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California State Assembly

PUBLIC SAFETY



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CHAIR

Chief Counsel
Sandy Uribe

Deputy Chief Counsel
Cheryl Anderson

Staff Counsel
Liah Burnley
Andrew Ironside
Kimberly Horiuchi

Lead Committee Secretary
Elizabeth Potter

Committee Secretary
Samarpreet Kaur

1020 N Ste, Room 111
(916) 319-3744
FAX: (916) 319-3745

AGENDA

Tuesday, February 27, 2024
9 a.m. – State Capitol, Room 126

REGULAR ORDER OF BUSINESS

HEARD IN SIGN-IN ORDER

- | | | | |
|----|---------|---------------|--|
| 1. | AB 1803 | Jim Patterson | Criminal procedure: restitution. |
| 2. | AB 1804 | Jim Patterson | Crime: fentanyl trafficking. |
| 3. | AB 1810 | Bryan | Incarcerated persons: menstrual products. |
| 4. | AB 1814 | Ting | Law enforcement agencies: facial recognition technology. |
| 5. | AB 1859 | Alanis | Coroners: duties. |
| 6. | AB 1875 | McKinnor | Prisons: canteens. |
| 7. | AB 1909 | Quirk-Silva | Criminal fines: collection. |

Date of Hearing: February 27, 2024

Chief Counsel: Sandy Uribe

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Kevin McCarty, Chair

AB 1803 (Jim Patterson) – As Introduced January 8, 2024

SUMMARY: Authorizes restitution for non-economic losses in cases involving convictions for human trafficking. Specifically, **this bill:** Adds the crime of human trafficking to the statute authorizing non-economic restitution.

EXISTING LAW:

- 1) Provides that, in order to preserve and protect a victim's rights to justice and due process, a victim shall be entitled specified rights, including among others, restitution. (Cal. Const., art. I, § 28, subd. (b)(13).)
- 2) States that it is the unequivocal intention of the People of the State of California that all persons who suffer losses as a result of criminal activity shall have the right to seek and secure restitution from the persons convicted of the crimes causing the losses they suffer. (Cal. Const., art. I, § 28, subd. (b)(13)(A).)
- 3) Provides that restitution shall be ordered from the convicted wrongdoer in every case, regardless of the sentence or disposition imposed, in which a crime victim suffers a loss. (Cal. Const., art. I, § 28, subd. (b)(13)(B).)
- 4) Requires the sentencing court to order the defendant to pay victim restitution to fully reimburse the victim for economic losses resulting from the defendant's criminal conduct. (Pen. Code, § 1202.4, subd. (f).)
- 5) States that economic losses include, but are not limited to, the following: full or partial payment for the value of stolen or damaged property; medical expenses; mental health counseling expenses; wages or profits lost due to injury incurred by the victim, and if the victim is a minor, wages or profits lost by the minor's parent, parents, guardian, or guardians, while caring for the injured minor; wages or profits lost by the victim, due to time spent as a witness or in assisting the police or prosecution. (Pen. Code, § 1202.4, subd. (f)(3).)
- 6) Permits courts to order restitution for noneconomic losses, including, but not limited to, psychological harm, for felony violations of lewd and lascivious acts against a child under 14 years of age, continuous sexual abuse of a child, and sexual acts with a child 10 years of age or younger. (Pen. Code § 1202.4, subd. (f)(3)(F).)
- 7) Prohibits consideration of a defendant's inability to pay in determining the amount of a restitution order. (Pen. Code § 1202.4, subd. (g).)

- 8) Authorizes the victim to enforce the restitution order as a civil judgment. (Pen. Code, § 1202.4, subd. (i).)

FISCAL EFFECT: Unknown

COMMENTS:

- 1) **Author's Statement:** According to the author, "This bill addresses the inadequacies in current restitution procedures by extending its scope to incorporate a more inclusive approach, particularly geared towards the nuanced needs of victims of human trafficking. Recognizing the comprehensive impact of such offenses, the legislation ensures that both economic and noneconomic losses are considered in the determination of restitution amounts. At its core, the bill empowers the judiciary to determine suitable restitution by considering the seriousness of the offense and the specific losses endured by the victim. This refined approach not only strengthens the pursuit of justice but also underscores a commitment to providing tailored support for victims, fostering a more compassionate and equitable restitution process."
- 2) **Victim Restitution:** The purpose of victim restitution is to reimburse the victim for economic loss caused by the crime. (*People v. Giordano* (2007) 42 Cal.4th 644, 652.) In 1982, California voters passed Proposition 8, the Victims' Bill of Rights, which added article I, section 28, subdivision (b) to the California Constitution, which gives victims the right to seek and secure restitution from the persons convicted of the crimes causing the loss that the suffer. (*People v. Gross* (2015) 238 Cal.App.4th 1313, 1317-1318.) "A victim's right to restitution is, therefore, a constitutional one; it cannot be bargained away or limited, nor can the prosecution waive the victim's right to receive restitution." (*Ibid.*)

