"Currently law enforcement agencies are not required to track or report information about the number of rape kits they collect or how many go unanalyzed. Further, investigators are not required to document their reasons for not submitting a rape kit to be tested. Due to the lack of tracking and reporting requirements, the total number of unanalyzed kits statewide is unknown. The unknown number of unanalyzed kits that are sitting in evidence rooms across

the state allow perpetrators to walk free and deprive victims of justice."

- 4) **Argument in Opposition:** According to the *California State Sheriffs' Association*, "By requiring law enforcement agencies to provide statistics to DOJ, AB 909 will create another unfunded mandate and would place significant cost burdens on these agencies in terms of resources and personnel. Doing so could inadvertently hamper our ability to process these kits.

"Local law enforcement agencies are still dealing with the effects of significant budget cuts over the last several years while trying to maintain critical services. Adding an additional reporting requirement would divert limited resources away from providing current services."

5) **Prior Legislation:**

- a) AB 1517 (Skinner), Chapter 874, Statutes of 2014, established timelines for law enforcement agencies and crime labs to perform and process DNA testing of rape kit evidence.
- b) SB 978 (DeSaulnier), Chapter 136, Statutes of 2014, allows the hospital to notify the local rape victim counseling center when the victim is presented to the hospital for the medical or evidentiary physical examination, upon approval of the victim.
- c) AB 322 (Portantino), of the 2011-12 Legislative Session, would have created a pilot project, commencing July 1, 2012 and ending on January 1, 2016, in 10 counties to have DOJ test all rape kits collected after the start date of the pilot project in those counties to determine if such testing increases their arrest rates in rape cases. AB 322 was vetoed.
- d) AB 558 (Portantino), of the 2009-10 Legislative Session, would have required local law enforcement agencies responsible for taking or collecting rape kit evidence to annually report to the Department of Justice statistical information pertaining to the testing and submission for DNA analysis of rape kits, and would have made the reports subject to inspection under the California Public Records Act. AB 558 was vetoed.
- e) AB 1017 (Portantino), of the 2009-10 Legislative Session, would have required that beginning July 1, 2012, and annually thereafter until July 1, 2016, each local law enforcement agency responsible for taking or collecting rape kit evidence shall annually report to the DOJ various statistical information pertaining to the testing and submission for DNA analysis of rape kits, as specified. AB 1017 was vetoed.

REGISTERED SUPPORT / OPPOSITION:

Support

American Civil Liberties Union of California
California Women Lawyers
Crime Victims United
National Association of Social Workers – California Chapter

Opposition

California State Sheriffs' Association

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

Date of Hearing: April 14, 2015
Counsel: Sandra Uribe

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Bill Quirk, Chair

AB 920 (Gipson) – As Amended April 8, 2015
As Proposed to be Amended in Committee

SUMMARY: Allows a victim, next of kin, or victim's attorney to obtain a copy of the packet prepared by the parole board for purposes of a parole-suitability hearing. Specifically, **this bill:**

- 1) Authorizes the victim, victim's next of kin, or victim's attorney to request a copy of the parole board packet.
- 2) Requires the Board of Parole Hearings (BPH) to provide the packet, if requested, at the same time that the information is given to the district attorney.
- 3) Requires the BPH to redact any confidential information in the board packet before providing it to the victim, or the victim's attorney.
- 4) Allows the victim or next of kin to submit relevant documents related to any subject about which they have a right to be heard, including recommendations regarding the grant of parole.
- 5) States that any other information possessed by the victim or next of kin which is not contained in the board packet shall be submitted in writing to BPH no later than 10 days before the hearing.

EXISTING LAW:

- 1) Provides guidelines for the BPH to schedule parole hearings for prisoners in California Department of Correction and Rehabilitation for whom they are appropriate. (Pen. Code, § 3041.5.)
- 2) Allows the prisoner, at least 10 days prior to the parole suitability hearing, to review his or her file which will be examined by the board, and gives the prisoner the opportunity to file a written response to any material contained in the file. (Pen. Code, § 3041.5, subd. (a)(1).)
- 3) Allows the prisoner to be present at the hearing, to ask and answer questions, and to speak on his or her own behalf. (Pen. Code, § 3041.5, subd. (a)(2).)
- 4) Entitles the victim or next of kin if the victim has died, to be notified, upon request, of any parole-eligibility hearing and of the right to appear, either personally or by other means specified, to reasonably express his or her views, and to have his or her statements considered. (Pen. Code, § 679.02, subd. (a)(5).)

- 5) Requires the BPH to give at least 30-day's notice to the superior court judge, the defendant's trial attorney, the district attorney, and the investigating law enforcement agency, about an upcoming parole-review hearing. (Pen. Code, § 3042.)
- 6) Requires the BPH, upon request, to notify any victims of any crime committed by the prisoner, or the next of kin if the victim has died, at least 90 days before any hearing to review or consider the parole suitability or the setting of a parole date for any prisoner in a state prison. (Pen. Code, § 3043, subd. (a)(1).)
- 7) Provides that the victim, next of kin, members of the victim's family, and two designated representatives have the right to appear, personally or by counsel, at the hearing and to adequately and reasonably express his, her, or their views concerning the prisoner and the case, including, but not limited to the commitment crimes, determinate term commitment crimes for which the prisoner has been paroled, any other felony crimes or crimes against the person for which the prisoner has been convicted, the effect of the enumerated crimes on the victim and the family of the victim, the person responsible for these enumerated crimes, and the suitability of the prisoner for parole. (Pen. Code, § 3043, subd. (b)(1).)
- 8) Provides that any statement by a representative designated by the victim or next of kin may cover any subject about which the victim or next of kin has the right to be heard, including any recommendation regarding the granting of parole. (Pen. Code, § 3043, subd. (b)(2).)
- 9) Requires BPH, in deciding whether to release the person on parole, to consider the entire and uninterrupted statements of the victim or victims, next of kin, immediate family members of the victim, and the designated representatives, if applicable, and shall include in its report a statement whether the person would pose a threat to public safety if released on parole. (Pen. Code, § 3043, subd. (d).)
- 10) Permits the victim, his or her next of kin, immediate family members, or two representatives to provide a statement in writing or a recorded statement in lieu of making a personal appearance. (Pen. Code, § 3043.2, subd. (a)(1).)
- 11) Allows the victim to appear by means of videoconferencing, if it is available at the hearing site. (Pen. Code, § 3043.25.)

FISCAL EFFECT: Unknown

COMMENTS:

- 1) **Author's Statement:** According to the author, "Our justice system is based on principles of fair treatment and equal rights. However, when the victim of a crime is not allowed access to information relevant to the parole hearing of their assailant, which is provided to the inmate's attorney seeking release, there is not equality for both sides. AB 920 addresses this disparate treatment by requiring that an attorney designated by a crime victim or their next of kin is granted the same rights to discovery as the inmate's attorney and district attorney during a parole hearing."
- 2) **Victim's Bill of Rights:** On November 4, 2008, the voters approved Proposition 9, the Victims' Bill of Rights Act of 2008: Marsy's Law. This measure amended the California

Constitution to provide additional rights to crime victims. In pertinent part, for purposes of this bill, the initiative allows a victim "[t]o be informed, upon request, of the conviction, sentence, place and time of incarceration, or other disposition of the defendant, the scheduled release date of the defendant, and the release of or the escape by the defendant from custody. (Cal. Const., article I, § 28(b)(12).)

Marsy's Law also amended increased victims' rights with regards to lifer parole-suitability hearings. Specifically, it did the following:

- Expanded the definition of "victim" related to who can attend a hearing;
- Allows victims to attend hearings without being questioned by the prisoner or the prisoner's attorney;
- Expanded the scope of persons entitled to a stenographic recording of the proceedings;
- Requires the BPH to consider all of the victim's statements when determining whether to release a prisoner on parole;
- Requires the BPH, when denying parole to consider the victim's safety, among other circumstances, in determining the length of the denial period;
- Requires the BPH, upon request, to send notice to victims and victim's next of kin if the victim died, 90 days prior to any hearing to review or consider the parole suitability or the setting of a parole date; and to confirm the date, time and place of the hearing no later than 14 days prior to the hearing date;
- Expanded the scope of persons allowed to act as victim representatives at parole hearings, and allows representatives to make a statement even when the victim, or victim's next of kin, also makes a statement;
- Permits victims to have notice and to submit written statements concerning a prisoner's request for advancement of his/her hearing date;
- Allows victims, victim's next of kin and their representatives to make statements which reasonably express their views concerning the prisoner, including, but not limited to the crimes committed, the effect of the crimes on the victim and the victim's family, and the prisoner's suitability for parole.
(http://www.cdcr.ca.gov/BOPH/marsys_law.html.)

This bill would expand the rights of victims at parole suitability hearings by allowing the victim, next of kin, or victim's attorney access to the information given to the inmate's attorney and the district attorney. The bill also allows the victim or next of kin to submit relevant documents pertaining to any subject about which the victim has a right to be heard.

- 3) **Parole Grant Rate by Presence of Victim at Suitability Hearing:** In 2011 Stanford Law School's Criminal Justice Center published a study examining the rates of release for parolees

serving life sentences. One of the factors considered was whether a victim appeared at the hearing, with "victim" being broadly defined to include not only the immediate victim, but also a friend, family member, or acquaintance of the victim. The report notes, "There is a statistically significant difference in the grant rate between hearings at which victims are present and hearings at which victims are not present. The effect is in the expected direction: when victims attending hearings, the grant rate is less than half the rate when victims do not attend. A more nuanced analysis of the relationship between victim participation and disposition rates might identify the reasons for this correlation. In particular, a better tracking of when victims most commonly participate in hearings—particularly whether they typically appear primarily at initial or first subsequent suitability hearings – could explain why their participation is associated with parole denials." (Weisberg et al. *Life in Limbo: An Examination of Parole Release for Prisoners Serving Life Sentences with the Possibility of Parole in California* (Sept. 2011) pp. 19-20, <https://www.law.stanford.edu/sites/default/files/child-page/164096/doc/slpublic/SCJC_report_Parole_Release_for_Lifers.pdf.)

- 4) **California Constitutional Limitations on Amending a Voter Initiative:** Because Proposition 9 was a voter initiative, the Legislature may not amend the statute without subsequent voter approval unless the initiative permits such amendment, and then only upon whatever conditions the voters attached to the Legislature's amendatory powers. (*People v. Superior Court (Pearson)* (2010) 48 Cal.4th 564, 568; see also Cal. Const., art. II, § 10, subd. (c).) The purpose of California's constitutional limitation on the Legislature's power to amend initiative statutes is to protect the people's initiative powers by precluding the Legislature from undoing what the people have done, without the electorate's consent. Courts have a duty to jealously guard the people's initiative power and, hence, to apply a liberal construction to this power wherever it is challenged in order that the right to resort to the initiative process is not improperly annulled by a legislative body. (*Proposition 103 Enforcement Project v. Quackenbush* (1998) 64 Cal.App.4th 1473.)

Proposition 9 provides: "The statutory provisions of this act shall not be amended by the Legislature except by a statute passed in each house by roll-call vote entered in the journal, three-fourths of the membership of each house concurring, or by a statute that becomes effective only when approved by the voters. However, the Legislature may amend the statutory provisions of this act to expand the scope of their application, to recognize additional rights of victims of crime, or to further the rights of victims of crime by a statute passed by a majority vote of the membership of each house."

Because this bill expands victim's rights at parole hearings, it is consistent with the intent of the initiative.

- 5) **Argument in Support:** According to *Crime Victims United of California*, the sponsor of this bill, "Under Marsy's Law crime victims have a constitutional right to have representation at all proceedings, including parole hearings. Under Penal Code Section 3043, the victim, victim next of kin or victim's representative/attorney has the right to attend the hearing and to express his/her views regarding the inmate and the case, including but not limited to, the commitment crime(s), determinate term commitment crime(s) for which the inmate has been convicted, the effect of the crime(s) on the victim and the family of the victim, the suitability of the inmate for parole, and more. And while the inmate's Board Packet is provided to Board Commissioners, the inmate's attorney and district attorney prior to the parole hearing,

the victim, victim's next of kin or victim's attorney is not provided that information despite the fact that it is read in to the public record and as such is not confidential. Such information may be relevant to the victim making their case for any recommendation regarding the granting of parole and as such, the victim, victim's next of kin or victim's attorney should be provided those documents ahead of the hearing consistent with the timelines laid out in statute for providing them to the inmate's attorney and district attorney.

"AB 920 seeks to better inform the victim, victim's next of kin or victim's attorney as they prepare to speak at a parole hearing by providing them with the same information provided to the inmate's attorney and district attorney that will ultimately make the case for or against parole of that inmate."

- 6) **Argument in Opposition:** The *Law Offices of Rosen Bien Galvan & Grunfeld* writes, "This firm represents prisoners in two class action lawsuits against the California Department of Corrections and Rehabilitation (CDCR), one of which includes the Board of Parole Hearings as a defendant. The first class action is *Coleman v. Brown*. The class we represent in *Coleman* consists of the approximately 38,000 prisoners in the California Department of Corrections (CDCR) with severe mental illness. Many of the class members are life prisoners who regularly appear before the Board of Parole Hearings. The second class action is *Armstrong v. Brown*. The *Armstrong* class consists of approximately 8,000 disabled prisoners with impairments in vision, hearing, mobility or learning. There are multiple court orders in *Armstrong* that require the Board of Parole Hearings to make the lifer process accessible to persons with disabilities, and we regularly monitor lifer parole suitability hearings as part of that case.

"We oppose Assembly Bill 920 because it would cause disclosure of confidential medical and mental health information protected by federal law to the victim or the victim's next of kin. The board packet contains significant information protected by state and federal privacy statutes, including but not limited to the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA) and the California Confidentiality of Medical Information Act. In addition, we do not believe it would be possible for the Board to accurately sort through the documents in the packet and to redact confidential medical information in a manner that would resolve these privacy claims. The recent amendment regarding redaction of confidential information does not address this problem, as it does not define confidential information, leaving the Board free to apply the customary standard in corrections, which limits confidential information to information that would reveal the identity of a confidential informant or otherwise endanger the safety of persons within the institution. This standard does nothing to protect confidential mental health and medical information.

"The current life process already gives victims and victims' families significant opportunities to influence the Board's decision making, and the new law's provisions are not necessary to permit victims and victims' next of kin to fully and meaningfully participate in the process.

"We urge you to reconsider these unwise provisions which violate federal law and are not needed to advance the goals of the legislation. The lifer review process is already excessively political and punitive towards life prisoners."

- 7) **Related Legislation:** AB 487 (Gonzalez) requires that when an inmate requests to advance a parole hearing, notice be sent to the district attorney of the county in which the offense was committed, in addition to the victim. AB 487 is pending hearing in the Assembly Appropriations Committee.

REGISTERED SUPPORT / OPPOSITION:

Support

Crime Victims United of California (Sponsor)
Association for Los Angeles Deputy Sheriffs
California State Lodge, Fraternal Order of Police
Long Beach Police Officers Association
Los Angeles County Professional Peace Officers Association
Los Angeles Police Protective League
Riverside Sheriffs Association
Sacramento County Deputy Sheriffs' Association
Santa Ana Police Officers Association

Opposition

California Attorneys for Criminal Justice
California Public Defenders Association
Legal Services for Prisoners with Children
Rosen Bien Galvan & Grunfeld LLP

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

Amendments Mock-up for 2015-2016 AB-920 (Gipson (A))

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

**Mock-up based on Version Number 98 - Amended Assembly 4/8/15
Submitted by: Sandy Uribe, Assembly Public Safety Committee**

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

SECTION 1. Section 3043 of the Penal Code is amended to read:

3043. (a) (1) Upon request to the Department of Corrections and Rehabilitation and verification of the identity of the requester, notice of a hearing to review or consider the parole suitability or the setting of a parole date for any prisoner in a state prison shall be given by telephone, certified mail, regular mail, or electronic mail, using the method of communication selected by the requesting party, if that method is available, by the Board of Parole Hearings at least 90 days before the hearing to a victim of a crime committed by the prisoner, or to the next of kin of the victim if the victim has died, to include the commitment crimes, determinate term commitment crimes for which the prisoner has been paroled, and any other felony crimes or crimes against the person for which the prisoner has been convicted. The requesting party shall keep the board apprised of his or her current contact information in order to receive the notice.

(2) No later than 30 days prior to the date selected for the hearing, a person, other than the victim, entitled to attend the hearing shall inform the board of his or her intention to attend the hearing and the name and identifying information of any other person entitled to attend the hearing who will accompany him or her.

(3) No later than 14 days prior to the date selected for the hearing, the board shall notify every person entitled to attend the hearing confirming the date, time, and place of the hearing.

(b) (1) The victim, next of kin, members of the victim's family, and two representatives designated as provided in paragraph (2) have the right to appear, personally or by counsel, at the hearing and to adequately and reasonably express his, her, or their views concerning the prisoner and the case, including, but not limited to, the commitment crimes, determinate term commitment crimes for which the prisoner has been paroled, any other felony crimes or crimes against the person for which the prisoner has been convicted, the effect of the enumerated crimes on the victim and the family of the victim, the person responsible for these enumerated crimes, and the suitability of the prisoner for parole.

(2) A statement provided by a representative designated by the victim or next of kin may cover any subject about which the victim or next of kin has the right to be heard including any recommendation regarding the granting of parole. The representatives shall be designated by the victim or, in the event that the victim is deceased or incapacitated, by the next of kin. They shall be designated in writing for the particular hearing prior to the hearing.

(c) (1) When notification has been requested pursuant to subdivision (a), a victim, the victim's next of kin, or the victim's attorney may request to be provided a copy of the board packet. The requested board packet shall be provided at the same time as that information is provided to the district attorney. ~~To the extent that any confidential information is included in the board packet, the victim, victim's next of kin, or the victim's lawyer shall protect the confidentiality of that information.~~ **The board shall redact any confidential information contained in the board packet before providing it to the victim, the victim's next of kin, or the victim's attorney.**

(2) The victim or the victim's next of kin may submit relevant documents related to any subject about which the victim or his or her next of kin has the right to be heard, including recommendations regarding the grant of parole. In addition to the statement authorized by Section 3043.2, information that the victim or his or her next of kin possesses that is not available in the ~~central file~~ or board packet shall be submitted in writing to the department no later than 10 days before the hearing.

(d) A representative designated by the victim or the victim's next of kin for purposes of this section may be any adult person selected by the victim or the family of the victim. The board shall permit a representative designated by the victim or the victim's next of kin to attend a particular hearing, to provide testimony at a hearing, and to submit a statement to be included in the hearing as provided in Section 3043.2, even though the victim, next of kin, or a member of the victim's immediate family is present at the hearing, and even though the victim, next of kin, or a member of the victim's immediate family has submitted a statement as described in Section 3043.2.

(e) The board, in deciding whether to release the person on parole, shall consider the entire and uninterrupted statements of the victim or victims, next of kin, immediate family members of the victim, and the designated representatives of the victim or next of kin, if applicable, made pursuant to this section and shall include in its report a statement as to whether the person would pose a threat to public safety if released on parole.

(f) In those cases where there are more than two immediate family members of the victim who wish to attend a hearing covered in this section, the board shall allow attendance of additional immediate family members to include the following: spouse, children, parents, siblings, grandchildren, and grandparents.

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

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Bill Quirk, Chair

AB 947 (Chávez) – As Introduced February 26, 2015

SUMMARY: Requires individuals convicted of possession of specified drugs (personal use) while armed with a loaded firearm to be punishable in county jail, instead of state prison, without changing the length of imprisonment. Requires individuals convicted of specified drug offenses (trafficking) while armed with a firearm to be imprisoned in the state prison, instead of county jail, without changing the length of imprisonment. Specifically, **this bill:**

- 1) Specifies the punishment for persons who commit the felony offenses of unlawfully possessing any amount of a substance containing cocaine base, a substance containing cocaine, a substance containing heroin, a substance containing methamphetamine, a crystalline substance containing phencyclidine, a liquid substance containing phencyclidine, plant material containing phencyclidine, or a hand-rolled cigarette treated with phencyclidine, while armed with a loaded, operable firearm, as imprisonment in the county jail for two, three, or four years.
- 2) Specifies the punishment for persons who are personally armed with a firearm in the commission of a violation or attempted violation of Section 11351, 11351.5, 11352, 11366.5, 11366.6, 11378, 11378.5, 11379, 11379.5, or 11379.6 of the Health and Safety Code (these offenses generally address the possession of drugs for sale, or sale drugs, or manufacturing of drugs) shall be punished by an additional and consecutive term of imprisonment in the state prison for three, four, or five years.