As directed by the voters, the Legislature enacted Penal Code section 1202.4 to implement the Victims' Bill of Rights. (*Gross, supra*, 238 Cal.App.4th at p. 1318; *People v. Seymour* (2015) 239 Cal.App.4th 1418, 1435.) This statute provides that "in every case in which a victim has suffered economic loss as a result of the defendant's conduct, the court shall require that the defendant make restitution to the victim or victims in an amount established by court order." (Pen. Code, § 1202.4, subd. (f).) The statute further provides that a "defendant's inability to pay shall not be a consideration in determining the amount of a restitution order." (Pen. Code, § 1202.4, subd. (g).) Rather, victim restitution orders must be of a dollar amount that is sufficient to fully reimburse the victim, which can include an assortment of expenses such as medical expenses, mental health counseling expenses, wages or lost profits, noneconomic losses like psychological harm, actual and reasonable attorney's fees, and relocation fees. The victim restitution order must also include interest at the rate of 10% per annum (Pen. Code, § 1202.4, subd. (f)(3)(G).)

Payment of victim restitution goes directly to the victim and compensates them for economic losses they have suffered because of the defendant's crime, i.e., to make the victim reasonably whole. (*People v. Guillen* (2013) 218 Cal.App.4th 975, 984.) A victim restitution order is an enforceable civil money judgment, and typical post-judgment enforcement tools are available to the victim. (Pen. Code, § 1202.4, subd. (i).) Victims have access to all available resources to enforce the order, including wage garnishment and lien procedures, even if the defendant is no longer in custody or on supervision. (*Ibid.*)

With limited exceptions, restitution orders are limited to economic damages. There are exceptions for noneconomic losses, including but not limited to psychological harm, for felony violations of lewd or lascivious acts performed on minors, continuous sexual abuse of a child, and sexual acts with a child 10 years of age or younger. (*People v. Fulton* (2003) 109 Cal.App.4th 876, 884, fn. 5.) Otherwise, noneconomic losses are recoverable through a civil judgment. (*Vigilant Ins. Co. v. Chiu* (2009) 175 Cal.App.4th 438, 445.)

This bill amends the restitution provision pertaining to crimes eligible for noneconomic losses to include violations of human trafficking.

- 3) **Argument in Support:** According to the *Fresno County District Attorney*, “Presently, California law guarantees victims the right to restitution, with the court mandated to order convicted individuals to pay for the complete economic loss suffered by the victim. While noneconomic losses, such as psychological harm, are considered for felony violations, there exists a pressing need to enhance and clarify procedures for determining restitution amounts, especially for non-economic losses.

“AB 1803 broadens restitution procedures for human trafficking victims, ensuring a more inclusive approach. The legislation recognizes both economic and noneconomic losses, empowering the judiciary to assess suitable restitution by considering the offense’s gravity and specific losses endured by the victim. This refined approach strengthens the pursuit of justice and underscores a commitment to providing personalized support for victims, fostering a more compassionate restitution process.”

- 4) **Argument in Opposition:** According to the *California Public Defenders Association*, “Restitution is an important issue in criminal matters. Crime victims are entitled to be reimbursed for their actual, out-of-pocket economic losses. These losses usually are based upon easily determinable cost figures that accurately establish the loss. After a hearing, the accused is assessed the restitution amount. Often, because the losses are readily ascertainable, defense counsel will stipulate with the prosecutor to the amount, thus saving court and victim/witness time.

“Under current law, a court may order non-economic losses for three specified sex offenses involving children. The term “non-economic losses” is not specifically defined but it usually refers to the damages one often claims in a civil case: pain and suffering as well as psychological harm.

“AB 1803 would expand restitution for non-economic losses by adding the crime of human trafficking. The problem with non-economic losses in a criminal case is that they are standardless – the protections and proof found in civil cases are entirely absent in a criminal case.

“In a civil case, the plaintiff will produce expert testimony, perhaps from mental health professionals, showing the lingering trauma caused by an occurrence. This testimony establishes a basis from which a jury could determine a reasonable amount of non-economic loss.

“In a criminal case there is no such requirement. There is no jury trial on restitution – the judge alone makes that determination. There is no requirement in a criminal case that the

prosecution put on any evidence at all to support a demand for non-economic damages. The prosecution is not required to call experts, for example. A judge can simply read a probation report and assess non-economic damages, seemingly at the judge's whim. The judge's determination is subject to "abuse of discretion" review, which is very difficult to overcome....

"Crime victims are not without recourse. They will, of course, continue to receive restitution for actual losses and for non-economic losses for the three specified sex crimes involving children. The civil courts are specifically designed to determine damages in these types of cases and crime victims can avail themselves of that venue."

- 5) **Related Legislation:** AB 1909 (Quirk-Silva), would make any portion of a restitution order that remains unsatisfied after a defendant has completed diversion enforceable. This bill will be heard in committee today.
- 6) **Prior Legislation:**
 - a) AB 1186 (Bonta), of the 2023-2024 Legislative Session, would remove the ability of the court to require a minor to pay victim restitution. AB 1186 was ordered to the inactive file on the Senate Floor.
 - b) SB 756 (Stern), Chapter 101, Statutes of 2017, authorizes restitution for non-economic losses in cases where a person is convicted of continuous sexual abuse of a child or sexual acts with a child 10 years of age or younger.
 - c) Proposition 9, of the November 2008 general election, Marsy's Law, significantly expands the rights of crime victims in California by giving them specified constitutional rights, including expanded right to restitution.

REGISTERED SUPPORT / OPPOSITION:

Support

Arcadia Police Officers' Association
 Breaking the Chains
 Burbank Police Officers' Association
 California Coalition of School Safety Professionals
 California Family Council
 California Narcotic Officers' Association
 California Reserve Peace Officers Association
 Central Valley Justice Coalition
 City of Clovis
 City of Clovis Police Department
 Claremont Police Officers Association
 Corona Police Officers Association
 County of Fresno
 Culver City Police Officers' Association
 Deputy Sheriffs' Association of Monterey County
 Fresno County District Attorneys Office

Fresno County Sheriff's Office
Fresno Police Department
Fullerton Police Officers' Association
Jerry Dyer, Mayor of City of Fresno
Los Angeles School Police Management Association
Los Angeles School Police Officers Association
Madera County
Mariposa County Board of Supervisors
Murrieta Police Officers' Association
Newport Beach Police Association
Novato Police Officers Association
Palos Verdes Police Officers Association
Peace Officers Research Association of California (PORAC)
Placer County Deputy Sheriffs' Association
Pomona Police Officers' Association
Riverside Police Officers Association
Riverside Sheriffs' Association
Santa Ana Police Officers Association
State Center Community College District
Upland Police Officers Association

Opposition

California Public Defenders Association
Legal Services for Prisoners With Children
San Francisco Public Defender
Young Women's Freedom Center

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

Date of Hearing: February 27, 2024
Counsel: Andrew Ironside

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Kevin McCarty, Chair

AB 1804 (Jim Patterson) – As Introduced January 8, 2024

SUMMARY: Lowers the requisite amount of fentanyl to support probable cause to obtain a wiretap order. Specifically, **this bill:** Authorizes a judge, upon receipt of a valid application to issue an ex parte order authorizing interception of wire or electronic communications initially intercepted within the territorial jurisdiction of the judge's court if there is probable cause to believe that an individual is committing, has committed, or is about to commit the crime of importing, possessing for sale, transporting, manufacturing, or selling of a substance containing fentanyl or its precursors or analogs where the substance exceeds 1.67 gallons by liquid volume or eight ounces of solid substance by weight.

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

EXISTING STATE LAW:

- 1) Provides that all people have an inalienable right to privacy. (Cal. Const., art. I, § 1.)
- 2) Provides that the right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches may not be violated; and a warrant may not issue except on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized. (Cal. Const., Art. I, § 13.)
- 3) Requires each application for an order authorizing the interception of a wire or electronic communication to be made in writing upon the personal oath or affirmation of the Attorney General, Chief Deputy Attorney General, or Chief Assistant Attorney General, Criminal Law Division, or of a district attorney, or the person designated to act as district attorney in the district attorney's absence, to the presiding judge of the superior court or one other judge designated by the presiding judge. (Pen. Code, § 629.50, subd. (a).)
- 4) Requires that the application include a statement of facts and circumstances, including the offense that is being, has been, or is about to be committed, the place where the communication is to be intercepted, that conventional investigative techniques are unlikely to succeed, the type of communication that is to be intercepted, the identity, if known, of the person whose communications are to be intercepted, and a statement of the period of time for which the interception is required to be maintained. (Pen. Code, § 629.50, subd. (a)(4)-(5).)