EXISTING LAW:

- 1) Specifies that every person who unlawfully possesses any amount of a substance containing cocaine base, a substance containing cocaine, a substance containing heroin, a substance containing methamphetamine, crystal or liquid phencyclidine (PCP), plant material containing PCP, or a hand-rolled cigarette treated with PCP while armed with a loaded, operable firearm is guilty of a felony punishable by imprisonment in the state prison for two, three, or four years. (Health & Saf. Code, § 11370.1, subd. (a).)
- 2) Defines "armed with" as having a firearm available for immediate offensive or defensive use. (Health & Saf. Code, § 11370.1, subd. (a).)
- 3) States that any person who is convicted under this section shall be ineligible for diversion or deferred entry of judgment. (Health & Saf. Code, § 11370.1, subd. (b).)
- 4) Specifies that person who is personally armed with a firearm in the commission of a violation or attempted violation of specified narcotics sales offenses shall be punished by an additional and consecutive term of imprisonment in the county jail for three, four, or five years. (Pen. Code, § 12022, subd. (c).)

- 5) Mandates that a person who is not personally armed with a firearm who, knowing that another principal is personally armed with a firearm, is a principal in the commission of an offense or attempted offense specified in subdivision (c), shall be punished by an additional and consecutive term of imprisonment in the county jail for one, two, or three years. (Pen. Code, § 12022, subd. (d).)
- 6) States that for purposes of imposing an enhancement under Section 1170.1, the enhancements under this section shall count as a single enhancement. (Pen. Code, § 12022, subd. (e).)
- 7) Allows the court to strike the additional punishment for the enhancements in an unusual case where the interests of justice would best be served, if the court specifies on the record and enters into the minutes the circumstances indicating that the interests of justice would best be served by that disposition. (Pen. Code, § 12022, subd. (f).)
- 8) States that every person who possesses for sale or purchases for purposes of sale any specified drugs or narcotics shall be punished by imprisonment in the county jail for two, three, or four years. (Health & Saf. Code, § 11351.)
- 9) Specifies that every person who possesses for sale or purchases for purposes of sale cocaine base, as specified, shall be punished by imprisonment in the county jail for a period of two, three, or four years. (Health & Saf. Code, § 11351.5)
- 10) Provides that every person who transports, imports into this state, sells, furnishes, administers, or gives away, or offers to transport, import into this state, sell, furnish, administer, or give away, or attempts to import into this state or transport specified drugs or narcotics, unless upon the written prescription of a physician, dentist, podiatrist, or veterinarian licensed to practice in this state, shall be punished by imprisonment in the county jail for three, four, or five years. (Health & Saf. Code, § 11352, subd. (a).)
- 11) States that any person who has under his or her management or control any building, room, space, or enclosure, either as an owner, lessee, agent, employee, or mortgagee, who knowingly rents, leases, or makes available for use, with or without compensation, the building, room, space, or enclosure for the purpose of unlawfully manufacturing, storing, or distributing any controlled substance for sale or distribution shall be punished by imprisonment in the county jail for not more than one year, in the county jail for 16 months, two or three years. (Health & Saf. Code, § 11366.5, subd. (a).)
- 12) Specifies that any person who has under his or her management or control any building, room, space, or enclosure, either as an owner, lessee, agent, employee, or mortgagee, who knowingly allows the building, room, space, or enclosure to be fortified to suppress law enforcement entry in order to further the sale of any amount of cocaine base as specified, cocaine as specified, heroin, phencyclidine, amphetamine, methamphetamine, or lysergic acid diethylamide and who obtains excessive profits from the use of the building, room, space, or enclosure shall be punished by imprisonment in the county jail for two, three, or four years. (Health & Saf. Code, § 11366.5, subd. (b).)

- 13) Specifies that any person who utilizes a building, room, space, or enclosure specifically designed to suppress law enforcement entry in order to sell, manufacture, or possess for sale any amount of cocaine base as specified, cocaine as specified, heroin, phencyclidine, amphetamine, methamphetamine, or lysergic acid diethylamide shall be punished by imprisonment in the county jail for three, four, or five years. (Health & Saf. Code, § 11366.6.)
- 14) States that a person who possesses for sale specified controlled substances that meets any of the following criteria shall be punished by imprisonment in the county jail for 16 months, two, or three years. (Health & Saf. Code, § 11378.)
- 15) States that every person who possesses for sale phencyclidine (PCP) or any analog or any precursor of phencyclidine as specified, shall be punished by imprisonment in the county jail for a period of three, four, or five years. (Health & Saf. Code, § 11379.)
- 16) States that every person who transports, imports into this state, sells, furnishes, administers, or gives away, or offers to transport, import into this state, sell, furnish, administer, or give away, or attempts to import into this state or transport phencyclidine or any of its analogs as specified, unless upon the prescription of a physician, dentist, podiatrist, or veterinarian licensed to practice in this state, shall be punished by imprisonment in the county jail for a period of three, four, or five years. (Health & Saf. Code, § 11379.5, subd. (a).)
- 17) Specifies that any person who transports for sale any specified controlled substances within this state from one county to another noncontiguous county shall be punished by imprisonment pursuant in the county jail for three, six, or nine years. (Health & Saf. Code, § 11379.5, subd. (b).)
- 18) States that every person who manufactures, compounds, converts, produces, derives, processes, or prepares, either directly or indirectly by chemical extraction or independently by means of chemical synthesis, any specified controlled substance shall be punished by imprisonment in the county jail for three, five, or seven years and by a fine not exceeding fifty thousand dollars (\$50,000). (Health & Saf. Code, § 11379.6, subd. (a).)
- 19) Provides that every person who offers to manufacture drugs as specified shall be punished by imprisonment in the county jail for three, four, or five years. (Health & Saf. Code, § 11379.6, subd. (c).)

FISCAL EFFECT: Unknown

COMMENTS:

- 1) **Author's Statement:** According to the author, "California is one of the nation's leaders in drug defense; this change in punishment is essential to continue the war on drugs and is in conformity with the goals of the Legislature in enacting AB 109."
- 2) **Realignment:** AB 109, Chapter 15, Statutes of 2011. AB 109 is generally referred to as "realignment." This bill made a number of felonies punishable by imprisonment in a county jail as opposed to state prison. The felonies punishable by imprisonment in county jail were

generally deemed to be on the lower end of the felony spectrum. The bill continued to require imprisonment in state prison for serious and violent felonies, and felonies requiring registration as a sex offender. Also requiring imprisonment in the state prison, were situations when the defendant was convicted on a felony and had a prior conviction for a serious or violent felony, or a felony subjecting the defendant to registration as a sex offender.

- 3) **Punishment Scheme for Health and Safety Code section 11370.1 and Penal Code section 12022(c) Prior to Realignment:** Prior to realignment, possession of specified controlled substances for personal use while armed with a loaded, operable firearm was punishable by state prison for two, three, or four years. (Pen. Code, § 11370.1.) Prior to realignment, a person who was personally armed with a firearm in the commission of specified drug trafficking offenses was subject to an enhancement which imposed an additional and consecutive term of imprisonment in the state prison for three, four, or five years. (Pen. Code, § 12022, subd. (c).)
- 4) **Proposed Legislation Would Not Change the Sentencing Scheme for Individuals Charged with Specified Drug Trafficking Offenses Without an Enhancement That Imposes State Prison:** Pursuant to realignment drug trafficking offenses including possession of drugs for sale, sale of drugs, and manufacturing of drugs are now punishable under Penal Code section 1170(h) with imprisonment in the county jail, rather than state prison. (Pen. Code, §§ 11351, 11351.5, 11352, 11366.5, 11366.6, 11378, 11378.5, 11379, 11379.5, 11379.6.) Individuals convicted on any of those drug trafficking offenses without an enhancement specifying state prison, would continue to be imprisoned in county jail under Pen. Code section 1170(h).

The proposed legislation would impose a state prison enhancement when an individual is convicted of the specified drug trafficking offenses while personally armed with a firearm. The imposition of that state prison enhancement would require that time imposed for the underlying drug trafficking offense also be served in state prison. Under *People v. Vega* (2014), 222 Cal. App. 4th 1374, the imposition of an enhancement imposing state prison on a base term punishable in county jail results in the entire sentence (base term + enhancement) served in state prison.

- 5) **Argument in Support:** According to the *California District Attorney Association*, “As you know, Realignment was intended to address prison overcrowding, escalating costs, and rehabilitation issues caused by incarcerating low-level offenders in the state prison. AB 109 sought to correct these issues by allowing such offenders to serve their prison time in local jail, leaving room in state prison for more serious offenders.

“Unfortunately, the drafting of AB 1089 created an incongruous result whereby a person convicted of simple possession of a controlled substance while armed with a loaded and operable firearm is punishable by a term in state prison, while a person convicted of the far more egregious crime of selling, and possessing a controlled substance (other than marijuana) for sale, while armed with a loaded and operable firearm is punishable in county jail pursuant to PC 1170(h).

"AB 947 would effectively flip the location of where these sentences are served – armed drug dealers and traffickers would be state prison eligible, while those who simply possess

controlled substances while armed would serve their sentences locally. We believe that this is consistent with the intent of the Legislature, and the goals of Realignment, that low level offenders serve time locally, and more serious offenders serve time in state prison.”

- 6) **Prior Legislation:** AB 109, Chapter 15, Statutes of 2011. This law, commonly referred to as “realignment,” generally provided that specified felonies are punishable by imprisonment in a county jail, as opposed to state prison. The bill provided exceptions to imprisonment in a county jail for a variety of felonies, including serious felonies and violent felonies, as defined, felonies requiring registration as a sex offender, and when the defendant has a prior conviction for a serious or violent felony, or a felony subjecting the defendant to registration as a sex offender, among other exceptions. Those exceptions continued to be punished by imprisonment in state prison.

REGISTERED SUPPORT / OPPOSITION:

Support

San Diego County District Attorney
California District Attorneys Association

Opposition

None

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

Date of Hearing: April 14, 2015

Counsel: Gabriel Caswell

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Bill Quirk, Chair

AB 950 (Melendez) – As Introduced February 26, 2015

SUMMARY: Allows a person, who is subject to a gun violence restraining order (GVRO), to transfer his or her firearms or ammunition to a licensed firearms dealer for the duration of the prohibition. If the firearms or ammunition have been surrendered to a law enforcement agency, the bill would entitle the owner to have them transferred to a licensed firearms dealer. The bill would additionally provide for the transfer of ammunition to a licensed firearms dealer by any person who is prohibited from owning or possessing ammunition.

EXISTING LAW:

- 1) Permits persons who are subject to domestic violence restraining orders to surrender their weapons to licensed firearms dealers for storage during the period they are not permitted to possess firearms. (Pen. Code, § 29380.)
- 2) States that the provisions of law establishing gun violence restraining orders shall take effect on January 1, 2016. (Pen. Code, § 18122.)
- 3) Requires, upon issuance of a gun violence restraining order, the court to order the restrained person to surrender to the local law enforcement agency all firearms and ammunition in the restrained person's custody or control, or which the restrained person possesses or owns. (Pen. Code, § 18120, subd. (b)(1).)
- 4) Allows an immediate family member of a person or a law enforcement officer to file a petition requesting that the court issue an ex parte gun violence restraining order, that expires no later than 21 days from the date of the order, enjoining the subject of the petition from having in his or her custody or control, owning, purchasing, possessing, or receiving a firearm or ammunition. (Pen. Code, §§ 18150 and 18155, subd. (c).)
- 5) States that the court, before issuing an ex parte gun violence restraining order, shall examine on oath, the petitioner and any witness the petitioner may produce, or in lieu of examining the petitioner and any witness the petitioner may produce, the court may require the petitioner and any witness to submit a written affidavit signed under oath. (Pen. Code, § 18155, subd. (a).)
- 6) Requires a showing that the subject of the petition poses a significant danger, in the near future, of personal injury to himself or herself, or another by having in his or her custody or control, owning, purchasing, possessing, or receiving a firearm as determined by considering specified factors and that less restrictive alternative have been ineffective, or are inappropriate for the situation, before an ex parte gun violence restraining order may be issued. (Pen. Code, § 18150, subd. (b).)

- 7) Specifies in determining whether grounds for a gun violence restraining order exist, the court shall consider all evidence of the following:
 - a) A recent threat of violence or act of violence by the subject of the petition directed toward another;
 - b) A recent threat of violence or act of violence by the subject of the petition directed toward himself or herself;
 - c) A violation of an emergency protective order that is in effect at the time the court is considering the petition;
 - d) A recent violation of an unexpired protective order;
 - e) A conviction for any specified offense resulting in firearm possession restrictions; or,
 - f) A pattern of violent acts or violent threats within the past 12 months, including, but not limited to, threats of violence or acts of violence by the subject of the petition directed toward himself, herself, or another. (Pen. Code, § 18155, subd. (b)(1).)
- 8) States that an ex parte gun violence restraining order shall be personally served on the restrained person by a law enforcement officer, or any person who is at least 18 years of age and not a party to the action, if the restrained person can reasonably be located. When serving a gun violence restraining order, a law enforcement officer shall inform the restrained person of the hearing that will be scheduled to determine whether to issue a gun violence restraining order. (Pen. Code, § 18160, subd. (b).)
- 9) Requires, within 21 days from the date an ex parte gun violence restraining order was issued, before the court that issued the order or another court in the same jurisdiction, the court to hold a hearing to determine if a gun violence restraining order should be issued. (Pen. Code, § 18160, subd. (c).)
- 10) Allows an immediate family member of a person or a law enforcement officer to request a court, after notice and a hearing, to issue a gun violence restraining order enjoining the subject of the petition from having in his or her custody or control, owning, purchasing, possessing, or receiving a firearm or ammunition for a period of one year. (Pen. Code, § 18170.)
- 11) States at the hearing, the petitioner shall have the burden of proving, by clear and convincing evidence, that both of the following are true:
 - a) The subject of the petition, or a person subject to an ex parte gun violence restraining order, as applicable, poses a significant danger of personal injury to himself or herself, or another by having in his or her custody or control, owning, purchasing, possessing, or receiving a firearm or ammunition; and,
 - b) A gun violence restraining order is necessary to prevent personal injury to the subject of the petition, or the person subject to an ex parte gun violence restraining order, as applicable, or another because less restrictive alternatives either have been tried and

found to be ineffective, or are inadequate or inappropriate for the circumstances. (Pen. Code, § 18175, subd. (b).)

- 12) Provides if the court finds that there is clear and convincing evidence to issue a gun violence restraining order, the court shall issue a gun violence restraining order that prohibits the subject of the petition from having in his or her custody or control, owning, purchasing, possessing, or receiving, or attempting to purchase or receive, a firearm or ammunition. If the court finds that there is not clear and convincing evidence to support the issuance of a gun violence restraining order, the court shall dissolve any temporary emergency or ex parte gun violence restraining order then in effect. (Pen. Code, § 18175, subd. (c).)
- 13) Requires the court to inform the restrained person that he or she is entitled to one hearing to request a termination of the gun violence restraining order and provide the restrained person with a form to request a hearing. (Pen. Code, § 18180, subd. (b).)
- 14) States that it is a misdemeanor offense for every person who files a petition for an ex parte gun violence restraining order or a gun violence restraining order issued after notice and a hearing knowing the information in the petition to be false or with the intent to harass. (Pen. Code, § 18200.)
- 15) Provides that it is a misdemeanor offense for every person who owns or possesses a firearm or ammunition with knowledge that he or she is prohibited from doing so by a gun violence restraining order and he or she shall be prohibited from having in his or her custody or control, owning, purchasing, possessing, or receiving, or attempting to purchase or receive, a firearm or ammunition for a five-year period, to commence upon the expiration of the existing gun violence restraining order. (Pen. Code, § 18205.)

FISCAL EFFECT: Unknown

COMMENTS:

- 1) **Author's Statement:** According to the author, "This measure will ensure the safety of the public without unnecessarily infringing upon the rights of individuals. It will reinstate passed statutes set by AB 539 in 2013 which created a process to provide an individual who is prohibited from owning or possessing firearms, due to a gun violence restraining order (GVRO), the ability to transfer their firearms to a federal firearm licensed (FFL) dealer for the duration of the restraining order. Gun violence restraining orders are extremely serious and reflect the gravity of the situation. As long as the firearm and ammunition is not in the possession of the individual and is not accessible, the intent of the GVRO is being carried out."
- 2) **Provides an Option of Storage of Firearms with Licensed Dealers:** AB 1014 (Skinner), Chapter 872, Statutes of 2014, enacted a novel gun violence restraining order law in California to address concerns related to mental health and firearms possession after the Isla Vista shooting in Santa Barbara. Under the provisions of AB 1014, persons subject to gun violence restraining orders are required to either sell their weapons or surrender those firearms to law enforcement. This bill seeks to provide an option that is available for persons who are subject to domestic violence restraining orders. That option was put into place by

AB 539 (Pan), Chapter 739, Statutes of 2013, which created a process whereby persons subject to a domestic violence restraining order could transfer their firearms to a federally licensed firearms dealer for the duration of the restraining order. This bill would provide that same remedy for persons subject to a gun violence restraining order. By enacting this bill, the original intent of AB 1014 is preserved, while the property interests of persons subject to restraint through a GVRO are also maintained.

- 3) **Argument in Support:** According to *The California Chapters of the Brady Campaign to Prevent Gun Violence*, "In 2014, the Brady Campaign was instrumental in the passage of AB 1014 (Skinner), which we believe, when implemented in 2016, will save numerous lives. The California Brady Campaign Chapters **support AB 950** by Assembly Member Melissa Melendez, as the bill will facilitate the implementation of this important new law.

"AB 1014 allows an immediate family member or a law enforcement officer to request a court to issue a Gun Violence Restraining Order (GVRO) to enjoin a person from owning or possessing a firearm or ammunition for a period of one year upon a showing that the person poses a significant danger of personal injury to himself, herself, or another. Existing law requires a person who is subject to such a restraining order to surrender his or her firearms and ammunition immediately upon request of any law enforcement officer. If no request is made, existing law requires the person to surrender his or her firearms or ammunition to a local law enforcement agency or to sell his or her firearms or ammunition to a licensed firearms dealer within 24 hours.

"This bill would allow a person who is subject to a GVRO to transfer his or her firearms and/or ammunition to a licensed firearms dealer for the duration of the prohibition. If the firearms or ammunition have been surrendered to a law enforcement agency, the bill would entitle the owner to have them transferred to a licensed firearms dealer. The bill would additionally provide for the transfer of ammunition to a licensed firearms dealer by any person who is prohibited from owning or possessing ammunition.

"AB 950 is essentially similar to AB 539 (2013) by Dr. Richard Pan and, in fact, Senator Pan is principle coauthor of this bill. Like AB 539, this bill presents a reasonable alternative for temporarily removing firearms, particularly in volatile situations. We believe that it would enhance public safety as people may be more likely to surrender their firearms and ammunition if they believe that there is a reasonable chance that they can get them back upon the termination of the prohibition. "

- 4) **Related Legislation:** AB 225 (Melendez), makes it felony perjury punishable by two, three, or four years to make a false statement on a petition for the issuance of a gun violence restraining order. AB 225 failed passage in the Assembly Committee on Public Safety and has been granted reconsideration.
- 5) **Prior Legislation:** AB 539 (Pan), Chapter 739, Statutes of 2013, created a process whereby persons subject to a domestic violence restraining order could transfer their firearms to a federally licensed firearms dealer for the duration of the restraining order.

REGISTERED SUPPORT / OPPOSITION:

Support

California Chapters of the Brady Campaign to Prevent Gun Violence
California Rifle and Pistol Association
Law Center to Prevent Gun Violence

Opposition

None

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

Date of Hearing: April 14, 2015
Counsel: Sandra Uribe

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Bill Quirk, Chair

AB 962 (Maienschein) – As Introduced February 26, 2015

SUMMARY: Makes specified sex crimes committed against victims with mental disorders or physical or developmental disabilities qualifying crimes for the "One Strike Sex Law" and the vulnerable victim enhancement. Specifically, **this bill:**

- 1) Adds the crimes of rape, sexual penetration, sodomy, and oral copulation committed against a person who is incapable of giving legal consent due to of a mental disorder or developmental or physical disability to the list of offenses which qualify for application of the "One Strike Sex Law."
- 2) Adds the crimes of rape, sexual penetration, sodomy, and oral copulation committed against a person who is incapable of giving legal consent due to of a mental disorder or developmental or physical disability to the list of offenses which qualify for the vulnerable-victim enhancement.