- 5) Authorizes a judge, upon application as specified, to enter an ex parte order, as requested or modified, authorizing interception of wire or electronic communications initially intercepted within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines, on the basis of the facts submitted by the applicant, all of the following:
 - a) There is probable cause to believe that an individual is committing, has committed, or is about to commit, among other crimes, the crime of importing, possessing for sale, transporting, manufacturing, or selling of controlled substances, as specified, with respect to a substance containing heroin, cocaine, PCP, methamphetamine, fentanyl, or their precursors or analogs where the substance exceeds 10 gallons by liquid volume or three pounds of solid substance by weight;
 - b) There is probable cause to believe that particular communications concerning the illegal activities will be obtained through that interception, including, but not limited to, communications that may be utilized for locating or rescuing a kidnap victim;
 - c) There is probable cause to believe that the facilities from which, or the place where, the wire or electronic communications are to be intercepted are being used, or are about to be used, in connection with the commission of the offense, or are leased to, listed in the name of, or commonly used by the person whose communications are to be intercepted; and,
 - d) Normal investigative procedures have been tried and have failed or reasonably appear either unlikely to succeed if tried or too dangerous. (Pen. Code, § 629.52, subs. (a)-(d).)
- 6) Prohibits a magistrate, unless otherwise authorized by law, from entering an ex parte order authorizing interception of wire or electronic communications for the purpose of investigating or recovering evidence of a prohibited violation, as specified. (Pen. Code, § 629.52, subd. (e).)
- 7) Authorizes the Judicial Council to establish guidelines for judges to follow in granting an order authorizing the interception of any wire or electronic communications. (Pen. Code, § 629.53.)
- 8) Requires each order authorizing the interception of any wire or electronic communication to specify all of the following:
 - a) The identity, if known, of the person whose communications are to be intercepted, or if the identity is not known, then that information relating to the person's identity known to the applicant;
 - b) The nature and location of the communication facilities as to which, or the place where, authority to intercept is granted;
 - c) A particular description of the type of communication sought to be intercepted, and a statement of the illegal activities to which it relates;

- d) The identity of the agency authorized to intercept the communications and of the person making the application; and,
 - e) The period of time during which the interception is authorized including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained. (Pen. Code, § 629.54, subs. (a)-(e).)
- 9) Permits the judge to grant oral approval for an emergency interception without an order as specified. Approval for an oral interception shall be conditioned upon filing with the court, within 48 hours of the oral approval, a written application for an order. (Pen. Code, § 629.56.)
- 10) Provides that no order shall authorize the interception of a wire or electronic communication for a period longer than necessary to achieve the objective of the authorization, nor longer than 30 days. (Pen. Code, § 629.58.)
- 11) Requires that a defendant identified as the result of an interception shall be notified prior to the entry of a plea of guilty or nolo contendere, or at least 10 days prior to any trial, hearing, or proceedings in the case other than an arraignment or grand jury proceeding. Within 10 days prior to trial, hearing, or proceeding the prosecution shall provide the defendant a copy of all recorded interceptions from which evidence against the defendant was derived, including a copy of the court order, accompanying application and monitory logs. (Pen. Code, § 629.70.)
- 12) Specifies that a defendant in any trial, hearing, or proceeding, may move to suppress some or all of the contents of an intercepted wire or electronic communications, or evidence derived from an intercepted communication, on the basis that the evidence was obtained in violation of the Fourth Amendment of the United States Constitution. (Pen. Code, § 629.72).
- 13) Defines “wire communication” as any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception (including the use of a like connection in a switching station), furnished or operated by any person engaged in providing or operating these facilities for the transmission of communications. (Pen. Code, § 629.51, subd. (a)(1).)
- 14) Defines “electronic communication” as any transfer of signs, signals, writings, images, sounds, data, or intelligence of any nature in whole or in part by a wire, radio, electromagnetic, photoelectric, or photo-optical system. (Pen. Code, § 629.51, subd. (a)(2).)

FISCAL EFFECT: Unknown

COMMENTS:

- 1) **Author's Statement:** According to the author, “AB 1804 is a targeted legislative initiative designed to empower law enforcement in the fight against the fentanyl crisis. By reducing the interception threshold for wire or electronic communications, the bill strategically focuses on providing valuable intelligence to catch major drug dealers rather than individual users.”

- 2) **Probable Cause:** The Fourth Amendment to the U.S. Constitution protects against unreasonable searches and seizures by the government. “[A] Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable.” (*Kyllo v. U.S.* (2001) 533 U.S. 27, 33; *California v. Ciraolo* (1986) 476 U.S. 207, 211.) The U.S. Supreme Court has held that the interception of private communications is a search within the meaning of the Fourth Amendment. (See *Berger v. New York* (1967) 388 U.S. 41 and *Katz v. U.S.* (1967) 389 U.S. 347; cf. *People v. Roberts* (2010) 184 Cal.App.4th 1149, 1160 [California’s wiretap statute allows for “the judicially authorized intrusion into a constitutionally protected zone of privacy”].)

Subject to limited exceptions, a search is reasonable if it is supported by probable cause. Probable cause sufficient to justify a search generally requires showing that “there is a fair probability that contraband or evidence of a crime will be found in a particular place” to be searched. (*Illinois v. Gates* (1983) 462 U.S. 213, 238.) Whether justification for a search exists is based on the totality of the circumstances known to law enforcement at the time of submitting an affidavit for a search warrant. (See e.g., *Illinois v. Gates*, supra, 462 U.S. at 238; *U.S. v. Buckner* (9th Cir. 1999) 179 F.3d 834, 837.)

This bill lowers the requisite amount of fentanyl to support probable cause to obtain a wiretap order from 10 gallons by liquid volume or three pounds solid substance by weight to 1.67 gallons by liquid volume or eight ounces of solid substance by weight.