EXISTING LAW:

- 1) Provides that a person who commits an act of rape against a victim who is incapable of giving legal consent due to of a mental disorder or developmental or physical disability, shall be punished by imprisonment in the state prison for three, six, or eight years. (Pen. Code, § 264.)
- 2) Provides that a person who commits an act of sodomy against a victim who is incapable of giving legal consent due to a mental disorder or developmental or physical disability, shall be punished by imprisonment in the state prison for three, six, or eight years. (Pen. Code, § 286, subd. (g).)
- 3) Provides that a person who commits an act of oral copulation against a victim who is incapable of giving legal consent due to a mental disorder or developmental or physical disability, shall be punished by imprisonment in the state prison for a period of three, six, or eight years. (Pen. Code, § 288a, subd. (g).)
- 4) Provides that a person who commits an act of sexual penetration against a victim who is incapable of giving legal consent due to a mental disorder or developmental or physical disability shall be punished by imprisonment in the state prison for a period of three, six, or eight years. (Pen. Code, § 289, subd. (b).)
- 5) Provides an additional punishment of one year when the defendant knows or reasonably should know that the victim of an enumerated offense is 65 years of age or older, blind, deaf, developmentally disabled, a paraplegic, a quadriplegic, or under 14 years old. (Pen. Code, §

667.9, subd. (a).)

- 6) Provides an additional punishment of two years when the defendant knows or reasonably should know that the victim of an enumerated offense is 65 years of age or older, blind, deaf, developmentally disabled, a paraplegic, a quadriplegic, or under 14 years old, and where the defendant also has a prior conviction for one of those crimes. (Pen. Code, § 667.9, subd. (b).)
- 7) Defines "developmentally disabled" for purposes of the vulnerable victim enhancement as "a severe, chronic disability of a person, which is all of the following:
 - a) Attributable to a mental or physical impairment or a combination of mental and physical impairments;
 - b) Likely to continue indefinitely; and
 - c) Results in substantial functional limitation in three or more of the following areas of life activity:
 - i) Self-care;
 - ii) Receptive and expressive language;
 - iii) Learning;
 - iv) Mobility;
 - v) Self-direction;
 - vi) Capacity for independent living;
 - vii) Economic self-sufficiency." (Pen. Code, § 667.9, subd. (d).)
- 8) Provides that persons who commit rape, spousal rape, rape in concert, lewd and lascivious acts on a minor, sexual penetration, sodomy, oral copulation, continuous sexual abuse of a child, shall be punished by 25-years-to-life if (Pen. Code, § 667.61, subd. (a)):
 - a) One or more of the following circumstances exist:
 - i) The defendant has been previously convicted of a specified sex offense.
 - ii) The defendant kidnapped the victim of the present offense and the movement of the victim substantially increased the risk of harm to him or her.
 - iii) The defendant inflicted aggravated mayhem or torture on the victim or another person in the commission of the present offense.
 - iv) The defendant committed the present offense during the commission of a burglary of the first degree.

- v) The defendant committed rape by a foreign object, sodomy in concert, as specified, oral copulation in concert as specified; or,
- b) Two or more of the following circumstances exist:
 - i) The defendant kidnapped the victim of the present offense, as specified.
 - ii) The defendant committed the present offense during the commission of a burglary, as specified.
 - iii) The defendant personally used a dangerous or deadly weapon or a firearm in the commission of the present offense, as specified.
 - iv) The defendant has been convicted in the present case or cases of committing an offense specified against more than one victim.
 - v) The defendant engaged in the tying or binding of the victim or another person in the commission of the present offense.
 - vi) The defendant administered a controlled substance to the victim in the commission of the present offense, as specified.
- 9) Provides that persons who commit rape, spousal rape, rape in concert, lewd and lascivious acts on a minor, sexual penetration, sodomy, oral copulation, continuous sexual abuse of a child, shall be punished with 15-years-to-life if one of the following circumstances exist (Pen. Code, § 667.61, subd. (b)):
 - i) The defendant kidnapped the victim of the present offense, as specified.
 - ii) The defendant committed the present offense during the commission of a burglary, as specified.
 - iii) The defendant personally used a dangerous or deadly weapon or a firearm in the commission of the present offense, as specified.
 - iv) The defendant has been convicted in the present case or cases of committing an offense specified against more than one victim;
 - v) The defendant engaged in the tying or binding of the victim or another person in the commission of the present offense; or,
 - vi) The defendant administered a controlled substance to the victim in the commission of the present offense, as specified.

FISCAL EFFECT: Unknown

COMMENTS:

- 1) **Author's Statement:** According to the author, "Under AB 962, the scope of existing penalty enhancements in Penal Code section 667.9 will be expanded, thus allowing prosecutors to obtain higher penalties when sex crimes are committed against vulnerable individuals specifically where it is difficult or impossible to prove force was used due to the nature of the victim's disability. In the recent California example, this was imperative as the victim's disability makes her incapable of speech or movement.

"Additionally, AB 962 will expand One Strike base crime offenses to include sex crimes involving a victim who is incapable of giving consent due to a disability when performed in conjunction with other aggravating circumstances, such as kidnapping, restraining or use of a deadly weapon.

"All victims deserve equal protection under the law. AB 962 will allow for more equitable punishment for those who commit heinous crimes against victims who do not have the ability to protect themselves."

- 2) **Dual Use of Facts:** "Although a single factor may be relevant to more than one sentencing choice, such dual or overlapping use is prohibited to some extent. For example, the court generally cannot use a single fact both to aggravate the base term and to impose an enhancement, nor may it use a fact constituting an element of the offense either to aggravate or to enhance a sentence." (*People v. Scott* (1994) 9 Cal.4th 331, 350 & fn. 12.)

For example, Penal Code section 12022.7, the great bodily injury enhancement, which allows for enhanced punishment for actual infliction of great bodily injury where a great bodily injury occurred, can be applied to any offense except those where serious bodily injury is already an element of the substantive offense charged. (*People v. Parrish* (1985) 170 Cal.App.3d 336, 343-344; see also Pen. Code, § 12022.7, subd. (e), and Cal. Rules of Court, rule 4.420.)

However, "where the facts surrounding the charged offense exceed the minimum necessary to establish the elements of the crime, the trial court can use such evidence to aggravate the sentence." (*People v. Castorena* (1996) 51 Cal.App.4th 558, 562.) So, for example, where an age is an element of the offense, the victim's age alone may not be used as a factor in aggravation (*People v. Fernandez* (1990) 226 Cal.App.3d 669, 680), unless the victim is extremely young within the given age range so as to make a victim "particularly vulnerable" in relation to others within the age range (*People v. Ginese* (1981) 121 Cal.App.3d 468, 477).

As pertains to this bill, the victim's developmental or physical disability is an element of the enhancement. CALCRIM No. 3222 instructs the jury that it must decide whether the victim was, inter alia, "blind/deaf/developmentally disabled/paraplegic/[or] quadriplegic." The instruction also gives a specific definition for a developmental disability. For a true finding on the enhancement based on this characteristic, the jury must find developmentally disabled means a severe, chronic disability of a person that: 1) is attributable to a mental or physical impairment or a combination of mental and physical impairments; 2) is likely to continue indefinitely; and 3) results in substantial functional limitation in three or more of the following abilities: to care for one's self; to understand and express language; to learn; to be independently mobile; to engage in self-direction; to live independently; or to be economically self-sufficient. (CALCRIM No. 3222.)

The instructions on the substantive crimes also reference the victim's disability. The jury is required to find that a mental disorder/development or physical disability prevents the victim from legally consenting. (See e.g., CALCRIM No. 1004 [rape of a disabled woman.]) The finding that there is a disability is limited to whether that disability affects the victim's ability to consent.

Arguably, the jury would have to make additional findings to impose the vulnerable-victim enhancement. The jury would be required to find that the developmental disability satisfied the criteria listed in the jury instruction. Alternatively, the jury could find that a victim suffered from one of the other physical disabilities which would not necessarily have prevented the person from legally consenting to the sex act. So, imposing the victim-vulnerability enhancement on a sex crime committed against a disabled person would not necessarily constitute impermissible dual use of facts.

- 3) **One Strike Law:** The One Strike Sex Crime Law is a separate sentencing scheme which was enacted to provide life sentences for certain aggravated sex offenders, even if they do not have prior convictions. Under this scheme, a first-time offender who commits a qualifying sex offense under one or more of the circumstances listed in the statute is subject to a mandatory sentence of 15 years to life or 25 years to life. (Pen. Code, § 667.61.) The facts that bring a defendant within the provisions of the One Strike Law are grouped into two categories. If a defendant commits a qualifying crime under one circumstance listed in subdivision (e), then he or she will receive a sentence of 15 years to life. If a defendant commits a qualifying crime under one or more circumstances listed under subdivision (d), or two or more circumstances listed under subdivision (e), then he or she will receive a sentence of 25 years to life. The distinction is that the aggravating circumstances listed in subdivision (d) are more severe than those listed in subdivision (e).

This bill adds crimes to the list of offenses which can be prosecuted under the One Strike Law. The additional aggravating circumstances must still be pled and proven to a jury.

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

After continued litigation, on February 10, 2014, the federal court ordered California to reduce its in-state adult institution population to 137.5% of design capacity by February 28, 2016, as follows:

- 143% of design bed capacity by June 30, 2014;
- 141.5% of design bed capacity by February 28, 2015; and,
- 137.5% of design bed capacity by February 28, 2016.

In its most recent status report to the court (February 2015), the administration reported that as of February 11, 2015, 112,993 inmates were housed in the State's 34 adult institutions,

which amounts to 136.6% of design bed capacity, and 8,828 inmates were housed in out-of-state facilities. This current population is now below the court-ordered reduction to 137.5% of design bed capacity." (Defendants' February 2015 Status Report In Response To February 10, 2014 Order, 2:90-cv-00520 KJM DAD PC, 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (fn. omitted).

The state now must stabilize these advances and demonstrate to the federal court that California has in place the "durable solution" to prison overcrowding "consistently demanded" by the court. (Opinion Re: Order Granting in Part and Denying in Part Defendants' Request For Extension of December 31, 2013 Deadline, NO. 2:90-cv-0520 LKK DAD (PC), 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (2-10-14).) Moreover, there are still approximately 10,500 prisoners being housed in out of state and in private prisons. (See latest CDCR monthly population report: <http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Monthly/TPOP1A/TPOP1Ad1503.pdf>.)

CDCR has informed this Committee that in in the last four fiscal years (FY), there were approximately 25 admissions to prison for the offenses targeted under this bill, as follows:

FY 2010/11

	Principal	Subordinate	Both
PC § 261(a)(1)	9	6	15
PC §286(h)	0	0	0
PC § 286(g)	0	1	1
PC § 288a(g)	1	1	2
PC § 289(b)	2	5	7
Totals	12	13	25

FY 2011/12

	Principal	Subordinate	Both
PC § 261(a)(1)	4	4	8
PC §286(h)	0	0	0
PC § 286(g)	1	6	7
PC § 288a(g)	3	8	11
PC § 289(b)	1	0	1
Totals	9	18	27

FY 2012/13

	Principal	Subordinate	Both
PC § 261(a)(1)	9	4	13
PC §286(h)	0	1	1
PC § 286(g)	1	1	2
PC § 288a(g)	3	6	9
PC § 289(b)	1	0	1
Totals	14	12	26

FY 2013/14

	Principal	Subordinate	Both
PC § 261(a)(1)	5		

PC § 286(h)	0
PC § 286(g)	1
PC § 288a(g)	1
PC § 289(b)	3
Totals	10

However, it should be noted that not all of these admissions would be prosecuted under the One-Strike Law or allege the vulnerable-victim enhancement. Moreover, in those cases in which the vulnerable-victim enhancement is pled and proven, the court retains the discretion to strike it. (Pen. Code, § 1385.) Therefore, expanding the scope of these provisions to include the specified crimes would likely result in minor increased state incarceration.

- 5) **Argument in Support:** According to the *Arc and United Cerebral Palsy California Collaboration*, "Sexual assault of people with developmental disabilities can legitimately be called an epidemic. Your bill will increase penalties for the relatively few persons who the criminal justice system is able to convict of this vile crime, keeping them in prison and preventing their predation of non-incarcerated persons [with] developmental disabilities for longer periods of time."
- 6) **Argument in Opposition:** The *California Public Defenders Association* writes, "While well-intended, this proposed bill has the potential to imprison mentally disordered and disabled people. Mentally disordered and disabled individuals in group homes and other settings may not have the legal capacity to consent since the CALCRIM jury instruction 1004 defines it as 'a woman is prevented from legally consenting if she is unable to understand the act, its nature, and possible consequences.' Courts have stated that the definition, as embodied in the jury instruction, is sufficient to explain inability to legally consent. *People v. Miranda*, 199 Cal.App.4th 1403, 1419, fn. 13 (2011).

"However, such individuals are not children. They have sex drives and are sexually active. Should one mentally disordered or disabled individual face life in prison for having sex with another disabled or disordered person? Who is culpable? Is the person with the borderline mentally retarded I.Q. culpable for having sex with someone whose I.Q. is lower? Is the mentally disordered person who is taking his psychotropic medication culpable for having sex with the mentally disordered person who refused to take his psychotropic medications? Under the provisions of this proposed legislation, no force or other offense would be required if the individual had done it before and been convicted.

"This legislation is not needed and is redundant because someone who in the course of committing a sexual assault kidnaps the victim, commits a burglary, uses a weapon, inflicts great bodily injury, or ties the victim up or has a prior sexual assault is already subject to the enhanced punishment provisions, 15 or 25 years to life, of Penal Code Section 667.61. What this legislation does is add merely the status of the disability of the victim. ...

"This proposed legislation would also undermine the Department of Corrections and Rehabilitation's efforts to comply with the federal court order regarding prison overcrowding. Increasing sentences requires additional expenditures for state prisons.

Currently, it costs the state about \$50,000 annually per prisoner. Costs are higher for physically or mentally disabled inmates."

7) Related Legislation:

- a) AB 1272 (Grove) authorizes a judicial officer to issue an ex parte emergency protective order when an officer has reason to believe that a developmentally-disabled person is in immediate danger of sexual exploitation by a developmental disability residential service provider. AB 1272 is pending hearing in this Committee.
- b) SB 164 (Beall) provides that where a defendant has been convicted of a One-Strike qualifying crime in two separate cases, he or she is subject to a life term under the law regardless of the order of the convictions. SB 164 is pending hearing in the Senate Appropriations Committee.

8) Prior Legislation:

- a) AB 1335 (Maienschein), of the 2013-2014 Legislative Session, would have made sex crimes committed against developmentally disabled victims qualifying crimes under the One Strike life-term sentencing scheme, and the vulnerable victim sentence enhancement. AB 1335 was held on the Senate Appropriations Committee suspense file.
- b) AB 313 (Zettel), Chapter 569, Statutes of 1999, added deaf and developmentally disabled persons as qualifying victims to the existing enhancement statute for serious crimes committed against the elderly, children under age 14, and persons who are either blind, a paraplegic, or quadriplegic.
- c) SBx1 26 (Bergeson), Chapter 14, Statutes of 1994, codified the One-Strike Sex Law.

REGISTERED SUPPORT / OPPOSITION:

Support

The Arc and Cerebral Palsy California Collaboration
California District Attorneys Association
California State Lodge, Fraternal Order of Police
Crime Victims United
Junior League of California
Los Angeles County Professional Peace Officers Association
Long Beach Police Officers Association
Sacramento County Deputy Sheriffs' Association
San Diego County District Attorney
Santa Ana Police Officers Association

Opposition

American Civil Liberties Union of California
California Public Defenders Association

Legal Services for Prisoners with Children

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

Date of Hearing: April 14, 2015

Counsel: Sandra Uribe

ASSEMBLY COMMITTEE ON PUBLIC SAFETY

Bill Quirk, Chair

AB 989 (Cooper) – As Amended April 8, 2015

As Proposed to be Amended in Committee

REVISED

SUMMARY: Authorizes the district attorney and probation department to access sealed juvenile records for additional limited purposes. Specifically, **this bill:**

- 1) Authorizes the prosecutor and the probation department to access a juvenile's sealed records for the limited purpose of determining whether the minor is ineligible for informal supervision.
- 2) States that if a new petition has been filed against the minor for a felony offense, the probation department can access the sealed records for the limited purpose of identifying the minor's previous court-ordered programs or placements, and in that event solely to determine the individual's eligibility or suitability for remedial programs or services. The information obtained pursuant to this subparagraph shall not be disseminated to other agencies or individuals, except as necessary to implement a referral to a remedial program or service, and shall not be used to support the imposition of penalties, detention, or other sanctions upon the minor.
- 3) Authorizes the probation department to access sealed juvenile records for the limited purpose of meeting Federal Title IV-E compliance.
- 4) States that this access shall not be considered an unsealing of the records.

EXISTING LAW:

- 1) Provides that, if a minor satisfactorily completes an informal program of supervision, probation as specified, or a term of probation for any offense other than a specified serious, sexual, or violent offense, then the court shall order sealed all records pertaining to that dismissed petition in the custody of the juvenile court, except that the prosecuting attorney and the probation department of any county shall have access to these records after they are sealed for the limited purpose of determining whether the minor is eligible for deferred entry of judgment. The court may access a file that has been sealed pursuant to this section for the limited purpose of verifying the prior jurisdictional status of a ward who is petitioning the court to resume its dependency or delinquency jurisdiction. This access shall not be deemed an unsealing of the record and shall not require notice to any other entity. (Welf. & Inst. Code, § 786.)
- 2) Provides that five years or more after the jurisdiction of the juvenile court has terminated over a person adjudged a ward of the court or after a minor appeared before a probation

officer, or, in any case, at any time after the person has reached the age of 18, the person or county probation officer, with specified exceptions, may petition the juvenile court for sealing of the records, including arrest records, relating to the person's case, in the custody of the juvenile court, the probation officer, or any other agency or public official. (Welf. & Inst. Code, § 781, subd. (a).)

- 3) States that once the court has ordered the person's records sealed, the proceedings in the case shall be deemed never to have occurred, and the person may reply accordingly to any inquiry about the events. (Welf. & Inst. Code, § 781, subd. (a).)
- 4) Permits the court to access a file that has been sealed for the limited purpose of verifying the prior jurisdictional status of the ward who is petitioning the court to resume its jurisdiction, as specified. This access is not to be deemed an unsealing of the records. (Welf. & Inst. Code, § 781, subd. (e).)
- 5) Allows a judge of the juvenile court in which a petition was filed to dismiss the petition, or to set aside the findings and dismiss the petition, if the court finds that the interests of justice and the welfare of the person who is the subject of the petition require that dismissal, or if it finds that he or she is not in need of treatment or rehabilitation. The court has jurisdiction to order dismissal or setting aside of the findings and dismissal regardless of whether the person who is the subject of the petition is, at the time of the order, a ward or dependent child of the court. (Welf. & Inst. Code, § 782.)
- 6) Allows the probation officer to destroy all records and papers in the proceedings concerning a minor after five years from the date on which the jurisdiction of the juvenile court over the minor is terminated. (Welf. & Inst. Code, § 826.)
- 7) States that any person who was under the age of 18 when he or she was arrested for a misdemeanor may petition the court in which the proceedings occurred or, if there were no court proceedings, the court in whose jurisdiction the arrest occurred, for an order sealing the records in the case, including any records of arrest and detention, in certain circumstances. (Pen. Code, § 851.7.)
- 8) Provides that a person who was under the age of 18 at the time of commission of a misdemeanor and is eligible for, or has previously received expungement relief, may petition the court for an order sealing the record of conviction and other official records in the case, including arrest records and records relating to other offenses charged in the accusatory pleading, whether the defendant was acquitted, or the charges dismissed. Thereafter the conviction, arrest, or other proceeding shall be deemed not to have occurred, and the petitioner may answer accordingly any question relating to their occurrence. (Pen. Code, § 1203.45, subd. (a).)

FISCAL EFFECT: Unknown

COMMENTS:

- 1) **Author's Statement:** According to the author, "In 2014, SB 1038 (Leno) regarding juvenile records sealing was signed into law. The bill provided for the automatic dismissal of juvenile petitions and sealing of records in cases where a juvenile offender successfully completes

probation. The intent was to provide incentives for youth to successfully complete probation and foster employment, housing, and education opportunities by setting forth a process to have juvenile records sealed.

"Upon implementation there have been varying legal opinions as to whether probation records such as program referrals and risk/needs assessments are considered part of the court record and would therefore be required to be sealed under the provisions of SB 1038. This inhibits the ability of probation to access their internal records should a minor, who has had their record sealed, come back into the custody of the juvenile court and probation department.

"Therefore, there are cases when a youth comes back into the custody of the juvenile court and probation is unable to view their previous program referrals and risk/needs assessments to make the most appropriate determination on getting them connected to services. Further, it is important that probation be able to access records on a limited basis for the purposes of determining AB 12 extended foster care eligibility, eligibility for informal probation, and Federal Title IV-E purposes. In order to achieve the best outcomes for these minors, it is important that probation have access to this information to make the most effective case plan determinations for the minor's treatment.

"AB 989 would continue the practice and original intent of SB 1038 to ensure that minors' records are automatically sealed upon successful completion and would clarify that in cases where a juvenile record has been sealed pursuant to Welfare & Institutions Code 786, if a youth subsequently comes back into the custody of the juvenile court, probation may access limited information as it pertains to determining AB 12 extended foster care eligibility, informal probation eligibility, Federal Title IV-E purposes, previous risk/needs assessments, and prior program and service referrals in order to most appropriately develop a case plan to address the treatment needs of the minor."

- 2) **Sealing and Dismissals of Juvenile Records:** Juvenile court records generally must be destroyed when the person of record reaches the age of 38 unless good cause is shown for maintaining those records. (Welf. & Inst. Code, § 826.) The person of record also may petition to destroy records retained by agencies other than the court. (Welf. & Inst. Code, § 826, subd. (b).) The request must be granted unless good cause is shown for retention of the records. (Welf. & Inst. Code, § 826.) When records are destroyed pursuant to the above provision, the proceedings "shall be deemed never to have occurred, and the person may reply accordingly to an inquiry." (Welf. & Inst. Code, § 826, subd. (a).) Courts have held that the phrase "never to have occurred" means that the juvenile proceeding is deemed not to have existed. (*Parmett v. Superior Court (Christal B.)* (1989) 212 Cal.App.3d 1261, at 1267.)

Minors adjudicated delinquent in juvenile court proceedings may petition the court to have their records sealed unless they were found to have committed certain serious offenses. (Welf. & Inst. Code, § 781.) To seal a juvenile court record, either the minor or the probation department must petition the court. (*Ibid.*) Juvenile court jurisdiction must have lapsed five years previously, or the person must be at least 18 years old. (Welf. & Inst. Code, § 781, subd. (a).) The records are not sealed if the person of record has been convicted of a felony or a misdemeanor involving moral turpitude. (*Ibid.*) No offenses listed in Welfare and Institutions Code section 707, subdivision (b) may be sealed if the juvenile was 14 years

or older at the time of the offense. Additionally, there can be no pending civil litigation involving the incident.

Last year SB 1038 (Leno), Chapter 249, Statutes of 2014, enacted another process for automatic juvenile record sealing (i.e. without a petition from the minor) in cases involving satisfactorily-completed informal supervision or probation, except in cases involving serious offenses, namely Welfare and Institutions Code section 707, subdivision (b) offenses. (Welf. & Inst. Code, § 786.) When the record is sealed, the arrest in the case is deemed never to have occurred. (*Ibid.*) The court must order all records in its custody pertaining to the petition sealed. However, the prosecuting attorney and the probation department can access these records after they are sealed for the limited purpose of determining whether the minor is eligible for deferred entry of judgment. Also, the court may access the sealed file for the limited purpose of verifying the prior jurisdictional status of a ward who is petitioning the court to resume its jurisdiction. (*Ibid.*)

This bill seeks to permit the probation department and district attorney to view the sealed records for several other limited purposes. First, the prosecutor and probation department would be able to access the sealed records to determine whether minor is ineligible for informal supervision. Second, the probation department would be able to access the sealed records to comply with the requirements of federal Title IV-E, which enables a local probation department to obtain federal funds from the federal foster care program. Finally, the probation department would be able to access the sealed records for the purposes of determining a minor's prior program referrals and risk-needs assessments. As to this final purpose, it seems beneficial for a probation department to be able to verify what programs have been tried successfully and unsuccessfully. However, should the bill include a limitation preventing a probation department from using the information to impose detention or other sanctions on the minor who has successfully had his or her record sealed?

- 3) **Title IV-E:** The largest federal funding stream for child welfare activities is Title IV-E of the Social Security Act. It comprises the Foster Care and Adoption Assistance programs, which are open-ended entitlements (the state receives a certain level of reimbursement from the federal government for every eligible claim submitted), and the Chafee Foster Care Independence Program, which is a capped entitlement (the state is entitled to get reimbursed for every single claim it submits to the federal government, up to a certain level, or cap).

"Funds are available for monthly maintenance payments for the daily care and supervision of eligible children; administrative costs to manage the program; training of staff and foster care providers; recruitment of foster parents and costs related to the design, implementation and operation of a state-wide data collection system."

(<http://www.acf.hhs.gov/programs/cb/resource/title-ive-foster-care.>)

- 4) **Informal Supervision:** The juvenile court can order either pre-petition or post-petition informal probation, also known as diversion. (Welf. & Inst. Code, §§ 654, 654.2.) Welfare and Institutions Code section 654.3 lists the eligibility criteria for both of these forms of diversion. Some of the factors to be considered are the type of offense committed, whether the offense occurred on school grounds, involved gang activity, and whether more than \$1000 in victim restitution would be owed. (Welf. & Inst. Code, § 654.3.)

If the probation department concludes that the minor is within the juvenile court's

jurisdiction or likely soon will be, the probation officer can delineate a specific program of supervision for the minor for up to six months to try to adjust the situation that brings the minor within the juvenile court's jurisdiction. (Welf. & Inst. Code, § 654; *In re Adam R.* (1997) 57 Cal.App.4th 348.) This is known as pre-petition informal supervision. The underlying purpose of informal supervision is to avoid a true finding on criminal culpability, which would result in a criminal record for the minor. (*In re Abdirahman S.* (1997) 58 Cal.App.4th 963, 968.) The discretion to initially determine whether to institute informal supervision against the minor rests with the probation officer and cannot be delegated to the prosecution. (*Charles S. v. Superior Court* (1982) 32 Cal.3d 741, 746.)

If the probation officer determines informal supervision is not appropriate, the juvenile court should conduct a new hearing on the minor's suitability for post-petition informal supervision and shall exercise its independent discretion in making its decision. (Welf. & Inst. Code, § 654.2; *In re Armondo A.* (1992) 3 Cal.App.4th 1185, 1189-90.) With Welfare and Institutions Code section 654.2m the Legislature intended to further address delinquency at its inception within a less structured program even after a delinquency petition is filed. The statute created a new power in the juvenile courts by allowing them to order informal supervision after a petition had been filed. This power is in addition to the probation officer's already existing pre-petition discretion. (*Derick B. v. Superior Court* (2009) 180 Cal.App. 4th 295, 302.)

The court cannot require a minor to admit the truth of the petition before granting informal supervision. (*In re Ricky J.* (2005) 128 Cal.App.4th 783.) When ordering informal supervision, the juvenile court should not even make a true finding on the allegations in the petition. (*In re Omar R.* (2003) 105 Cal.App.4th 1434, 1437-1438.) Since informal supervision pursuant to Welfare and Institutions Code section 654.2 is available pre-adjudication only, it is not a viable alternative at a dispositional hearing. (*In re Abdirahman S.* (1997) 58 Cal.App.4th 963, 968.)

- 5) **Argument in Support:** The *Chief Probation Officers of California*, the sponsor of this bill, state, "By way of background, in 2014, SB 1038 (Leno) regarding juvenile records sealing was signed into law. The bill provides for the automatic dismissal of juvenile petitions and sealing of records in cases where a juvenile offender successfully completes probation. The intent was to provide incentives for youth to successfully complete probation and foster employment, housing, and education opportunities by setting forth a process to have juvenile records sealed.

"Upon implementation there have been varying legal opinions as to whether probation records, such as program referrals and risk/needs assessments are considered part of the court record and would therefore be required to be sealed under the provisions of SB 1038. This inhibits the ability of probation to access their internal records should a minor, who has had their record sealed, come back to the custody of the juvenile court and probation department.

"Therefore, there are cases when a youth comes back into the custody of the juvenile court and probation is unable to view their previous program referrals and risk/needs assessments to make the most appropriate determination on getting them connected to services. Further, it is important that probation be able to access records on a limited basis for the purpose of determining AB 12 extended foster care eligibility, eligibility for informal probation, and for Federal Title IV-E purposes. In order to achieve the best outcomes for these minors, it is

important that probation have limited access to this information, when a minor comes back into our care for a subsequent violation, to make the most effective case plan determinations for the minor's treatment."

- 6) **Argument in Opposition:** According to *Legal Services for Prisoners with Children*, "California's confidentiality laws are intended to protect children from present and future adverse consequences and unnecessary emotional harm. Juvenile courts are intended to have exclusive authority in determining whether a juvenile record is to be shared. Under current law, entities must petition the court to obtain someone's confidential juvenile records. This process gives the defending party an opportunity to contest the sharing of information that may be detrimental to his or her rehabilitation and best interests.

"AB 989 would add a new subsection (b)(3) to Welfare and Institutions Code Section 786 to grant probation departments access to sealed juvenile records, for the limited purpose of determining program referrals. This proposal is unnecessary because district attorneys already make informed decisions to refer young defendants to programs, regardless of probation records. District attorneys already have access to sealed juvenile records to decide eligibility for deferred entry of judgment. Additionally, we are concerned that it will be difficult to limit access to this stated 'limited purpose,' and difficult to know whether access was limited in this fashion or whether probation officers used this information for other purposes."

- 7) **Related Legislation:** AB 666 (Stone) requires records in the custody of law enforcement agencies, the probation department, or any other public agency having records pertaining to the case, to also be sealed, in a case where a court has ordered a juvenile's records to be sealed, as specified. AB 666 is pending hearing in this committee today.
- 8) **Prior Legislation:** SB 1038 (Leno), Chapter 249, Statutes of 2014, provides for the automatic dismissal of juvenile petitions and sealing of records when a juvenile offender successfully completes probation.

REGISTERED SUPPORT / OPPOSITION:

Support

Chief Probation Officers of California (Sponsor)
 American Federation of State, County and Municipal Employees
 California District Attorneys Association
 Fraternal Order of Police, N. California Probation Lodge 19
 Los Angeles County Probation Officers Union
 Riverside Sheriffs' Association
 San Joaquin Probation Officers Association
 San Mateo County Probation and Detention Association
 Santa Clara County Probation Peace Officers' Union
 SEIU Local 721
 State Coalition of Probation Organizations
 Ventura County Professional Peace Officers' Association

Opposition

Legal Services for Prisoners with Children

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

Amendments Mock-up for 2015-2016 AB-989 (Cooper (A))

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

**Mock-up based on Version Number 97 - Amended Assembly 4/8/15
Submitted by: Sandy Uribe, Assembly Public Safety Committee**

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

SECTION 1. Section 786 of the Welfare and Institutions Code is amended to read:

786. (a) If the minor satisfactorily completes (1) an informal program of supervision pursuant to Section 654.2, (2) probation under Section 725, or (3) a term of probation served after a finding that the minor was a ward pursuant to Section 602 for any offense not listed in subdivision (b) of Section 707, the court shall order the petition dismissed, and the arrest upon which the judgment was deferred shall be deemed not to have occurred.

(b) (1) The court shall order sealed all records pertaining to that dismissed petition in the custody of the juvenile court.

(2) The prosecuting attorney and the probation department of any county shall have access to the records after they are sealed for the limited purpose of determining whether the minor is eligible for deferred entry of judgment pursuant to Section 790 or ineligible for informal supervision pursuant to Section 654.3.

(3) ~~The probation department of any county shall have access to the records after they are sealed for the limited purposes of determining a minor's prior program referrals and risk needs assessments.~~ **If a new petition has been filed against the minor for a felony offense, by the probation department for the limited purpose of identifying the minor's previous court-ordered programs or placements, and in that event solely to determine the individual's eligibility or suitability for remedial programs or services. The information obtained pursuant to this subparagraph shall not be disseminated to other agencies or individuals, except as necessary to implement a referral to a remedial program or service, and shall not be used to support the imposition of penalties, detention, or other sanctions upon the minor.**

(4) The court may access a file that has been sealed pursuant to this section for the limited purpose of verifying the prior jurisdictional status of a ward who is petitioning the court to resume its jurisdiction pursuant to subdivision (e) of Section 388.

(5) The probation department of any county may access the records for the limited purpose of meeting federal Title IV-E compliance.

(c) The access authorizations described in subdivision (b) shall not be deemed an unsealing of the record and shall not require notice to any other entity.

Date of Hearing: April 14, 2015

Counsel: Sandra Uribe

ASSEMBLY COMMITTEE ON PUBLIC SAFETY

Bill Quirk, Chair

AB 1093 (Eduardo Garcia) – As Introduced February 27, 2015

SUMMARY: Modifies the criteria for the Supervised Population Workforce Training Grant Program to allow grant applicants to address the education and training needs of people who have some postsecondary education or individuals who require basic education, or people in both categories. Specifically, **this bill:**

- 1) Contains legislative findings and declarations about the importance of workforce training for the reentry population.
- 2) Revises program criteria to allow applicants to address either the education and training needs of individuals with some postsecondary education, or individuals who require basic education and training to obtain entry level jobs, instead of requiring the applicants to serve both education needs.
- 3) Authorizes the California Workforce Investment Board (WIB) to delegate the responsibility for determining the sufficiency of a prior assessment to one or more local workforce investment boards.
- 4) Expands the content of the report to be given to the Legislature evaluating the Supervised Population Workforce Training Grant Program to include the following:
 - a) The education and workforce readiness of the supervised population at the time individual participants entered the program and how this impacted the types of services needed and offered; and,
 - b) Whether the metrics used to evaluate the individual grants were sufficiently aligned with the objectives of the program.
- 5) Contains an urgency clause requiring the provisions of the bill to take effect immediately.

EXISTING LAW:

- 1) States that WIB is the body responsible for assisting the Governor in the development, oversight, and continuous improvement of California's workforce investment system and the alignment of the education and workforce investment systems to the needs of the 21st century economy and workforce. (Unemp. Ins. Code, § 14010.)
- 2) Establishes the Supervised Population Workforce Training Grant Program to be administered by the WIB. (Pen. Code, § 1234.1.)

- 3) Requires WIB to administer the grant program as follows:
 - a) Develop criteria for the selection of grant recipients through a public application process, including the rating and ranking of applications that meet threshold criteria; and
 - b) Design the grant program application process to ensure all of the following occurs:
 - i) Outreach and technical assistance is made available to eligible counties;
 - ii) There is fairness and competitiveness for all counties, including for smaller and rural counties;
 - iii) It encourages applicants to develop evidence-based, best practices to serve the target population; and,
 - iv) It addresses the education and training needs of both individuals with some postsecondary education who can benefit from services that result in certifications, and placement on a middle skill career ladder, and individuals who require basic education and training to obtain entry level jobs. (Pen. Code, § 1234.2.)
- 4) Requires the grant program to be competitively awarded through at least two rounds of funding, as specified, and provides that each county is eligible to apply but that a single application may include multiple counties applying jointly. Requires each application to include a partnership agreement between the county, or counties, and one or more local workforce investment boards that outline the actions each party agrees to undertake as part of the project proposed in the application. (Pen. Code, § 1234.3.)
- 5) Requires, at a minimum, each project proposed in the application to include a provision for an education and training assessment for each individual of the supervised population who participates in the project. (Pen. Code, § 1234.3, subd. (c).)
- 6) Provides that eligible uses of grant funds include, but are not limited to, vocational training, stipends for trainees, and apprenticeship opportunities for the supervised population. States that supportive services and job readiness activities are to serve as bridge activities that lead to enrollment in long-term training programs. (Pen. Code, § 1234.3, subd. (d).)
- 7) Requires the WIB to report to the Legislature the outcomes from the grant program, as specified. (Pen. Code, § 1234.4.)
- 8) Repeals the grant program on January 1, 2021, unless a later enacted statute deletes or extends that date. (Pen. Code, § 1234.5.)

FISCAL EFFECT: Unknown

COMMENTS:

- 1) **Author's Statement:** According to the author, "With orders from the U.S. Supreme Court to reduce its prison population, the state needs smart, effective policies to help local jurisdictions achieve realignment goals and reduce recidivism. Workforce development for

the re-entry population is a practical strategy for improving access to a stable job. It helps improve offender outcomes, reduce the likelihood of recidivism, and promote community safety and stability. This bill makes key program changes to the 2014 bill [AB 2060 9V, Manuel Perez)]."

- 2) **Supervised Population Workforce Training Grant Program:** In the Solicitation for Proposals, the WIB describes the Supervised Population Workforce Training Grant Program as follows:

"The California Workforce Investment Board (State Board) and the Employment Development Department (EDD) are pleased to announce the availability of up to \$825,000 in Recidivism Reduction Funds to implement and support recidivism reduction workforce training and development programs targeting the supervised population. The supervised population includes all persons who are on probation, mandatory supervision, or postrelease community supervision as defined in AB 2060 (Chapter 383, Statutes of 2014) and codified in Penal Code Section 1234(c) and are supervised by, or are under the jurisdiction of, a county. The State Board and EDD will fund proposals that will expand existing, mature collaborative relationships between county based Community Corrections Partnerships (parole, probation, courts, mental health services, community colleges, etc.) and Local Workforce Investment Boards (LWIB) in support of innovative strategies that accelerate educational attainment and reemployment for the supervised population by:

- Increasing labor market and skills outcomes through the development of strategies that fill gaps, accelerate processes, or customize services to ensure greater access to workforce services and employment opportunities.
- Implementing promising new modes and practices in workforce system delivery infrastructure and funding alignment that can be replicated across the State and tailored to regional needs.
- Leveraging State investment with commitments from industry, labor, public, and community partners.

"In addition, the State Board will fund proposals that further advance the goals of California's Strategic Workforce Development Plan 2013-2017 - 'Shared Strategy for a Shared Prosperity' (Strategic Plan) prioritizes regional coordination among key partners, sector-based employment strategies, skill attainment through earn and learn and other effective training models (including, but not limited to apprenticeship), and development of career pathways."

(<http://www.cwib.ca.gov/res/docs/AB2060/AB%202060%20SFP%2070001%20FINAL-TR.pdf>.)

The grant applications were due to the WIB on April 3, 2015. The WIB has informed this committee that it intends to award the first round of funding by the statutorily mandated deadline of May 1, 2015. (See Pen. Code, § 1234.3, subd. (a).) So, despite having an urgency clause, the revised criteria proposed by this bill will be too late to affect these award grants.

However, the grant program anticipated "at least two rounds of funding." (Pen. Code, § 1234.3, subd. (a).) Thus, the revised criteria could be implemented for the second round of

solicitation for proposals.

- 3) **State Strategy on Employment of Former Offenders:** The federal Workforce Investment Act requires the Governor, through WIB, to submit a State Strategic Workforce Development Plan (State Plan) to the U.S. Department of Labor. This plan outlines a five-year strategy for the investment of federal workforce training and employment services funds. With respect to services to former offenders, WIB states the following:

The State Board has leveraged the [California Department of Corrections and Rehabilitation (CDCR)] expertise to help Local Boards obtain additional funding from "realignment" funds allocated to counties. A workshop was conducted by the California Workforce Association, which included CDCR and Local Board staff sharing knowledge about realignment and funding so that Local Boards might be in a better position to engage their counties in seeking funding to serve this new "realigned" population.

The State Board will continue to work closely with CDCR and Local Boards to encourage and develop innovative services for the ex-offender population.

With Policy Link and the National Employment Law Project (NELP), the State Board is helping convene Local Boards, to ensure formally incarcerated individuals have access to quality employment services. The State Board also worked with EDD and NELP to develop a directive to ensure that Local Boards comply with nondiscrimination obligations when serving individuals with criminal records. http://edd.ca.gov/Jobs_and_Training/pubs/wsd12-9.pdf.

Consistent with Adults Goal Objective 1, Action 2; the State Board will work with the Local Boards to identify in their Local Plan strategies they will utilize to identify and remove barriers hampering their investment of WIA Adult and Dislocated Worker funds in [career technical education] programs to the ex-offender population in their areas.

(Shared Strategy for a Shared Prosperity: California's Strategic Workforce Development Plan 2013 – 2017, Services to State Target Populations, pp. 10-7 & 10-8, <http://www.cwib.ca.gov/res/docs/state_plans/Final%20Approved%20State%20Plan/12%20Chapter%20X%20Services%20to%20State%20Target%20Populations.pdf> [as of Apr. 2, 2014].)

- 4) **Argument in Support:** According to the *California Workforce Association*, a co-sponsor of this bill, "AB 1093 makes technical changes to a 2014 bill, AB 2060 (V.M. Perez), which established this essential program. Workforce development for the re-entry population is a practical approach that will improve offender outcomes, reduce the likelihood of recidivism, and promote community safety, and for these reasons we support this important effort.

"The California Workforce Association is an organization comprised of the 49 Local Workforce Investment Boards and America's Job Centers of California that work closely with adults, dislocated workers and at-risk youth to ensure they have the skills and training required for jobs needed by businesses. Last program year, CWA's members served 1.2 million customers and over 60,000 businesses.