- 3) **Ex Parte Orders for Interception of Wire and Electronic Communications:** Electronic intercepts are legally sanctioned surveillance of electronic and wire communications for law enforcement purposes. Individuals involved in criminal activity often use wire and electronic communications to plan crimes such as drug trafficking. The use of court-authorized electronic intercepts is a tool used by law enforcement to identify and investigate drug traffickers, street gangs, and investigate serious and violent offenses. According to the California Department of Justice, in 2022, intercept orders led to approximately 89 drug related arrests and two convictions. (California Electronic Interceptions Report, Annual Report, Office of the Attorney General (2022) at p. 6
<<https://oag.ca.gov/system/files/media/annual-rept-legislature-2022.pdf>>)

An ex parte order is a limited order that a court may issue without providing the subject of the order the usual notice prescribed by law. Such orders are justified on the grounds that informing the targeted individual of law enforcement efforts to monitor their communications would jeopardize law enforcement’s investigation—the individual could simply cease communicating specifically about the suspect criminal activity or use an alternate means of communication. (Cf. *People v. Roberts* (2010) 184 Cal.App.4th 1149, 1160.)

In interpreting a state wiretap scheme, the courts may look for guidance to cases under the Federal Wiretap Act of 1968, which “provides a ‘comprehensive scheme for the regulation of wiretapping and electronic surveillance.’” (*People v. Otto* (1992) 2 Cal.4th 1088, 1097.) “The [Federal Wiretap Act], in effect, establishes minimum standards for the admissibility of evidence procured through electronic surveillance; state law cannot be less protective of privacy than the federal Act.” (*Id.* at p. 1098.) California law generally is stricter than federal law, with a presumption that wiretapping is prohibited. (*People v. Leon* (2007) 40 Cal.4th 376, 383.) “California’s wiretap law subjects the authorization of electronic surveillance to a

much higher degree of scrutiny than a conventional search warrant.” (*People v. Roberts*, 184 Cal. App. 4th 1149, 1166.) The purpose of wiretap laws is to protect the privacy of wire and oral communications and to delineate a uniform basis of the circumstances and conditions under which the interception of wire and oral communications may be authorized. (*Halpin v. Superior Court* (1972) 6 Cal.3d 885, 898.)

Existing state law authorizes ex parte orders for the interception and recording of wire and electronic communications in limited circumstances. (See Pen. Code, § 629.52.) Unlike a search warrant, the application for authorization to intercept wire or electronic communications must come from the Attorney General, Chief Deputy Attorney General, or Chief Assistant Attorney General, Criminal Law Division, or of a district attorney. (Pen. Code, § 629.50, subd. (a).) The application must attest to the facts and circumstance justifying the application, including the details of the offense being investigated; the investigative techniques employed by law enforcement and why those techniques are unlikely to be successful; the nature and location of the facilities or place where the communication is to be intercepted; a description of the communications law enforcement expects to intercept; and the identity, if known, of the person being investigated and whose communications are to be intercepted. (Pen. Code, § 629.50, subd. (a)(4).) The application must also specify the period of time it will maintain the interception. (Pen. Code, § 629.50, subd. (a)(5).) And, an extension of the period of time for intercepting communications requires a request for an extension of the order. (Pen. Code, § 629.50, subd. (a)(7).)

Finally, the application must attest, and the court must find, that normal investigative procedures have been tried and have failed or reasonably appear either unlikely to succeed if tried or would be too dangerous. (Pen. Code, §§ 629.50, subd. (a)(4) and 629.52, subd. (d).) In *People v. Roberts*, the appellate court considered a challenge to the trial court’s order authorizing interception of wire and electronic communications because, among other reasons, “the state did not exhaust normal investigatory methods before seeking the wiretaps.” ((2010) 184 Cal.App.4th 1149, 1171.) The court rejected this argument, citing the detectives statement of the techniques used and that those techniques were unlikely to be efficacious in further investigation; that confidential informants upon whom investigators had relied had become unreliable; that an undercover officer had not been able to identifying the drug supplier or purchase large amounts of the drug, despite successfully purchasing smaller amounts; the target of the wiretap had become suspicious of the undercover agent and had cut off direct contact with the agent; the target of the wiretap took extensive measure to avoid surveillance; and that “search warrants, interviews and grand jury proceedings would effectively terminate the investigation by alerting participants and foreclosing prosecution of some of [the] most culpable participants in the narcotics trafficking organization.” (*Id.* at p. 1173.) Based on these facts, the court concluded, “The record supports the trial court’s conclusion that the supervising judge’s finding of necessity did not contravene the Fourth Amendment or [Pen. Code] section 629.52, subdivision (d).” (*Id.* at p. 1172.)