"CWA is co-sponsoring AB 1093 because job training for post-release individuals is one of the most critical actions the state can take to help ensure that former offenders successfully transition into their communities. Local Workforce Investment Boards and America's Job Centers of California specialize in working with individuals who have the biggest barriers to employment, including ex-offenders. Without the essential tools these entities provide, former offenders are more likely to return to their old ways of life and increase their odds of reoffending."

- 5) **Prior Legislation:** AB 2060 (V.M. Perez), Chapter 383, Statutes of 2014, established the Supervised Population Workforce Training Grant Program.

REGISTERED SUPPORT / OPPOSITION:

Support

California Workforce Association (Co-Sponsor)
Communities United for Restorative Youth Justice (Co-Sponsor)
Policy Link (Co-Sponsor)
California Public Defenders Association

Opposition

None

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

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

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Bill Quirk, Chair

AB 1156 (Brown) – As Introduced February 26, 2015

SUMMARY: Takes various provisions of law relating to persons convicted of a felony and sentenced to the state prison, and applies them to persons convicted of a felony and sentenced to a county jail under the 2011 Realignment Act. Specifically, **this bill:**

- 1) Clarifies that in any case where the pre-imprisonment credit of a person sentenced to the county jail under the 2011 Realignment Act exceeds any sentence imposed, the entire sentence shall be deemed to have been served, except for the remaining portion of mandatory supervision, and the defendant shall not be delivered to the custody of the county correctional administrator.
- 2) Provides that when a defendant is sentenced to the county jail under the 2011 Realignment Act, the court may, within 120 days of the date of commitment on its own motion, or upon the recommendation of the county correctional administrator, recall the sentence previously ordered and resentence the defendant in the same manner as if he or she had not previously been sentenced, provided the new sentence, if any, is no greater than the original sentence.
- 3) Requires the Judicial Council to adopt rules providing criteria for the imposition of the lower, or upper term, and determine the county or jurisdictional territory when the court is imposing a concurrent or consecutive sentence under the 2011 Realignment Act upon a person previously sentenced to the county jail under the 2011 Realignment Act in another county or jurisdictional territory.
- 4) Extends provisions related to the compassionate release of a state prison inmate, who is terminally ill, to an inmate sentenced to a county jail under the 2011 Realignment Act.
- 5) Clarifies that a person released from the state prison on post release community supervision shall be supervised by the probation department of the county to which the person is released, and requires that the inmate be informed of his or her duty to report to the county probation department upon release.
- 6) Extends the right to petition for a certificate of rehabilitation and pardon to persons convicted of a felony and sentenced to a county jail under the 2011 Realignment Act. Makes additional non-substantive changes, conforming changes, and deletes obsolete provisions.
- 7) Provides that a person shall not be subject to prosecution for a non-felony offense arising out of a violation in the California Vehicle Code, with the exception of Driving under the Influence (DUI), that is pending against him or her at the time of his or commitment to a county jail under the 2011 Realignment Act.

EXISTING LAW:

- 1) Provides when a defendant has been sentenced to be imprisoned in the state prison and has been committed to the custody of the secretary, the court may, within 120 days of the date of commitment on its own motion, or at any time upon the recommendation of the secretary of the California Department of Corrections and Rehabilitation (CDCR) or the Board of Parole Hearings (BPH), recall the sentence and commitment previously ordered and resentence the defendant in the same manner as if he or she had not previously been sentenced, provided the new sentence, if any, is no greater than the initial sentence. The court resentencing under this subdivision shall apply the sentencing rules of the Judicial Council so as to eliminate disparity of sentences and to promote uniformity of sentencing. Credit shall be given for time served. (Pen. Code, § 1170, subd. (d)(1).)
- 2) States that any case in which the amount of pre-imprisonment credit exceeds any sentence imposed, the sentence shall be deemed to have been served, and the defendant shall not be delivered to the custody of the secretary of CDCR. The court shall advise the defendant that he or she will serve a period of parole, and order the defendant to report to the parole office closest to the defendant's last legal residence, unless the in-custody credits exceed the total sentence, including both confinement time and parole. (Pen. Code, § subd. (a)(3).)
- 3) Provides that if the secretary of CDCR or the BPH, or both, determine both that the prisoner has six months or less to live and the conditions under which the prisoner would be released do not pose a threat to public safety, the CDC director or BPT may recommend to the court that the prisoner's sentence be recalled. (Pen. Code, § 1170, subd. (e)(1).)
- 4) Provides that the court shall have discretion to recall or re-sentence if the court finds both that the prisoner has six months or less to live and the conditions under which the prisoner would be released do not pose a threat to public safety. (Pen. Code, § 1170, (e)(2).)
- 5) Requires the court to hold a hearing to consider whether a prisoner's sentence should be recalled within 10 days of receipt of a positive recommendation by the CDC director or BPT. (Pen. Code, § 1170, subd. (e)(3).)
- 6) States the Judicial Council shall seek to provide uniformity of sentencing by:
 - a) The adoption of rules providing criteria for the consideration of the trial judge at the time of sentencing regarding the court's decision to:
 - i) Grant or deny probation;
 - ii) Impose the lower or upper term;
 - iii) Impose concurrent or consecutive sentences;
 - iv) Determine whether or not to impose an enhancement when an enhancement is permitted by law;

- v) Deny a period of mandatory supervision in the interests of justice, or determine the appropriate period and conditions of mandatory supervision. (Pen. Code, § 1170.3, subd. (a)(1)-(5).)
- 7) Provides that any person convicted of a felony who has been released from a state prison or other state penal institution or agency in the state of California, whether discharged on completion of the term for which he or she was sentenced or released on parole, who has not been incarcerated in a state prison or other state penal institution or agency since his or her release, and who presents satisfactory evidence of a three year residence in this state immediately prior to the filing of the petition for a certificate of rehabilitation and pardon may file the petition as specified. (Pen. Code, § 4852.01, subd. (a).)

FISCAL EFFECT: Unknown

COMMENTS:

- 1) **Author's Statement:** According to the author, "AB 1156 eliminates discrepancies and inconsistencies in treatment between felons sent to prison and felons sent to county jail under Realignment that were not addressed in the original or subsequent legislation. These inconsistencies are unnecessary, unfair, and costly. Their elimination will enhance the fairness of the system and save the taxpayers money. "

REGISTERED SUPPORT / OPPOSITION:

Support

California Public Defenders Association (Sponsor)
Conference of California Bar Associations (Co-Sponsor)
City and County of San Francisco
Office of the Sheriff
National Association of Social Workers, California Chapter
California Attorneys for Criminal Justice
Legal Services for Prisoners with Children
American Civil Liberties Union

Opposition

None

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

Date of Hearing: April 14, 2015

Counsel: Sandra Uribe

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Bill Quirk, Chair

AB 1272 (Grove) – As Amended March 26, 2015
As Proposed to be Amended in Committee

SUMMARY: Authorizes the issuance of an ex parte emergency protective order when there is reason to believe that a developmentally-disabled person is in immediate danger of sexual exploitation by a developmental disability residential service provider. Specifically, **this bill:**

- 1) Allows a judicial officer to issue an ex parte emergency protective order when a law-enforcement officer asserts reasonable grounds to believe that a developmental-disability person, as specified, is in immediate and present danger of sexual exploitation by a developmental disability residential service provider.
- 2) States that the emergency protective order may be issued only if the judicial officer finds both of the following:
 - a) That reasonable grounds have been asserted to believe that a person with a developmental disability is in immediate and present danger of sexual exploitation by a developmental disability residential service provider; and,
 - b) The emergency protective order is necessary to prevent the occurrence, or recurrence of, sexual exploitation of a person with a developmental disability.

EXISTING LAW:

- 1) Requires the presiding judge of each county to designate at least one judge, commissioner, or referee to be reasonably available to issue orally, by telephone, or otherwise, emergency protective orders, at all times whether or not the court is in session. (Fam. Code, § 6241.)
- 2) States that the grounds for the issuance of an ex parte emergency protective order are where a law enforcement officer asserts reasonable grounds to believe any of the following:
 - a) That a person is in immediate and present danger of domestic violence, based on the person's allegation of a recent incident of abuse or threat of abuse by the person against whom the order is sought;
 - b) That a child is in immediate and present danger of abuse by a family or household member, based on an allegation of a recent incident of abuse or threat of abuse by the family or household member;
 - c) That a child is in immediate and present danger of being abducted by a parent or relative, based on a reasonable belief that a person has an intent to abduct the child or flee with the

- child from the jurisdiction or based on an allegation of a recent threat to abduct the child or flee with the child from the jurisdiction; and
- d) That an elder or dependent adult is in immediate and present danger of abuse, as specified, based on an allegation of a recent incident of abuse or threat of abuse by the person against whom the order is sought, except that no emergency protective order shall be issued based solely on an allegation of financial abuse. (Fam. Code, § 6250.)
- 3) Provides that an emergency protective order is valid only if it is issued by a judicial officer after making the required findings and pursuant to a specific request by a law enforcement officer. (Fam. Code, § 6250.3.)
 - 4) Permits the issuance of an emergency protective order only if the judicial officer finds both of the following:
 - a) That reasonable grounds have been asserted to believe that an immediate and present danger of domestic violence exists, that a child is in immediate and present danger of abuse or abduction, or that an elder or dependent adult is in immediate and present danger of abuse.; and,
 - b) That an emergency protective order is necessary to prevent the occurrence or recurrence of domestic violence, child abuse, child abduction, or abuse of an elder or dependent adult. (Fam. Code, § 6251.)
 - 5) Requires that an emergency protective order include all of the following:
 - a) A statement of the grounds asserted for the order;
 - b) The date and time the order expires;
 - c) The address of the superior court for the district or county in which the endangered person or child in danger of being abducted resides; and,
 - d) Specified admonitions provided both in English and in Spanish to the protected person and the restrained person regarding the length of the order, and the possibility of a more permanent restraining order. (Fam. Code, § 6253.)

FISCAL EFFECT: Unknown

COMMENTS:

- 1) **Author's Statement:** According to the author, "As proposed to be amended, AB 1272 bill allows police to obtain protective orders immediately, by phone, to protect people with disabilities from sexual exploitation, just as they can obtain emergency orders now to protect people from elder and dependent adult abuse and domestic violence."
- 2) **Emergency Protective Orders:** An emergency protective order is a restraining order requested by law enforcement. The officer calls the on-call judicial officer and fills out an emergency-protective-order form on site, alleging that there is recent abuse, immediate and present danger of abuse, or immediate and present danger of stalking.

An emergency protective order is only valid when a judicial officer finds both (1) that an officer has asserted reasonable grounds to believe that an immediate and present danger of domestic violence exists, that a child is in immediate and present danger of abuse or abduction, or that an elder or dependent adult is in immediate and present danger of abuse; and (2) that an emergency protective order is necessary to prevent the occurrence or recurrence of domestic violence, child abuse, child abduction, or abuse of an elder or dependent adult. (Fam. Code, § 6251.)

An emergency protective order is effective for five judicial business days after it is issued, or seven calendar days maximum, if a weekend or holiday falls within that time. (Fam. Code, § 6256.) The count starts the day after the protective order is issued.

This bill expands the ground for law enforcement to request an emergency protective order to situations where there are reasonable grounds to believe that a developmentally-disabled person is in immediate danger of sexual exploitation by a developmental disability residential service provider.

- 3) **Argument in Support:** According to the *Arc and United Cerebral Palsy California Collaboration*, the sponsor of this bill, "People with developmental disabilities are subject to sexual assault at much higher rates than the general population. One California and two national studies found roughly the same numbers: about eight in ten women and four in ten men with DD have been victimized at least once; about four in ten women and two in ten men with DD have been victimized at least 10 times. People in group homes, nursing homes, developmental centers, and other residential facilities are at greatest risk. These crimes are often – perhaps usually – committed by caregivers."
- 4) **Related Legislation:** AB 962 (Maienschein) makes specified sex crimes committed against victims with mental disorders or physical or developmental disabilities qualifying crimes for the "One Strike Sex Law" and the vulnerable victim enhancement. AB 962 is pending hearing in this Committee today.

REGISTERED SUPPORT / OPPOSITION:

Support

Arc and United Cerebral Palsy California Collaboration (Sponsor)

Opposition

None

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

Amendments Mock-up for 2015-2016 AB-1272 (Grove (A))

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

Mock-up based on Version Number 98 - Amended Assembly 3/26/15
Submitted by: Sandy Uribe, Assembly Public Safety Committee

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

SECTION 1. Section 729 of the Business and Professions Code is amended to read:

~~729. (a) (1) Any physician and surgeon, psychotherapist, alcohol and drug abuse counselor or any person holding himself or herself out to be a physician and surgeon, psychotherapist, or alcohol and drug abuse counselor, who engages in an act of sexual intercourse, sodomy, oral copulation, or sexual contact with a patient or client, or with a former patient or client when the relationship was terminated primarily for the purpose of engaging in those acts, is guilty of sexual exploitation, unless the physician and surgeon, psychotherapist, or alcohol and drug abuse counselor has referred the patient or client to an independent and objective physician and surgeon, psychotherapist, or alcohol and drug abuse counselor recommended by a third party physician and surgeon, psychotherapist, or alcohol and drug abuse counselor for treatment.~~

~~(2) Any developmental disability residential service provider who engages in an act of sexual intercourse, sodomy, oral copulation, or sexual contact with a person with a developmental disability who is an inpatient or resident of a treatment or care facility where the provider is employed or holds himself or herself out to be employed, or any former developmental disability residential service provider who engages in any of those acts with an inpatient or resident when the inpatient or resident has not been informed or does not understand that the former provider is not employed by the treatment or care facility, is guilty of sexual exploitation.~~

~~(b) Sexual exploitation by a physician and surgeon, psychotherapist, alcohol and drug abuse counselor, or a developmental disability residential service provider is a public offense:~~

~~(1) An act in violation of subdivision (a) shall be punishable by imprisonment in a county jail for a period of not more than six months, or a fine not exceeding one thousand dollars (\$1,000), or by both that imprisonment and fine.~~

~~(2) Multiple acts in violation of subdivision (a) with a single victim, when the offender has no prior conviction for sexual exploitation, shall be punishable by imprisonment in a county jail for~~

~~a period of not more than six months, or a fine not exceeding one thousand dollars (\$1,000), or by both that imprisonment and fine.~~

~~(3) An act or acts in violation of subdivision (a) with two or more victims shall be punishable by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code for a period of 16 months, two years, or three years, and a fine not exceeding ten thousand dollars (\$10,000); or the act or acts shall be punishable by imprisonment in a county jail for a period of not more than one year, or a fine not exceeding one thousand dollars (\$1,000), or by both that imprisonment and fine.~~

~~(4) Two or more acts in violation of subdivision (a) with a single victim, when the offender has at least one prior conviction for sexual exploitation, shall be punishable by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code for a period of 16 months, two years, or three years, and a fine not exceeding ten thousand dollars (\$10,000); or the act or acts shall be punishable by imprisonment in a county jail for a period of not more than one year, or a fine not exceeding one thousand dollars (\$1,000), or by both that imprisonment and fine.~~

~~(5) An act or acts in violation of subdivision (a) with two or more victims, and the offender has at least one prior conviction for sexual exploitation, shall be punishable by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code for a period of 16 months, two years, or three years, and a fine not exceeding ten thousand dollars (\$10,000).~~

~~(c) For purposes of subdivision (a), consent of the alleged victim is not a defense. However, physicians and surgeons shall not be guilty of sexual exploitation for touching any intimate part of a patient or client unless the touching is outside the scope of medical examination and treatment, or the touching is done for sexual gratification. In addition, developmental disability residential service providers shall not be guilty of sexual exploitation for touching any intimate part of an inpatient or resident unless the touching is outside the scope of his or her care or treatment responsibilities or the touching is done for sexual gratification.~~

~~(d) For purposes of this section:~~

~~(1) "Psychotherapist" has the same meaning as defined in Section 728.~~

~~(2) "Alcohol and drug abuse counselor" means an individual who holds himself or herself out to be an alcohol or drug abuse professional or paraprofessional.~~

~~(3) "Sexual contact" means sexual intercourse or the touching of an intimate part of a patient for the purpose of sexual arousal, gratification, or abuse.~~

~~(4) "Intimate part" and "touching" have the same meanings as defined in Section 243.4 of the Penal Code.~~

~~(5) "Developmental disability" has the same meaning as defined in Section 4512 of the Welfare and Institutions Code.~~

~~(6) “Developmental disability residential service provider” means either of the following:~~

~~(A) A person who is, or holds himself or herself out to be, an employee, contractor, or volunteer of a treatment or care facility for persons with developmental disabilities and who provides treatment or care to inpatients or residents of the facility.~~

~~(B) A person who is, or holds himself or herself out to be, an owner, officer, manager, or supervisor of a treatment or care facility that provides treatment or care to inpatients or residents who are persons with developmental disabilities.~~

~~(e) In the investigation and prosecution of a violation of this section, a person shall not seek to obtain disclosure of any confidential files of other patients, clients, or former patients or clients of the physician and surgeon, psychotherapist, alcohol and drug abuse counselor, or developmental disability residential service provider.~~

~~(f) (1) This section does not apply to sexual contact between a physician and surgeon and his or her spouse or person in an equivalent domestic relationship when that physician and surgeon provides medical treatment, other than psychotherapeutic treatment, to his or her spouse or person in an equivalent domestic relationship.~~

~~(2) This section does not apply to sexual contact between a developmental disability residential service provider and his or her spouse or person in an equivalent domestic relationship when that service provider provides care or treatment to, or is an owner, officer, manager, or supervisor of the facility that provides care or treatment to, his or her spouse or person in an equivalent domestic relationship.~~

~~(g) If a physician and surgeon, psychotherapist, alcohol and drug abuse counselor, or developmental disability residential service provider in a professional partnership or similar group has sexual contact with a patient, client, or resident in violation of this section, another physician and surgeon, psychotherapist, alcohol and drug abuse counselor, or developmental disability residential service provider in the partnership or group shall not be subject to action under this section solely because of the occurrence of that sexual contact.~~

~~(h) This section does not preclude arrest, prosecution, or conviction of any person under any other law.~~

~~(i) This section and Section 268 of the Penal Code are substantially identical. It is the intent of Legislature that this section and Section 268 of the Penal Code remain substantially identical following any future amendments.~~

SEC. 2. Section 6211.1 is added to the Family Code, to read:

~~6211.1. Nothing in this division shall be interpreted to define as domestic violence any crimes against children, elders, dependent adults, or persons with developmental disabilities who are not described in Section 6211.~~

~~SEC. 3.~~ Section 6250 of the Family Code is amended to read:

6250. A judicial officer may issue an ex parte emergency protective order if a law enforcement officer asserts reasonable grounds to believe any of the following:

(a) That a person is in immediate and present danger of domestic violence, based on the person's allegation of a recent incident of abuse or threat of abuse by the person against whom the order is sought.

(b) That a child is in immediate and present danger of abuse by a family or household member, based on an allegation of a recent incident of abuse or threat of abuse by the family or household member.

(c) That a child is in immediate and present danger of being abducted by a parent or relative, based on a reasonable belief that a person has an intent to abduct the child or flee with the child from the jurisdiction or based on an allegation of a recent threat to abduct the child or flee with the child from the jurisdiction.

(d) That an elder or dependent adult is in immediate and present danger of abuse as defined in Section 15610.07 of the Welfare and Institutions Code, based on an allegation of a recent incident of abuse or threat of abuse by the person against whom the order is sought, except that no emergency protective order shall be issued based solely on an allegation of financial abuse.

(e) That a person with a developmental disability, as defined in Section 4512 of the Welfare and Institutions Code, is in immediate and present danger of sexual exploitation by a developmental disability residential service provider, ~~as described in Section 729 of the Business and Professions Code and Section 268 of the Penal Code.~~

~~SEC. 4. 2.~~ Section 6251 of the Family Code is amended to read:

6251. An emergency protective order may be issued only if the judicial officer finds both of the following:

(a) That reasonable grounds have been asserted to believe that an immediate and present danger of domestic violence exists, that a child is in immediate and present danger of abuse or abduction, that an elder or dependent adult is in immediate and present danger of abuse as defined in Section 15610.07 of the Welfare and Institutions Code, or that a person with a developmental disability is in immediate and present danger of sexual exploitation by a

developmental disability residential service provider as described in Section 729 of the Business and Professions Code and Section 268 of the Penal Code.

(b) That an emergency protective order is necessary to prevent the occurrence or recurrence of domestic violence, child abuse, child abduction, abuse of an elder or dependent adult, or sexual exploitation of a person with a developmental disability.