- 4) **Fentanyl, Generally:** Fentanyl was synthesized in the 1960s and has been used medically since 1968. According to the Centers for Disease Control and Prevention (CDC), “Fentanyl is a synthetic opioid that is up to 50 times stronger than heroin and 100 times stronger than morphine.” (<https://www.cdc.gov/stopoverdose/fentanyl/index.html>) Pharmaceutical fentanyl is used legally to treat severe pain in both hospital and outpatient settings. It is often used to treat post-operative pain and advanced stage cancer. (*Ibid.*)

Illicit fentanyl is primarily responsible for the dramatic increase in fentanyl-related overdoses in recent years. Most of the illicit fentanyl consumed in the United States originates in China, “a major pipeline of the building blocks of fentanyl, known as fentanyl precursors, according to U.S. officials.” (John et al., *The US sanctioned Chinese companies to fight illicit fentanyl. But the drug’s ingredients keep coming*, CNN.com (Mar. 30, 2023) <<https://www.cnn.com/2023/03/30/americas/fentanyl-us-china-mexico-precursor-intl/index.html>> [last visited Mar. 31, 2023].). Chemical manufactures in China ship fentanyl precursors to Mexico where drug cartels make fentanyl and arrange for it to be transported across the U.S./Mexico border. (Ainsley, *U.S. and Mexico weighing deal from Mexico to crack down on fentanyl going north while U.S. cracks down on guns going south*, NBCNews.com (Mar. 27, 2023) <<https://www.nbcnews.com/politics/national-security/fentanyl-gun-smuggling-us-mexico-border-deal-rcna75782>> [last visited Mar. 31, 2023].) The vast majority of the fentanyl seizures in the U.S. occur at legal ports of entry or interior vehicle checkpoints, and U.S. citizens are primarily the ones trafficking fentanyl. (Bier, *Fentanyl Is Smuggled for U.S. Citizens By U.S. Citizens, Not Asylum Seekers*, Cato.org (Sept. 14, 2022) <<https://www.cato.org/blog/fentanyl-smuggled-us-citizens-us-citizens-not-asylum-seekers>> [last visited Mar. 31, 2023].).

Available as either a liquid or powder, illicit fentanyl has proved a potent and relatively low cost drug, making it attractive to drug cartels seeking to increase profit margins. (See DEA, Facts About Fentanyl <<https://www.dea.gov/resources/facts-about-fentanyl>> [last visited Feb. 21, 2024].) Illicit fentanyl is often mixed with other drugs like heroin, cocaine, or methamphetamine, and is widely used in counterfeit prescription opioids. Because of mixing, many users are not aware that they are consuming fentanyl. (CDC, Fentanyl Facts <<https://www.cdc.gov/stopoverdose/fentanyl/index.html>> [last visited Apr. 25, 2023].) Even when aware, the potency of the drug and variability within the market often leave people who use fentanyl and other drugs often mixed with fentanyl without accurate ways to gauge whether they are consuming a lethal dose.

- 5) **Overdoses in California:** The number of deaths involving opioids, and fentanyl in particular, has increased significantly over the course of the last decade. In California, between 2019 and 2022, the number of opioid-related deaths in the state increased by 121 percent. (Ibarra et al., *California’s opioid deaths increased 121% in 3 years. What’s driving the crisis?*, CalMatters.org (July 25, 2023) <<https://calmatters.org/explainers/california-opioid-crisis/>> [last visited Feb. 21, 2024].) In 2022, the year for which the most recent data is available, there were 21,316 emergency room visits resulting from an opioid overdose, 7,385 opioid-related overdose deaths, and 6,473 overdose deaths from fentanyl. (CDPH, Overdose Surveillance Dashboard <<https://skylab.cdph.ca.gov/ODdash/?tab=Home>> [last visited Feb. 21, 2024].)

Because of mixing, many fentanyl-related deaths were people who did not know they were consuming the drug. Intentional fentanyl use is also on the rise. Many people who use drugs now choose to use fentanyl on its own or knowingly seek drugs containing it. (Edwards, *Once feared, illicit fentanyl is now a drug of choice for many opioid users*, NBC News (Aug. 7, 2022) <<https://www.nbcnews.com/health/health-news/feared-illicit-fentanyl-now-drug-choice-many-opioids-users-rcna40418>> [last visited Apr. 24, 2023].) A recent University of Washington survey of people who had used syringe service programs found that two-thirds had used fentanyl “on purpose” in the last three months. (Kingston et al., University of Washington, *Results from the 2021 WA State Syringe Service Program Health Survey* (Mar.

2022) at pp. 1, 6 <<https://adai.uw.edu/wordpress/wp-content/uploads/ssp-health-survey-2021.pdf>> [last visited Apr. 24, 2023].) Harm reduction workers in San Francisco report that “[m]ore than half of drug users [in the Tenderloin district in San Francisco] purposely seek fentanyl, despite its dangers.” (Vestal, *Some Drug Users in Western U.S. Seek Out Deadly Fentanyl. Here’s Why.*, PEW Charitable Trusts (Jan. 7, 2019) <<https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2019/01/07/some-drug-users-in-western-us-look-out-deadly-fentanyl-heres-why>> [last view Apr. 24, 2023].)

- 6) **Existing Efforts to Combat Fentanyl in California:** The state’s 2022-23 budget included \$7.9 million in 2022-23 and \$6.7 million ongoing to fund the Fentanyl Task Force within the Department of Justice (DOJ) to help tackle the fentanyl crisis. (*Governor’s Budget Summary – 2023-24* at p. 117 <<https://ebudget.ca.gov/2022-23/pdf/Enacted/BudgetSummary/FullBudgetSummary.pdf>> [April 20, 2023].) The task force includes 25 new positions within the DOJ to support those efforts. (*Ibid.*)

Building on the 2022-23 Budget, the state’s 2023-24 Budget includes additional funding to combat fentanyl abuse. The budget allocates \$93 million over the next four years, including \$79 million for Naloxone distribution projects; \$10 million for grants for education, testing, recovery, and support services; \$4 million to make test strips more available; and, \$3.5 million for overdose medication for all middle and high schools. (*Governor’s Budget Summary – 2023-24* at p. 69 <<https://ebudget.ca.gov/FullBudgetSummary.pdf>> [April 20, 2023].)

The Governor’s Master Plan for Tackling the Fentanyl and Opioid Crisis also includes \$30 million to expand California National Guard’s work to prevent drug-trafficking transnational criminal organizations and \$15 million over two years to establish and operate the Fentanyl Enforcement Program within the DOJ to combat manufacturing, distribution, and trafficking. The Governor also has allocated \$40.8 million for an education and awareness campaign to establish partnerships and create messaging and education tools for parents and educators, and \$23 million in substance use disorder workforce grants to develop substance use disorder training for non-behavioral health professionals working with children and youth. (*Governor Newsom’s Master Plan for Tackling the Fentanyl and Opioid Crisis* <https://www.gov.ca.gov/wp-content/uploads/2023/03/Fentanyl-Opioids-Glossy-Plan_3.20.23.pdf?emrc=86c07e> [April 20, 2023].)

Adding to these efforts, the Governor recently announced a public safety partnership charged with combatting fentanyl trafficking in San Francisco. The partnership would include the California Highway Patrol, the California National Guard, San Francisco Police Department, and the San Francisco District Attorney’s Office. According to the press release, “This agreement will lead to the formation of a new collaborative operation between all four agencies focused on dismantling fentanyl trafficking and disrupting the supply of the deadly drug in the city by holding the operators of large-scale drug trafficking operations accountable.” (*Governor Newsom Announces Public Safety Partnership to Disrupt Fentanyl Trafficking San Francisco* <<https://www.gov.ca.gov/2023/04/21/public-safety-partnership-sf/>> [last visited Apr. 24, 2023].)

Additionally, AB 33 (Bains), Chapter 887, Statutes of 2023, established the Fentanyl Addiction and Overdose Prevention Task Force to, among other things, collect and organize data on the nature and extent of fentanyl abuse in California; identify and assess sources and

drivers of legal and illicit fentanyl activity in California; analyze existing statutes for their adequacy in addressing fentanyl abuse and, if the analysis determines that those statutes are inadequate, recommend revisions to those statutes or the enactment of new statutes that specifically define and address fentanyl abuse; and recommend strategies to increase the ability and willingness of the medical community to treat fentanyl addiction and abuse.

- 7) **Argument in Support:** According to the *Fresno County District Attorney's Office*, "In 2021, fentanyl overdoses emerged as the leading cause of death among adults aged 18-45, comprising 36% of all drug-related fatalities in California. AB 1804 confronts this crisis by reinforcing law enforcement capabilities to gather intelligence on drug suppliers. The proposed changes the criteria for authorizing the interception of wire or electronic communications, specifically related to offenses involving fentanyl or its precursors.

"The existing law allows interception when there's probable cause that an individual is involved in offenses related to a substance containing fentanyl or its precursors, exceeding 10 gallons by liquid volume or 3 pounds of solid substance by weight.

"Yet, the existing interception threshold inadequately addresses situations involving substantial quantities linked to suppliers, necessitating a recalibration to align with the potent lethality of fentanyl in comparison to other drugs. AB 1804 strategically empowers law enforcement by reducing the interception threshold, setting authorization amounts at 1.67 gallons by liquid volume and 8 ounces by weight for solid substances containing fentanyl or its precursors. This recalibration ensures proactive action against large-scale fentanyl operations, safeguarding our communities."

- 8) **Argument in Opposition:** According to the *California Public Defenders Association*, "AB 1804 would lower the threshold quantity of fentanyl or its precursors or analogs from ten liquid gallons or three pounds of solid substance to 1.67 liquid gallons or eight ounces of solid substance believed to be involved in the importation, possession for sale, transportation, manufacture, or sale of fentanyl required for a judge to authorize interception of wire or electronic communications.