SEC. 5. Section 268 is added to the Penal Code, to read:

~~268. (a) (1) Any physician and surgeon, psychotherapist, alcohol and drug abuse counselor or any person holding himself or herself out to be a physician and surgeon, psychotherapist, or alcohol and drug abuse counselor, who engages in an act of sexual intercourse, sodomy, oral copulation, or sexual contact with a patient or client, or with a former patient or client when the relationship was terminated primarily for the purpose of engaging in those acts, is guilty of sexual exploitation, unless the physician and surgeon, psychotherapist, or alcohol and drug abuse counselor has referred the patient or client to an independent and objective physician and surgeon, psychotherapist, or alcohol and drug abuse counselor recommended by a third party physician and surgeon, psychotherapist, or alcohol and drug abuse counselor for treatment.~~

~~(2) Any developmental disability residential service provider who engages in an act of sexual intercourse, sodomy, oral copulation, or sexual contact with a person with a developmental disability who is an inpatient or resident of a treatment or care facility where the provider is employed or holds himself or herself out to be employed, or any former developmental disability residential service provider who engages in any of those acts with an inpatient or resident when the inpatient or resident has not been informed or does not understand that the former provider is not employed by the treatment or care facility, is guilty of sexual exploitation.~~

~~(b) Sexual exploitation by a physician and surgeon, psychotherapist, alcohol and drug abuse counselor, or a developmental disability residential service provider is a public offense:~~

~~(1) An act in violation of subdivision (a) shall be punishable by imprisonment in a county jail for a period of not more than six months, or a fine not exceeding one thousand dollars (\$1,000), or by both that imprisonment and fine.~~

~~(2) Multiple acts in violation of subdivision (a) with a single victim, when the offender has no prior conviction for sexual exploitation, shall be punishable by imprisonment in a county jail for a period of not more than six months, or a fine not exceeding one thousand dollars (\$1,000), or by both that imprisonment and fine.~~

~~(3) An act or acts in violation of subdivision (a) with two or more victims shall be punishable by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code for a period of 16 months, two years, or three years, and a fine not exceeding ten thousand dollars (\$10,000); or the act or acts shall be punishable by imprisonment in a county jail for a period of not more than one~~

~~year, or a fine not exceeding one thousand dollars (\$1,000), or by both that imprisonment and fine.~~

~~(4) Two or more acts in violation of subdivision (a) with a single victim, when the offender has at least one prior conviction for sexual exploitation, shall be punishable by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code for a period of 16 months, two years, or three years, and a fine not exceeding ten thousand dollars (\$10,000); or the act or acts shall be punishable by imprisonment in a county jail for a period of not more than one year, or a fine not exceeding one thousand dollars (\$1,000), or by both that imprisonment and fine.~~

~~(5) An act or acts in violation of subdivision (a) with two or more victims, and the offender has at least one prior conviction for sexual exploitation, shall be punishable by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code for a period of 16 months, two years, or three years, and a fine not exceeding ten thousand dollars (\$10,000).~~

~~(e) For purposes of subdivision (a), consent of the alleged victim is not a defense. However, physicians and surgeons shall not be guilty of sexual exploitation for touching any intimate part of a patient or client unless the touching is outside the scope of medical examination and treatment, or the touching is done for sexual gratification. In addition, developmental disability residential service providers shall not be guilty of sexual exploitation for touching any intimate part of an inpatient or resident unless the touching is outside the scope of his or her care or treatment responsibilities or the touching is done for sexual gratification.~~

~~(d) For purposes of this section:~~

~~(1) "Psychotherapist" has the same meaning as defined in Section 728 of the Business Professions Code.~~

~~(2) "Alcohol and drug abuse counselor" means an individual who holds himself or herself out to be an alcohol or drug abuse professional or paraprofessional.~~

~~(3) "Sexual contact" means sexual intercourse or the touching of an intimate part of a patient for the purpose of sexual arousal, gratification, or abuse.~~

~~(4) "Intimate part" and "touching" have the same meanings as defined in Section 243.4.~~

~~(5) "Developmental disability" has the same meaning as defined in Section 4512 of the Welfare and Institutions Code.~~

~~(6) "Developmental disability residential service provider" means either of the following:~~

~~(A) A person who is, or holds himself or herself out to be, an employee, contractor, or volunteer of a treatment or care facility for persons with developmental disabilities who provides treatment or care to inpatients or residents of the facility.~~

~~(B) A person who is, or holds himself or herself out to be, an owner, officer, manager, or supervisor of a treatment or care facility that provides treatment or care to inpatients or residents who are persons with developmental disabilities.~~

~~(e) In the investigation and prosecution of a violation of this section, a person shall not seek to obtain disclosure of any confidential files of other patients, clients, or former patients or clients of the physician and surgeon, psychotherapist, alcohol and drug abuse counselor, or developmental disability residential service provider.~~

~~(f) (1) This section does not apply to sexual contact between a physician and surgeon and his or her spouse or person in an equivalent domestic relationship when that physician and surgeon provides medical treatment, other than psychotherapeutic treatment, to his or her spouse or person in an equivalent domestic relationship.~~

~~(2) This section does not apply to sexual contact between a developmental disability residential service provider and his or her spouse or person in an equivalent domestic relationship when that service provider provides care or treatment to, or is an owner, officer, manager, or supervisor of the facility that provides care or treatment to, his or her spouse or person in an equivalent domestic relationship.~~

~~(g) If a physician and surgeon, psychotherapist, alcohol and drug abuse counselor, or developmental disability residential service provider in a professional partnership or similar group has sexual contact with a patient, client, or resident in violation of this section, another physician and surgeon, psychotherapist, alcohol and drug abuse counselor, or developmental disability residential service provider in the partnership or group shall not be subject to action under this section solely because of the occurrence of that sexual contact.~~

~~(h) This section does not preclude arrest, prosecution, or conviction of any person under any other law.~~

~~(i) This section and Section 729 of the Business and Professions Code are substantially identical. It is the intent of Legislature that this section and Section 729 of the Business and Professions Code remain substantially identical following any future amendments.~~

SEC. 6. Section 836 of the Penal Code is amended to read:

~~**836.** (a) A peace officer may arrest a person in obedience to a warrant, or, pursuant to the authority granted to him or her by Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2, without a warrant, may arrest a person whenever any of the following circumstances occur:~~

~~(1) The officer has probable cause to believe that the person to be arrested has committed a public offense in the officer's presence.~~

~~(2) The person arrested has committed a felony, although not in the officer's presence.~~

~~(3) The officer has probable cause to believe that the person to be arrested has committed a felony, whether or not a felony, in fact, has been committed.~~

~~(b) (1) Any time a peace officer is called out on a domestic violence call, it shall be mandatory that the officer make a good faith effort to inform the victim of his or her right to make a citizen's arrest, unless the peace officer makes an arrest for a violation of paragraph (1) of subdivision (e) of Section 243 or 273.5. This information shall include advising the victim how to safely execute the arrest.~~

~~(2) Any time a peace officer receives a call alleging a violation of Section 729 of the Business and Professions Code and Section 268 of this code, the officer shall make a good faith effort to inform the victim of his or her right to make a citizen's arrest, unless the peace officer makes an arrest. This information shall include advising the victim or other person how to safely execute the arrest. If the call was made by a person other than the victim and the victim is unable to understand the information or is unable to execute the citizen's arrest, the officer shall make a good faith effort to inform the person who made the call of his or her right to make the citizen's arrest.~~

~~(e) (1) (A) When a peace officer is responding to a call alleging a violation of a domestic violence protective or restraining order issued under Section 527.6 of the Code of Civil Procedure, the Family Code, Section 136.2, 646.91, or paragraph (2) of subdivision (a) of Section 1203.097 of this code, Section 213.5 or 15657.03 of the Welfare and Institutions Code, or of a domestic violence protective or restraining order issued by the court of another state, tribe, or territory and the peace officer has probable cause to believe that the person against whom the order is issued has notice of the order and has committed an act in violation of the order, the officer shall, consistent with subdivision (b) of Section 13701, make a lawful arrest of the person without a warrant and take that person into custody whether or not the violation occurred in the presence of the arresting officer. The officer shall, as soon as possible after the arrest, confirm with the appropriate authorities or the Domestic Violence Protection Order Registry maintained pursuant to Section 6380 of the Family Code that a true copy of the protective order has been registered, unless the victim provides the officer with a copy of the protective order.~~

~~(B) When a peace officer is responding to a call alleging violation of a protective or restraining order against a developmental disability residential service provider issued under Section 6250 of the Family Code, and the peace officer has probable cause to believe that the person against whom the order is issued has notice of the order and has committed an act in violation of the order, the officer shall make a lawful arrest of the person without a warrant and take that person into custody whether or not the violation occurred in the presence of the arresting officer. The officer shall, as soon as possible after the arrest, confirm with the appropriate authorities that a true copy of the protective or restraining order has been registered, unless the victim or another person provides the officer with a copy of the order.~~

~~(2) The person against whom a protective order has been issued shall be deemed to have notice of the order if the victim or, in the case of a person with a developmental disability, another person presents to the officer proof of service of the order, the officer confirms with the appropriate authorities that a true copy of the proof of service is on file, or the person against whom the protective order was issued was present at the protective order hearing or was informed by a peace officer of the contents of the protective order.~~

~~(3) In situations where mutual protective orders have been issued under Division 10 (commencing with Section 6200) of the Family Code, liability for arrest under this subdivision applies only to those persons who are reasonably believed to have been the dominant aggressor. In those situations, prior to making an arrest under this subdivision, the peace officer shall make reasonable efforts to identify, and may arrest, the dominant aggressor involved in the incident. The dominant aggressor is the person determined to be the most significant, rather than the first, aggressor. In identifying the dominant aggressor, an officer shall consider (A) the intent of the law to protect victims of domestic violence from continuing abuse, (B) the threats creating fear of physical injury, (C) the history of domestic violence between the persons involved, and (D) whether either person involved acted in self defense.~~

~~(d) (1) Notwithstanding paragraph (1) of subdivision (a), if a suspect commits an assault or battery upon a current or former spouse, fiancé, fiancée, a current or former cohabitant as defined in Section 6209 of the Family Code, a person with whom the suspect currently is having or has previously had an engagement or dating relationship, as defined in paragraph (10) of subdivision (f) of Section 243, a person with whom the suspect has parented a child, or is presumed to have parented a child pursuant to the Uniform Parentage Act (Part 3 (commencing with Section 7600) of Division 12 of the Family Code), a child of the suspect, a child whose parentage by the suspect is the subject of an action under the Uniform Parentage Act, a child of a person in one of the above categories, any other person related to the suspect by consanguinity or affinity within the second degree, or any person who is 65 years of age or older and who is related to the suspect by blood or legal guardianship, a peace officer may arrest the suspect without a warrant where both of the following circumstances apply:~~

~~(A) The peace officer has probable cause to believe that the person to be arrested has committed the crime, whether or not it has in fact been committed.~~

~~(B) The peace officer makes the arrest as soon as probable cause arises to believe that the person to be arrested has committed the crime, whether or not it has in fact been committed.~~

~~(2) If a suspect violates Section 729 of the Business and Professions Code and Section 268 of this code, a peace officer may arrest the suspect without a warrant if the conditions of subparagraphs (A) and (B) of paragraph (1) are satisfied.~~

~~(e) In addition to the authority to make an arrest without a warrant pursuant to paragraphs (1) and (3) of subdivision (a), a peace officer may, without a warrant, arrest a person for a violation of Section 25400 when all of the following apply:~~

~~(1) The officer has reasonable cause to believe that the person to be arrested has committed the violation of Section 25400.~~

~~(2) The violation of Section 25400 occurred within an airport, as defined in Section 21013 of the Public Utilities Code, in an area to which access is controlled by the inspection of persons and property.~~

~~(3) The peace officer makes the arrest as soon as reasonable cause arises to believe that the person to be arrested has committed the violation of Section 25400.~~

~~SEC. 7. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution for certain costs that may be incurred by a local agency or school district because, in that regard, this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.~~

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

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

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Bill Quirk, Chair

AB 1328 (Weber) – As Introduced February 27, 2015

SUMMARY: Provides that in any criminal trial or proceeding in which the court determines that the prosecuting attorney has intentionally or knowingly failed to disclose relevant materials and information required to be disclosed by law, the court shall instruct the jury that the intentional failure to disclose the materials and information occurred and that the jury may consider the intentional or knowing failure to disclose in determining whether reasonable doubt of the defendant's guilt exists.

EXISTING LAW:

- 1) Requires the prosecuting attorney to disclose to the defendant or his or her attorney all of the following materials and information, if it is in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agencies:
 - a) The names and addresses of persons the prosecutor intends to call as witnesses at trial;
 - b) Statements of all defendants;
 - c) All relevant real evidence seized or obtained as a part of the investigation of the offenses charged;
 - d) The existence of a felony conviction of any material witness whose credibility is likely to be critical to the outcome of the trial;
 - e) Any exculpatory evidence; and
 - f) Relevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial, including any reports or statements of experts made in conjunction with the case, including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the prosecutor intends to offer in evidence at the trial. (Pen. Code, § 1054.1.)
- 2) Requires the defendant and his or her attorney to disclose to the prosecuting attorney:
 - a) The names and addresses of persons, other than the defendant, he or she intends to call as witnesses at trial, together with any relevant written or recorded statements of those persons, or reports of the statements of those persons, including any reports or statements of experts made in connection with the case, and including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the defendant

intends to offer in evidence at the trial; and,

- b) Any real evidence which the defendant intends to offer in evidence at the trial. (Pen. Code, § 1054.3 subd.(a).)
- 3) States, before a party may seek court enforcement of any of the required disclosures, the party shall make an informal request of opposing counsel for the desired materials and information. If within 15 days the opposing counsel fails to provide the materials and information requested, the party may seek a court order. Upon a showing that a party has not complied with the disclosure requirements and upon a showing that the moving party complied with the informal discovery procedure provided in this subdivision, a court may make any order necessary to enforce the provisions of this chapter, including, but not limited to, immediate disclosure, contempt proceedings, delaying or prohibiting the testimony of a witness or the presentation of real evidence, continuance of the matter, or any other lawful order. Further, the court may advise the jury of any failure or refusal to disclose and of any untimely disclosure. (Pen. Code, § 1054.5, subd.(b).)
- 4) Allows a court to prohibit the testimony of a witness upon a finding that a party has failed to provide materials as required only if all other sanctions have been exhausted. The court shall not dismiss a charge unless required to do so by the Constitution of the United States. (Pen. Code, § 1054.5, subd.(c).)
- 5) Provides that the required disclosures shall be made at least 30 days prior to the trial, unless good cause is shown why a disclosure should be denied, restricted, or deferred. If the material and information becomes known to, or comes into the possession of, a party within 30 days of trial, disclosure shall be made immediately, unless good cause is shown why a disclosure should be denied, restricted, or deferred. "Good cause" is limited to threats or possible danger to the safety of a victim or witness, possible loss or destruction of evidence, or possible compromise of other investigations by law enforcement. (Pen. Code, § 1054.7.)

FISCAL EFFECT: Unknown

COMMENTS:

- 1) **Author's Statement:** According to the author, "The United States Supreme Court has made clear that prosecutors are required by the Constitution to provide the defense with all evidence that may be favorable to a defendant. Prosecutors are not independent parties who may "win at all costs." Instead, they are officers of the court whose exclusive obligation is to pursue the "truth" and to ensure due process of the law. "A prosecutor that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice." *Brady*, 373 U.S. 83, 88. In addition, prosecutors are required to ensure that law enforcement officers involved in the case also provide all evidence in their possession that may be favorable to the defense

"There is a growing problem with prosecutorial misconduct throughout the country and in California. As recently as this February, 9th Circuit Judge Alex Kozinski has described rampant Brady violations as a growing "epidemic." Kozinski says that judges must put a stop to such injustice. CACJ does not see sufficient action by judges, judicial council, or the CA

Supreme Court; as such, CACJ believes there is a necessity to take legislative actions to address this injustice of “epidemic” proportions to the defendant in California.”

- 2) **Background:** In a criminal trial, a defendant is presumed innocent and the prosecution has the burden to prove beyond a reasonable doubt that the defendant is guilty. In order to ensure a fair trial, the prosecuting attorney has a constitutional and statutory duty to disclose specified information to the defendant. The jury instructions on reasonable doubt states, “Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt. In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial. Unless the evidence proves the defendant[s] guilty beyond a reasonable doubt, (he/she/they) (is/are) entitled to an acquittal and you must find (him/her/them) not guilty.” (CALCRIM No. 103.)

In the landmark case of *Brady v. Maryland* (1963) 373 U.S. 83, the Supreme Court held that a defendant has a constitutionally protected privilege to request and obtain from the prosecution evidence that is either material to the guilt of the defendant or relevant to the punishment to be imposed. The Supreme Court in a later case explained “[u]nder the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness. We have long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense. To safeguard that right, the Court has developed ‘what might loosely be called the area of constitutionally guaranteed access to evidence.’ [Citing *United States v. Valenzuela-Bernal* (1982) 458 U.S. 858, 867.] Taken together, this group of constitutional privileges delivers exculpatory evidence into the hands of the accused, thereby protecting the innocent from erroneous conviction and ensuring the integrity of our criminal justice system.” [*California v. Trombetta* (1984) 467 U.S. 479, 485.]

Even in the absence of a specific request, the prosecution has a constitutional duty to turn over exculpatory evidence that would raise a reasonable doubt about the defendant's guilt. [*United States v. Agurs* (1996) 427 U.S. 97,112.] Generally, a specific request is not necessary for parties to receive discovery, however, an informal discovery request must be made before a party can request formal court enforcement of discovery. (Pen. Code, § 1054.5, subd.(b).)

- 3) **Current Remedies:** The prosecuting attorney is required, both constitutionally and statutorily, to disclose specified information and materials to the defendant. In California, the defendant is also statutorily required to disclose specified information and materials to the prosecution. (Pen. Code, § 1054. 3, subd.(a).) If either party intentionally fails to disclose the required evidence, the court may make any order necessary to enforce the disclosure requirements, including, but not limited to, immediate disclosure, contempt proceedings, delaying or prohibiting the testimony of a witness or the presentation of real evidence, continuance of the matter, or any other lawful order. The court may also advise the jury of any failure or refusal to disclose and of any untimely disclosure. [Penal Code Section 1054. 5(b).] Under existing law, courts have the discretion in determining the appropriate sanction that should be imposed because of the untimely disclosure of discoverable records and evidence.

According to a Yale Law Journal article, "[a] prosecutor's violation of the obligation to disclose favorable evidence accounts for more miscarriages of justice than any other type of malpractice, but is rarely sanctioned by courts, and almost never by disciplinary bodies." The very nature of *Brady* violations—that evidence was suppressed—means that defendants learn of violations in their cases only fortuitously, when the evidence surfaces through an alternate channel. Nevertheless, a recent empirical study of all 5760 capital convictions in the United States from 1973 to 1995 found that prosecutorial suppressions of evidence accounted for sixteen percent of reversals at the state postconviction stage. And a study of 11,000 cases involving prosecutorial misconduct in the years since the *Brady* decision identified 381 homicide convictions that were vacated "because prosecutors hid evidence or allowed witnesses to lie." [Footnotes omitted; Dewar, *A Fair Trial Remedy for Brady Violations*, Yale Law Journal (2006) p. 1454.]

"When a prosecutor is inclined against disclosing a piece of arguably favorable evidence, few considerations weigh in favor of disclosure. Trial courts are reticent to grant motions to compel disclosure of alleged *Brady* evidence, examine government files, or hold prosecutors in contempt. Defendants only rarely unearth suppressions. And, even when they do, their convictions are rarely overturned because they face a tremendous burden on appeal: showing that the suppression raises a 'reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' Finally, lawyers' professional associations do not frequently discipline prosecutors for even the most egregious *Brady* violations." (Footnotes omitted; *Id.* at p. 1456.)

The author of the article proposed "when suppressed favorable evidence comes to light during or shortly before a trial, the trial court should consider instructing the jury on *Brady* law and allowing the defendant to argue that the government's failure to disclose the evidence raises a reasonable doubt about the defendant's guilt. . . . [I]nstead of curing the *Brady* violation through reversal on appeal, the remedy corrects the trial itself. In contributing to a jury's decision to acquit, the remedy would provide more immediate relief than a post-conviction reversal. Yet, because the remedy would not free or even grant a new trial to defendants of whose guilt the government has sufficient evidence, the remedy would not run afoul of those who decry the social costs of other 'punishments' for prosecutors, such as overturning convictions or dismissing charges. (Footnotes omitted; *Id.* at pp. 1456-1457.)

"The remedy would exist primarily for the benefit of defendants when the government's tardiness or failure to disclose favorable evidence permanently prejudiced the defense. Permanent prejudice might consist of the disintegration of tangible evidence or the death or disappearance of a witness or alternative suspect. In such cases, neither granting a continuance for further investigation nor the fact that the defendant may be able to make some use of the belatedly disclosed evidence is a sufficient remedy." (Footnotes omitted; *Id.* at p. 1458.)

- 4) **CALCRIM 306 Jury Instruction:** In addition to sanctions, untimely disclosure of required evidence is addressed in the CALCRIM 306 jury instruction, which reads in relevant part:

"Both the People and the defense must disclose to the other their evidence to the other before trial, within the time limits set by law. Failure to follow the rule may deny the other side the chance to produce all relevant evidence, to counter opposing evidence, or to receive a fair

trial."

"An Attorney for the (People/Defense) failed to disclose [description of the evidence that was not disclosed] within the legal time period."

"In evaluating the weight and significance of that evidence, you may consider the effect, if any, of that late discovery."

Is this instruction sufficient to remedy possible prejudice as a result of late disclosure of required evidence?

- 5) **Governor's Veto of AB 885 (Ammiano):** AB 885 (Ammiano) of the 2013-14 Legislative Session was identical to this bill in that it provided that in any criminal trial or proceeding in which the court determines that the prosecuting attorney has intentionally or knowingly failed to disclose relevant materials and information required to be disclosed by law, the court shall instruct the jury that the intentional failure to disclose the materials and information occurred and that the jury may consider the intentional or knowing failure to disclose in determining whether reasonable doubt of the defendant's guilt exists. AB 885 was vetoed by the Governor. The Governor in his veto message stated, "AB 885 would allow a court to instruct a jury to consider intentional or knowing prosecutorial discovery violations in determining whether reasonable doubt exists in criminal case.

"Prosecutorial misconduct should never be tolerated.

"This bill, however, would be a sharp departure from current practice that looks to the Judiciary to decide how juries should be instructed. Under current law, judges have an array of remedies at their disposal if a discovery violation comes to light during the trial."

- 6) **Argument in Support:** *Citizens United for a Responsible Budget* argues, "AB 1328 would allow a court—where there has been a determination of an intentional or knowing failure to disclose certain material information—to instruct the jury that a failure to disclose has occurred and the jury may determine whether reasonable doubt of the defendant's guilt exists. The United States Constitution creates protections requiring prosecutors in criminal cases to provide an accused and his/her attorney all evidence in their possession that may indicate innocence, erode the credibility of a witness, or is otherwise favorable to the defense. *Brady v. Maryland*, 373 U.S. 83 (1963)

"California law requires reciprocal disclosure pursuant to California Penal Code 1054.1. Specifically, section 1054.1 (c) requires all relevant real evidence seized or obtained as a part of the investigation of the offense charged. However, California law does allow trial to continue despite the court's identification of a violation of this constitutional right. As a result of these *Brady* violations, many people have been wrongly convicted in unfair trials.

"Despite this obligation to provide all evidence that may be favorable to the defense, there continues to be many reports of *Brady* violations throughout California. The Commission on the Fair Administration of Justice, and the Northern California Innocence Project have both conducted reviews of *Brady* violations and determined reforms are necessary. Moreover, many law review articles have explored and endorsed the proposed jury instruction remedy, including "A Fair Trial Remedy for *Brady* violations," by Elizabeth Napier Dewar, in the

Yale Law Review.

“AB 1328 is essential to maintain the integrity of criminal trials, provide oversight to overzealous prosecutors, and afford a legitimate remedy for those injured by *Brady* violations.”

- 7) **Argument in Opposition:** The *Alameda County District Attorney* states, "As you know, Proposition 115 (1990) established Penal Code Section 1054 and codified the principle of reciprocal discovery, under which both the prosecution and defense are obligated to turn over specified materials. When either side fails to comply with its statutory discovery obligations, PC 1054.5 provides the court with the authority to grant a variety of remedies, depending on the circumstances. The court may order immediate disclosure of the material, initiate contempt proceedings, delay or prohibit testimony, grant a continuance, “or any other lawful order.” Additionally, individual attorneys also face State Bar sanctions, including potential disbarment, for unethical conduct, and, in instances involving the intentional destruction of secreting of evidence, criminal sanctions.

“AB 1328 authorizes a court in any criminal trial or proceeding in which the court has determined that the prosecuting attorney has intentionally or knowingly failed to disclose relevant materials and information, to instruct the jury that the failure to disclose has occurred and the jury shall consider the failure to disclose in determining whether reasonable doubt of the defendant’s guilt exists.

“CALCRIM 306, which covers all untimely disclosures of required evidence, already addresses the circumstances of late discovery made during trial as contemplated by AB 1328. The Judicial Council Advisory Committee on Criminal Jury Instructions crafted this CALCRIM 306 with specific and nuanced language following input from judges, prosecutors, defense attorneys, and law professors. The instruction was designed to instruct the jury in a manner consistent with case law and the ethical obligation of the prosecution and defense. CALCRIM 306 applies to both parties by properly reflecting the considerations that should be before the jury: the content of the evidence, and the impact of the timing of its disclosure, while also acknowledging that in some instances, late disclosure may have no effect.

“In light of the breadth of the existing CALCRIM instruction, the new instruction envisioned by AB 1328 is unnecessary, duplicative and unbalanced. To the extent that discovery violations are committed by either the prosecution or the defense, existing law already provides the court with a variety of remedies, including a jury instruction. To add another jury instruction, particularly one as prejudicial and one-sided as this is, serves no purpose other than to confuse jurors and frustrate California’s criminal discovery process. AB 1328 could also have the unintended consequence of thwarting justice by improperly diverting the jury’s attention from the evidence to a procedural issue.”

- 8) **Prior Legislation:** AB 885 (Ammiano) of the 2013-14 Legislative Session was identical to this bill in that it provided that in any criminal trial or proceeding in which the court determines that the prosecuting attorney has intentionally or knowingly failed to disclose relevant materials and information required to be disclosed by law, the court shall instruct the jury that the intentional failure to disclose the materials and information occurred and that the jury may consider the intentional or knowing failure to disclose in determining whether

reasonable doubt of the defendant's guilt exists. AB 885 was vetoed by the Governor.

REGISTERED SUPPORT / OPPOSITION:

Support

American Civil Liberties Union
Legal Services for Prisoners with Children
Friends Committee on Legislation of California
Californians United for a Responsible Budget

Opposition

Alameda County District Attorney's Office
California District Attorneys Association
Association of Deputy District Attorneys
Association of Los Angeles Deputy Sheriffs
California Association of Code Enforcement Officers
California College and University Police Chiefs Association
California Narcotics Officers Association
Los Angeles Police Protective League
Riverside Sheriffs Association

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

Date of Hearing: April 14, 2015
Counsel: Sandra Uribe

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Bill Quirk, Chair

AB 1375 (Thurmond) – As Introduced February 27, 2015

SUMMARY: Increases the statutory rate for payment of fines by incarceration from not less than \$30 per day to not less than \$125 per day. Specifically, **this bill:**

- 1) Requires that the time of imprisonment for failure to pay a fine be calculated as no more than one day for every \$125 of the fine.
- 2) Provides that all days spent in custody by the defendant must first be applied to the term of imprisonment and then to any fine including, but not limited to, base fines at the rate of not less than \$125 per day.

EXISTING LAW:

- 1) Authorizes the court to incarcerate a defendant until an imposed criminal fine is satisfied, but limits such imprisonment to the maximum term permitted for the particular offense of conviction. (Pen. Code, § 1205, subd. (a).)
- 2) Requires that the time of imprisonment for failure to pay a fine be calculated as no more than one day for every \$30 of the fine. (Pen. Code, § 1205, subd. (a).)
- 3) States that this provision applies to any violation of any of the codes or statutes of the state which are punishable by a fine or by a fine and imprisonment, but that it does not apply to restitution fines or restitution orders. (Pen. Code, § 1205, subs. (c) & (f).)
- 4) Provides that all days spent in custody by the defendant must first be applied to the term of imprisonment and then to any fine including, but not limited to, base fines at the rate of not less than \$30 per day, or more, in the discretion of the trial court. (Pen. Code, § 2900.5, subd. (a).)

FISCAL EFFECT: Unknown

COMMENTS:

- 1) **Author's Statement:** According to the author, "AB 1375 will bring equity to an unfair situation that has been getting worse with each passing year, by making the first increase in the dollar amount of credit incarcerated prisoners receive against fines imposed since the law was enacted in 1976. In that time, the minimum wage has increased by over 600% and the total fines, with penalties and assessments, of typical infractions has increased similarly – to over 475% for running a red light and more than 800% for travelling 15 miles over the speed limit. The failure to adjust the rate of credit hurts poor defendants far more than better-off

defendants, increasing anger and resentment at the inequity. The inability of an increasing number of defendants to pay the fine outright also increases jail overcrowding and adds to the burden on the taxpayers, since the costs of incarceration are substantially more than the value of the fines imposed."

- 2) **Penal Code Section 1205:** Penal Code section 1205 gives the court power to enforce payment of fine in criminal case by imprisonment. However, imprisonment pending payment of a fine is unconstitutional as applied to a convicted indigent defendant if the failure to pay is due to indigence and not to willfulness. (*In re Antazo* (1970) 3 Cal.3d 100, 103-104.)

Penal Code section 1205 is also used by defendants as a vehicle to request that the trial court exercise its discretion to convert fines to jail time. However, the statute cannot be used to pay off restitution fines or victim restitution orders. (Pen. Code, § 1205, subd. (f).)

- 3) **Outstanding Court-Ordered Debt:** Criminal fines and penalties have climbed steadily in recent decades. Government entities tasked with collecting these fines have realized diminishing returns from collection efforts. A recent San Francisco Daily Journal article noted, "California courts and counties collect nearly \$2 billion in fines and fees every year. Nevertheless, the state still has a more than \$10.2 billion balance of uncollected debt from prior years, according to the most recent date from 2012." (See Jones & Sugarman, *State Judges Bemoan Fee Collection Process*, San Francisco Daily Journal, (January 5, 2015).) "Felons convicted to prison time usually can't pay their debts at all. The annual growth in delinquent debt partly reflects a supply of money that doesn't exist to be collected." (*Ibid.*) In the same article, the Presiding Judge of San Bernardino County was quoted as saying "the whole concept is getting blood out of a turnip." (*Ibid.*)

By raising the rate at which defendants can pay off fines and fees by converting them to jail time, this bill may help incentivize defendants to address delinquent debt.

- 4) **Argument in Support:** According to the *Conference of California Bar Associations*, the sponsor of this bill, "Under existing law, a criminal defendant may choose or be ordered to serve jail time in lieu of paying a criminal fine, or he or she may be allowed to credit time spent incarcerated against the payment of a fine. The minimum rate of credit is \$30.00 per day of incarceration – an amount that was set in 1976 and has not been adjusted since. In almost all California counties, this "minimum" has since become the actual amount credited.

"When this law was enacted, \$30.00 was equivalent to working 12 hours at a minimum wage job (\$1.50/hour). On January 1, 2016, the minimum wage in California will increase to be \$10.00/hour, meaning that the same 12-hour day should be worth \$120 – essentially the amount provided by AB 1375. By another measure, \$30.00 in 1976 had the same buying power as \$125.00 in 2014, according to the Bureau of Labor Statistics.

"Further, while base fines have not increased substantially in the 39 years since 1976, the total amount offenders are required to pay has skyrocketed due to added penalties and assessments. The total fine for running a red light increased from \$103 in 1993 to \$490 today – a 475% increase in just 20 years, compared to the proposed 416% increase in the credit proposed by AB 1375. Speeding up to 15 mph over the limit also comes with a \$238 price tag - more than 800% above what it cost in 1993. By almost any standard, the proposed

increase in the credit for jail time in lieu of a fine is very reasonable, modest even, when it is compared to the rise in inflation, the increased minimum wage, and the vast inflation of court fines and fees.

"This failure to adjust the rate of credit hurts poor defendants far more than better-off defendants, increasing anger and resentment at the inequity. Poor defendants are less likely to be able to post bail and will spend more time incarcerated awaiting a hearing or "working off" their fine. The inability of an increasing number of defendants to pay the fine outright also increases jail overcrowding.

"Finally, it is not fiscally responsible to credit defendants only \$30 per day in lieu of fine payments. At an average cost of \$100 per day to house somebody in a California county jail, it would take 10 days and cost \$1000 to house a person paying off a \$300 fine. At the more equitable rate of \$125 per day, it would only take 3 days and cost about \$300. The cost savings alone justify the increase to \$125 per day."

- 5) **Prior Legislation:** SB 1371 (Anderson), Chapter 49, Statutes of 2012, prohibits a defendant from satisfying an order to pay direct restitution to a victim, a restitution fine, or both, through time spent in custody at the statutory rate of \$30 per day.

REGISTERED SUPPORT / OPPOSITION:

Support

Conference of California Bar Associations (Sponsor)
American Civil Liberties Union of California
California Attorneys for Criminal Justice
California Public Defenders Association
Legal Services for Prisoners with Children

Opposition

None

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

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

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Bill Quirk, Chair

AB 1423 (Mark Stone) – As Amended March 26, 2015

SUMMARY: Creates a process for an administrative hearing to determine a healthcare decision maker for incarcerated persons who lack the capacity to make their own healthcare decisions. Specifically, **this bill:**

- 1) Finds and declares the following:
 - a) In recognition of the dignity and privacy a person has a right to expect, the law recognizes that adults housed in state prison have the fundamental right to control decisions relating to their own healthcare, including the decision to have life-sustaining treatment withheld or withdrawn.
 - b) The determination of capacity for informed consent for adults housed in state prison is more appropriately conducted at the institution where the patient is housed and can attend, if he or she desires.
 - c) Because of the confinement of these adults and their frequent movement between institutions, existing protections for patients regarding healthcare decision making are inadequate.
 - d) Existing statutory schemes centered on life-threatening emergent illness and court-ordered decision makers do not adequately address the needs of adults housed in state prison to have their capacity issues addressed and adjudicated by a neutral third party, even in the absence of a serious or life-threatening medical emergency.
- 2) Provides, subject to enumerated exceptions, that an adult housed in state prison is presumed to have the capacity to give informed consent and make a healthcare decision, to give or revoke an advance healthcare directive, and to designate or disqualify a surrogate. This presumption is a presumption affecting the burden of proof.
- 3) States that, subject to specified existing exceptions related to administration of psychiatric medications, a licensed physician or dentist may file a petition with the Office of Administrative Hearings to request that an administrative law judge make a determination as to a patient's capacity to give informed consent or make a healthcare decision, and request appointment of a surrogate decision maker, if all of the following conditions are satisfied:
 - a) The licensed physician or dentist is treating a patient who is an adult housed in state prison;
 - b) The licensed physician or dentist is unable to obtain informed consent from the inmate patient because the physician or dentist determines that the inmate patient appears to lack capacity to give informed consent or make a healthcare decision; and

- c) There is no person with legal authority to provide informed consent for, or make decisions concerning the healthcare of, the inmate patient.
- 4) Provides that in appointing a surrogate decision maker, preference shall be given to the next of kin or a family member as a surrogate decision maker over other potential surrogate decision makers unless those individuals are unsuitable or unable to serve.
- 5) Provides that the petition shall allege all of the following:
 - a) The inmate patient's current physical condition, describing the healthcare conditions currently afflicting the inmate patient;
 - b) The inmate patient's current mental health condition resulting in the inmate patient's inability to understand the nature and consequences of his or her need for care such that there is a lack of capacity to give informed consent or make a healthcare decision;
 - c) The deficit or deficits in the inmate patient's mental functions as listed as specified in the Probate Code;
 - d) An identification of a link, if any, between the deficits identified and an explanation of how the deficits identified that result in the inmate patient's inability to participate in a decision about his or her healthcare either knowingly and intelligently or by means of a rational thought process;
 - e) A discussion of whether the deficits identified are transient, fixed, or likely to change during the proposed year-long duration of the court order;
 - f) The efforts made to obtain informed consent or refusal from the inmate patient and the results of those efforts;
 - g) The efforts made to locate next of kin who could act as a surrogate decision maker for the inmate patient. If those individuals are located, all of the following shall also be included, so far as the information is known:
 - i) The names and addresses of the individuals;
 - ii) Whether any information exists to suggest that any of those individuals would not act in the inmate patient's best interests; and
 - iii) Whether any of those individuals are otherwise suitable to make healthcare decisions for the inmate patient.
 - h) The probable impact on the inmate patient with, or without, the appointment of a surrogate decision maker;
 - i) A discussion of the inmate patient's desires, if known, and whether there is an advance healthcare directive, Physicians Orders for Life Sustaining Treatment (POLST), or other documented indication of the inmate patient's directives or desires and how those indications might influence the decision to issue an order. Additionally, any known POLST or Advanced Health Care Directives executed while the inmate patient had capacity shall be disclosed; and

- j) The petitioner's recommendation specifying a qualified and willing surrogate decision maker, and the reasons for that recommendation.
- 6) States that the petition shall be served on the inmate patient and his or her counsel, and filed with the Office of Administrative Hearings on the same day as it was served. The Office of Administrative Hearings shall issue a notice appointing counsel.
- 7) Provides at the time the initial petition is filed, the inmate patient shall be provided with counsel and a written notice advising him or her of all of the following:
 - a) His or her right to be present at the hearing;
 - b) His or her right to be represented by counsel at all stages of the proceedings;
 - c) His or her right to present evidence;
 - d) His or her right to cross-examine witnesses;
 - e) The right of either party to seek one reconsideration of the administrative law judge's decision per calendar year;
 - f) His or her right to file a petition for writ of administrative mandamus in superior court; and
 - g) His or her right to file a petition for writ of habeas corpus in superior court with respect to any decision.
- 8) States that counsel for the inmate patient shall have access to all relevant medical and central file records for the inmate patient, but shall not have access to materials unrelated to medical treatment located in the confidential section of the inmate patient's central file. Counsel shall also have access to all healthcare appeals filed by the inmate patient and responses to those appeals, and, to the extent available, any habeas corpus petitions or healthcare related litigation filed by, or on behalf of, the inmate patient.
- 9) States that the inmate patient shall be provided with a hearing before an administrative law judge within 30 days of the date of filing the petition, unless counsel for the inmate patient agrees to extend the date of the hearing.
- 10) Provides that the inmate patient, or his or her counsel, shall have 14 days from the date of filing of any petition to file a response to the petition, unless a shorter time for the hearing is sought by the licensed physician or dentist and ordered by the administrative law judge, in which case the judge shall set the time for filing a response. The response shall be served to all parties who were served with the initial petition and the attorney for the petitioner.
- 11) Provides that in case of an emergency, the inmate patient's physician or dentist may administer a medical intervention that requires informed consent prior to the date of the administrative hearing. Counsel for the inmate patient shall be notified by the physician or dentist.
- 12) Provides that in either an initial or renewal proceeding, the inmate patient has the right to contest the finding of an administrative law judge authorizing a surrogate decision maker by filing a petition for writ of administrative mandamus.

- 13) States that in either an initial or renewal proceeding, either party is entitled to file one motion for reconsideration per calendar year in front of the administrative law judge following a determination as to an inmate patient's capacity to give informed consent or make a healthcare decision. The motion may seek to review the decision for the necessity of a surrogate decision maker, the individual appointed under the order, or both. The motion for reconsideration shall not require a formal rehearing unless ordered by the administrative law judge following submission of the motion, or upon the granting of a request for formal rehearing by any party to the action based on a showing of good cause.
- 14) Provides that to renew an existing order appointing a surrogate decision maker, the current physician or dentist, or a previously appointed surrogate decision maker shall file a renewal petition. The renewal shall be for an additional year at a time. The renewal hearing on any order issued under this section shall be conducted prior to the expiration of the current order, but not sooner than 10 days after the petition is filed, at which time the inmate patient shall be brought before an administrative law judge for a review of his or her current medical and mental health condition:
 - a) Specifies that a renewal petition shall be served on the inmate patient and his or her counsel, and filed with the Office of Administrative Hearings on the same day as it was served. The Office of Administrative Hearings shall issue a written order appointing counsel;
 - b) Provides that the renewal hearing shall be held as specified;
 - c) States that at the time the renewal petition is filed, the inmate patient shall be provided with counsel and a written notice advising him or her of all of the following:
 - i) His or her right to be present at the hearing;
 - ii) His or her right to be represented by counsel at all stages of the proceedings;
 - iii) His or her right to present evidence;
 - iv) His or her right to cross-examine witnesses;
 - v) The right of either party to seek one reconsideration of the administrative law judge's decision per calendar year; and
 - vi) His or her right to file a petition for writ of administrative mandamus in superior court.
 - vii) His or her right to file a petition for writ of habeas corpus in superior court with respect to any decision.
 - d) Specifies that counsel for the inmate patient shall have access to all relevant medical and central file records for the inmate patient, but shall not have access to materials unrelated to medical treatment located in the confidential section of the inmate patient's central file. Counsel shall also have access to all healthcare appeals filed by the inmate patient and responses to those appeals, and, to the extent available, any habeas corpus petitions or healthcare related litigation filed by, or on behalf of, the inmate patient;

- e) States that the renewal petition shall request the matter be reviewed by an administrative law judge, and allege all of the following:
 - i) The current status of each of the elements requiring notification of rights of the patient;
 - ii) Whether the inmate patient still requires a surrogate decision maker; and
 - iii) Whether the inmate patient continues to lack capacity to give informed consent or make a healthcare decision.
- 15) Provides that a licensed physician or dentist who submits a petition pursuant to this section shall not be required to obtain a specified court order prior to administering care that requires informed consent.
- 16) States that this section does not affect the right of an inmate patient who has been determined to lack capacity to give informed consent or make a healthcare decision and for whom a surrogate decision maker has been appointed to do either of the following:
 - a) Seek appropriate judicial relief to review the determination or appointment by filing a petition for writ of administrative mandamus; or
 - b) File a petition for writ of habeas corpus in superior court regarding the determination or appointment, or any treatment decision by the surrogate decision maker.
- 17) States that a licensed physician or other healthcare provider whose actions under this section are in accordance with reasonable healthcare standards, a surrogate decision maker appointed pursuant to this section, and an administrative law judge shall not be liable for monetary damages or administrative sanctions for his or her decisions or actions consistent with this section and the known and documented desires of the inmate patient, or if unknown, the best interests of the inmate patient.
- 18) Provides that the determinations required to be made shall be documented in the inmate patient's medical record.
- 19) Provides with regard to any petition, the administrative law judge shall determine and provide a written order and findings setting forth whether there has been clear and convincing evidence that all of the following occurred:
 - a) Adequate notice and an opportunity to be heard has been given to the inmate patient and his or her counsel.
 - b) Reasonable efforts have been made to obtain informed consent from the inmate patient.
 - c) As a result of one or more deficits in his or her mental functions, the inmate patient lacks capacity to give informed consent or make a healthcare decision and is unlikely to regain that capacity over the next year.
 - d) Reasonable efforts have been made to identify family members or relatives who could serve as a surrogate decision maker for the inmate patient.
- 20) Provides that the written decision shall also specify and describe any advance healthcare directives, POLST, or other documented indication of the inmate patient's directives or

desires regarding healthcare that were created and validly executed while the inmate patient had capacity. Further specifies that if all findings related to directives are made, the administrative law judge shall appoint a surrogate decision maker for healthcare for the inmate patient. In doing so, the administrative law judge shall consider all reasonable options presented, including those identified in the petition, and weigh how the proposed surrogate decision maker would represent the best interests of the inmate patient, the efficacy of achieving timely surrogate decisions, and the urgency of the situation. Family members or relatives of the inmate patient should be appointed when possible if such an individual is available and the administrative law judge determines the family member or relative will act in the inmate patient's best interests.

- 21) Specifies that an employee or contract staff of the Department of Corrections and Rehabilitation, or other peace officer, shall not be appointed surrogate decision maker for healthcare for any inmate patient under this section, unless either of the following conditions apply:
 - a) The individual is a family member or relative of the inmate patient and will, as determined by the administrative law judge, act in the inmate patient's best interests.
 - b) The individual is a healthcare staff member in a managerial position and does not provide direct care to the inmate patient. A surrogate decision maker appointed under this subparagraph may be specified by his or her functional role at the institution, such as "Chief Physician and Surgeon" or "Chief Medical Executive" to provide clarity as to the active decision maker at the institution where the inmate patient is housed, and to anticipate potential personnel changes. When the surrogate decision maker is specified by position, rather than by name, the person occupying that specified role at the institution at which the inmate patient is currently housed shall be considered and act as the appointed surrogate decision maker.
- 22) Provides that the order appointing the surrogate decision maker shall be written and state the basis for the decision by reference to the particular mandates of this subdivision. The order shall also state that the surrogate decision maker shall honor and follow any advance healthcare directive, POLST, or other documented indication of the inmate patient's directives or desires, and specify any such directive, order, or documented desire.
- 23) Requires that the administrative law judge's written decision and order appointing a surrogate decision maker shall be placed in the inmate patient's Department of Corrections and Rehabilitation healthcare record.
- 24) Provides an order entered under this section is valid for one year and the expiration date shall be written on the order. The order shall be valid at any state correctional facility within California. If the inmate patient is moved, the sending institution shall inform the receiving institution of the existence of an order entered under this section.
- 25) Clarifies that this section applies only to orders appointing a surrogate decision maker with authority to make a healthcare decision for an inmate patient who lacks capacity to give informed consent or make a healthcare decision. Specifies that this section does not apply to existing law regarding healthcare to be provided in an emergency or existing law governing healthcare for un-emancipated minors. This section shall not be used for the purposes of determining or directing an inmate patient's control over finances, marital status, or for

convulsive treatment, as described in the Welfare and Institutions Code, psychosurgery, sterilization, abortion, or involuntary administration of psychiatric medication.

EXISTING LAW:

- 1) Specifies that a petition may be filed to determine that a patient has the capacity to make a healthcare decision concerning an existing or continuing condition and a petition may be filed to determine that a patient lacks the capacity to make a healthcare decision concerning specified treatment for an existing or continuing condition, and further for an order authorizing a designated person to make a healthcare decision on behalf of the patient. (Prob. Code, § 3201.)
- 2) Provides that a petition to determine capacity to make healthcare decisions may be filed in the superior court of any of the following counties: (Prob. Code, § 3202.)
 - a) The county in which the patient resides.
 - b) The county in which the patient is temporarily living.
 - c) Such other county as may be in the best interests of the patient.
- 3) Specifies the person who may file a petition to determine whether a patient has capacity to make healthcare decisions as any of the following: (Prob. Code, § 3203.)
 - a) The patient.
 - b) The patient's spouse.
 - c) A relative or friend of the patient, or other interested person, including the patient's agent under a power of attorney for healthcare.
 - d) The patient's physician.
 - e) A person acting on behalf of the healthcare institution in which the patient is located if the patient is in a healthcare institution.
 - f) The public guardian or other county officer designated by the board of supervisors of the county in which the patient is located or resides or is temporarily living.
- 4) Specifies that the contents of the petition should state or set forth by a medical declaration attached to the petition, all of the following known to the petitioner at the time the petition is filed: (Prob. Code, § 3204.)
 - a) The condition of the patient's health that requires treatment.
 - b) The recommended healthcare that is considered to be medically appropriate.

- c) The threat to the patient's condition if authorization for the recommended healthcare is delayed or denied by the court.
 - d) The predictable or probable outcome of the recommended healthcare.
 - e) The medically available alternatives, if any, to the recommended healthcare.
 - f) The efforts made to obtain consent from the patient.
 - g) If the petition is filed by a person on behalf of a healthcare institution, the name of the person to be designated to give consent to the recommended healthcare on behalf of the patient.
 - h) The deficit or deficits in the patient's mental functions that are impaired, and an identification of a link between the deficit or deficits and the patient's inability to respond knowingly and intelligently to queries about the recommended healthcare or inability to participate in a decision about the recommended healthcare by means of a rational thought process.
 - i) The names and addresses, so far as they are known to the petitioner, of the persons specified.
- 5) Provides, upon the filing of the petition, the court shall determine the name of the attorney the patient has retained to represent the patient in the proceeding under this part or the name of the attorney the patient plans to retain for that purpose. If the patient has not retained an attorney and does not plan to retain one, the court shall appoint the public defender or private counsel to consult with and represent the patient at the hearing on the petition and, if such appointment is made, specified procedures shall apply. (Prob. Code, § 3205.)
- 6) Provides specified notification procedures for a hearing on capacity to make healthcare decisions. (Prob. Code, § 3206.)
- 7) States that, except as specified, the court may make an order authorizing the recommended healthcare for the patient and designating a person to give consent to the recommended healthcare on behalf of the patient if the court determines from the evidence all of the following: (Prob. Code, § 3208.)
- a) The existing or continuing condition of the patient's health requires the recommended healthcare.
 - b) If untreated, there is a probability that the condition will become life-endangering or result in a serious threat to the physical or mental health of the patient.
 - c) The patient is unable to consent to the recommended healthcare.
 - d) In determining whether the patient's mental functioning is so severely impaired that the patient lacks the capacity to make any healthcare decision, the court may take into consideration the frequency, severity, and duration of periods of impairment.

- e) The court may make an order authorizing withholding or withdrawing artificial nutrition and hydration and all other forms of healthcare and designating a person to give or withhold consent to the recommended healthcare on behalf of the patient if the court determines from the evidence all of the following:
 - i) The recommended healthcare is in accordance with the patient's best interest, taking into consideration the patient's personal values to the extent known to the petitioner.
 - ii) The patient is unable to consent to the recommended healthcare.

FISCAL EFFECT: Unknown

COMMENTS:

- 1) **Author's Statement:** According to the author, "The state faces an aging prison population. Many inmates have no remaining family ties and lack capacity to sign a release of information or to appoint a decision-maker. When an inmate suffers a stroke or develops dementia during a prison term, existing legal avenues for obtaining consent to release information to relatives or to obtain consent to a proposed course of treatment do not work well in a correctional setting. This bill will establish a readily available process to ensure that an appropriate, qualified person is designated to act on behalf of a medically or mentally compromised inmate."
- 2) **Background:** According to the background submitted by the author, "The California Department of Corrections and Rehabilitation (CDCR) has a growing population of elderly inmates, a population with varied and complex needs, and which has the largest share of complicated and acute medical conditions. Because this population is growing, it is becoming more common for inmates to develop conditions that render them temporarily or permanently incapacitated; this has created legal dilemmas for inmates, family members, and prison administrators. Under current law, when an inmate suffers a stroke or develops dementia during a prison term, existing legal avenues under the Probate Code for obtaining consent to release information to relatives or to obtain consent for a proposed course of treatment do not anticipate the needs of an incapacitated person in a correctional setting. A readily available process is needed to ensure that an appropriate, qualified person is designated to act on behalf of a medically or mentally compromised inmate."

"This bill establishes a streamlined process for obtaining consent to release information to relatives or to obtain consent for a proposed course of treatment for inmates suffering from a debilitating medical condition that is not life threatening but renders them unable to give consent. This protocol solicits assistance from the Office of Administrative Hearings to obtain consent through a process similar to the procedure for administering psychiatric medication to inmates, which establishes due process through required participation from Administrative Law Judges and inmate counsel. The new system would incorporate the substantive rules of capacity determinations and healthcare decisions for adults without conservators, including notice to next of kin and procedural safeguards for treatment."

- 3) **Difficulties with the Existing Probate Law Process:** The existing process outlined in the existing law section of this analysis presents a number of hurdles for inmates in the

California State Prison System. The existing law is modeled on a conservator system. This process requires that prison medical staff must go through the superior court of the county in which the inmate is housed whenever a medical emergency arises, or an episodic injury occurs which incapacitates an inmate. Going through the existing process causes a significant wait time of six weeks to six months. During that period, while the inmate is incapacitated, prison officials are unable to update the inmate's family members as to their condition in fear of violating the federal Health Insurance Portability and Accountability Act (HIPAA). HIPAA protects patient confidentiality through strict restrictions on dissemination of information. Due to the fact that these patients often do not have advanced healthcare directives, the information as to their health is privileged from dissemination until a decision by the Superior Court can be made. This bill would authorize an administrative procedure with existing procedures in the prison system. Under existing practices administrative law judges already hold hearings in California State Prisons, called *Keyea* hearings. Permitting these administrative proceedings to handle these healthcare decisions would arguably shorten the existing wait times.

- 4) **Argument in Support:** According to *California Correctional Health Care Services (CCHCS)*, "Currently state prisoners over the age of 50 are the fastest growing segment of the prison population. As these prisoners age, many lose the capacity to make medical determinations on their own, due to dementia, strokes, and other debilitating medical conditions. Under existing law, prison officials are required to go through the process under Probate Code Section 3200, which requires a Superior court hearing to appoint an individual responsible for making medical determinations for the prisoner.

"AB 1423 would establish a streamlined legal process, using Administrative Law Judges, to make this determination and which is patterned after the existing process used for obtaining consent for involuntary medication for prisoners. This process, called a *Keyea* hearing, has been in place since the mid-1900s and has proven throughout the years to provide the necessary legal safeguards while providing a savings to the State through elimination of Superior Court resources.

"The bill is a common sense measure that will provide added benefit to the inmate population by speeding up the process for obtaining the necessary authority to provide treatment services in cases where the inmate lacks decision making capability."

- 5) **Argument in Opposition:** According to *Disability Rights California*, "Existing law provides for the designation and selection of health care surrogates, and for the manner of making health care decisions for patients without surrogates.

"Existing law prohibits the administration of psychiatric medication to an inmate in state prison on a nonemergency basis without the inmate's informed consent, unless certain conditions are satisfied, including, among other things that a psychiatrist determines the inmate is gravely disabled and does not have the capacity to refuse medication. Existing law authorizes a physician to administer psychiatric medication to a prison inmate in emergency situations.

"This bill would establish a process for a licensed physician or dentist to file a petition with the Office of Administrative Hearings to request an administrative law judge make a determination as to a patient's capacity to give informed consent or make a health care

decision, and request appointment of a surrogate decision maker. The bill would require the petition to contain specified information, including, among other things, the inmate patient's current physical condition and a description of the health care conditions currently afflicting the inmate patient.

"This process is redundant and unnecessary. There is already a process to get a medical treatment order from the Superior Court. Current procedures are adequate and contain appropriate due process protections. There is simply no need for this bill."

6) Prior Legislation:

- a) AB 1907 (Lowenthal), Chapter 814, Statutes of 2012, provided that no individual sentenced to imprisonment in county jail for specified felonies shall be administered any psychiatric medication without his or her prior informed consent, unless specified circumstances are met. Additionally, made conforming changes to the process by which inmates of the California Department of Corrections and Rehabilitation (CDCR) can be involuntarily medicated.
- b) AB 1114 (Lowenthal), Chapter 665, Statutes of 2011, changed the procedures for involuntarily medicating inmates of CDCR.
- c) SB 795 (Blakeslee), of the 2011-12 Legislative Session, would have changed the process for involuntary medication of defendants found mentally incompetent during the criminal process. SB 795 failed passage in the Senate Public Safety Committee.
- d) AB 2380 (Dymally), of the 2005-06 Legislative Session, would have clarified that "treatment" for medically disordered offenders paroled to other facilities for treatment includes involuntary medication. AB 2380 failed passage in this Committee.
- e) AB 1424 (Thompson), Chapter 506, Statutes of 2001, related to the involuntary medication for individuals under the Lanterman-Petris-Short Act.
- f) AB 2798 (Thompson), of the 1999-2000 Legislative Session, would have authorized a judicially committed forensic patient in a state hospital to be medicated involuntarily with antipsychotic medication in accordance with specified procedures. AB 2798 was never heard by this Committee.

REGISTERED SUPPORT / OPPOSITION:

Support

California Correctional Health Care Services
California Public Defenders Association

Opposition

Disability Rights California

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

Date of Hearing: April 14, 2015

Chief Counsel: Gregory Pagan

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Bill Quirk, Chair

AB 1493 (Cooper) – As Amended March 26, 2015

SUMMARY: Establishes the California High Technology Crimes Task Force (HTCTF) to, among other tasks, examine existing statutes for adequacy in addressing identity theft, Internet crimes, credit card fraud, and to develop recommendations to prevent and prosecute those crimes. Specifically, **this bill:**

- 1) Provides that the HTCTF is hereby established. The task force shall do all of the following:
 - a) Analyze existing statutes for adequacy in addressing identity theft, Internet crimes, and credit card fraud. If the analysis determines that those statutes are inadequate, the task force shall recommend revisions or new provisions that specifically address identity theft, Internet crimes, and credit card fraud;
 - b) Collect and organize data on the nature and extent of identity theft, Internet crimes, and credit card fraud;
 - c) Examine collaborative models between governmental and nongovernmental organizations for prevention and prosecution of identity theft, Internet crimes, and credit card fraud;
 - d) Measure and evaluate the progress of the state in prosecuting identity theft, Internet crimes, and credit card fraud, and protecting and providing assistance to the victims of those crimes;
 - e) Evaluate approaches to increase public awareness of preventing identity theft, Internet crimes, and credit card fraud;
 - f) Consult with governmental and nongovernmental organizations in developing recommendations to strengthen state and local efforts to prevent and prosecute identity theft, Internet crimes, and credit card fraud, and to assist victims of those crimes; and,
 - g) Identify available federal, state, and local funding and grant opportunities to prevent and prosecute identity theft, Internet crimes, and credit card fraud, and to assist victims of those crimes.
- 2) States that the HTCTF shall consist of the following members:
 - a) A designee of the California District Attorneys Association;
 - b) A designee of the California State Sheriffs' Association;

- c) A designee of the California Police Chief's Association;
 - d) A designee of the Department of the California Highway Patrol;
 - e) A designee of the Federal Bureau of Investigation;
 - f) A designee of the Attorney General;
 - g) A representative of the California cellular telephone industry;
 - h) A representative of the California cable industry;
 - i) A representative of the California movie industry; and,
 - j) A representative of the California banking industry.
- 3) Requires HTCTF to conduct a study to accomplish the HTCTF objectives and to report the findings of the study to the Legislature, as specified, on or before December 31, 2017.

EXISTING LAW:

- 1) Establishes the High Technology Theft Apprehension and Prosecution Program (HTTAPP), a program of financial and technical assistance for law enforcement and district attorneys' offices, and for the distribution of funds to develop regional high technology crime units in California law enforcement agencies. (Pen. Code, § 13848.2.)
- 2) Provides that moneys allocated the HTTAPP shall be spent to fund programs to enhance the capacity of local law enforcement and prosecutors to deter, investigate, and prosecute high technology related crimes. Funds shall be expended to fund programs to enhance the capacity of local law enforcement, state police, and local prosecutors to deter, investigate, and prosecute high technology related crimes. Any funds distributed under these provisions shall be expended for the exclusive purpose of deterring, investigating, and prosecuting high technology related crimes. (Pen. Code, § 13848.4, subd. (a).)
- 3) States that funds allocated to the Department of Justice (DOJ) shall be used for developing and maintaining a statewide database on high technology crime for use in developing and distributing intelligence information to participating law enforcement agencies. The funds allocated to the California District Attorneys Association (CDAA) shall be used for the purpose of establishing statewide programs of education, training, and research for public prosecutors, investigators, and law enforcement officers relating to deterring, investigating, and prosecuting high technology related crimes. (Pen. Code, § 13948.4, subd (b).)
- 4) Provides that any regional task force receiving funds under these provisions may elect to have the DOJ administer the regional task force program. The DOJ may be reimbursed for any expenditures incurred in administering a regional task force from funds given to local law enforcement under the program.

FISCAL EFFECT: Unknown

COMMENTS:

- 1) **Author's Statement:** According to the author, "AB 1493 establishes the High Technology Crimes Task Force to tackle the issue of high technology crime, identity theft, and credit card fraud which continues to pose major threats to California, its citizens, its industries, and its enterprises. Convening a task force will help establish collaborative model between governmental and nongovernmental organizations to prevent and prosecute identity theft, internet crimes, and credit card fraud."
- 2) **Prior Legislation:**
 - a) AB 49 (Simitian), Chapter 618, Statutes of 2003, created the HTCTF comprised of each regional task force participating in the HTTAPP, and added a representative of the Office of Privacy Protection and a designee of the Department of Finance (DOF) to the High Crime Advisory Committee.
 - b) AB 821 (Simitian), Chapter 556, Statutes of 2001, authorized the Office of Criminal Justice Planning to allocate up to five percent of the funds available in the HTTAPP Trust Fund in order to fund education and training programs for prosecutors and law enforcement engaged in the investigation and prosecution of high technology crime.
 - c) SB 1357 (Johnston), Chapter 654, Statutes of 2000, required the appointment of a designee of the Department of Information and Technology to the HTCAC, and deleted the January 1, 2003 sunset date on the HTTAP making the program permanent.
 - d) SB 157 (Johnston), Chapter 427, Statutes of 1999, extended the HTTAPP until January 1, 2003.
 - e) SB 438 (Johnston), Chapter 906, Statutes of 1997, created the High Technology Theft Apprehension and Prosecution Program (HTTAP) and provided cellular phone cloning forfeiture after a conviction based on equipment misuse.

REGISTERED SUPPORT / OPPOSITION:

Support

Los Angeles County Professional Peace Officers Association
Long Beach Police Officers Association
Fraternal Order of Police, California State Lodge
Sacramento County Deputy Sheriffs' Association
Santa Ana Police Officers Association

Opposition

None

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