"CPDA sympathizes with and understands the unintended consequences and impact that the use of unregulated illegal drugs can have on the lives of users, including overdoses, as so many of our clients have struggled with substance abuse, mental health and addiction. However, AB 1804, by making it easier to investigate and prosecute conduct associated with fentanyl trafficking, represents a step backwards towards a debunked "tough on crime" approach, and is an attempt to resurrect the failed public policy of the past and return to mass incarceration as a solution for societal problems. Social scientists have extensively researched the outcomes of an enforcement and penalty-based approach to combatting illicit drugs and the results are clear: incarcerating those involved in the drug trade does not reduce the sale and use of drugs, does not reduce recidivism, does not increase public safety, and in fact is leads to more crime.

"By lowering the minimum quantity required for judicially authorized communications surveillance, AB 1804 will not only make it easier to prosecute narcotics sales generally, it will also promote the prosecution of low-level users and individuals who sell fentanyl due to their struggles with substance abuse, mental health and myriad other challenges, rather than to earn profit. The prosecution of this class of person, rather than more sophisticated

individuals, is easier, and the result will be the increased and repeated incarceration of indigent people, with a likely disproportionate impact on people of color.

“Returning to a ‘War on Drugs,’ tough on crime approach is a mistake, and runs contrary to established data and the will of California voters, who have repeatedly indicated their preference for treating the illicit drug trade as what it is—a health crisis. Instead of making it easier to prosecute and increasing the amount and type of people who can be targeted by law enforcement, California should double down on prevention, rehabilitation, education, and reentry. The War on Drugs has had a catastrophic impact on communities all across the state, its ruinous effects most acutely felt by people of color. Making it easier to investigate and prosecute these offenses will result in an increase in jail and prison populations, which will cause its own set of devastating collateral consequences on the families and communities of those incarcerated.

“From our experience as public defenders we know that many of those who engage in the illegal drug trade are often low-level users of drugs themselves. To make it easier to prosecute for engaging in illegal narcotic sales is contrary to sound public policy and humane treatment in our criminal justice system.”

9) Related Legislation:

- a) AB 1814 (Ting), would prohibit law enforcement and peace officers from using a facial recognition technology (FRT) as the sole basis for probable cause for an arrest, search, or affidavit for a warrant. AB 1814 will be heard today in this committee.
- b) AB 1892 (Flora), would authorize a judge, upon receipt of a valid application, to issue an ex parte order authorizing interception of wire or electronic communications initially intercepted within the territorial jurisdiction of the judge’s court if there is probable cause to believe that an individual is committing, has committed, or is about to commit a crime related to specified obscene matter involving minors. AB 1892 is currently pending hearing in this committee.

10) Prior Legislation:

- a) AB 793 (Bonta), of the 2023-2024 Legislative Session, would have prohibited a government entity from seeking or obtaining information from a reverse-location demand or a reverse-keyword demand, and prohibits any person or government entity from complying with a reverse-location demand or a reverse-keyword demand.
- b) AB 1242 (Bauer-Kahan), Chapter 627, Statutes of 2022, prohibits the issuance of, among other things, an ex parte order authorizing interception of wire or other electronic communication or a trap and trace device for purpose of investigating or recovering evidence arising out of the lawful abortion services.
- c) SB 439 (Umberg), Chapter 645, Statutes of 2019, expanded the ability for prosecuting agencies to use intercepted communications related to additional crimes captured during the lawful execution of a wiretap in court, as specified, and states that an agency that employs peace officers may use intercepted communications in an administrative or disciplinary hearing against a peace officer if the evidence relates to any crime involving

a peace officer.

- d) AB 1948 (Jones-Sawyer), Chapter 294, Statutes of 2018, added fentanyl to the list of controlled substances for which interception of wire or electronic communications may be ordered.
- e) AB 1924 (Low), Chapter 511, Statutes of 2016, required an order or extension order authorizing or approving the installation and use of a pen register or a trap and trace device direct that the order be sealed until the order, including any extensions, expires, and would require that the order or extension direct that the person owning or leasing the line to which the pen register or trap and trace device is attached not disclose the existence of the pen register or trap and trace device or the existence of the investigation to the listed subscriber or to any other person.
- f) SB 178 (Leno), Chapter 651, Statutes of 2015, prohibits a government entity from compelling the production of, or access to, electronic-communication information or electronic-device information without a search warrant or wiretap order, except under specified emergency situations.
- g) SB 741 (Hill) Chapter 741, Statutes of 2015, required local agencies to publicly approve or disclose the acquisition of cellular communications interception technology.
- h) SB 35 (Pavley), Chapter 745, Statutes of 2014, extended the sunset date on California's wiretapping law until January 1, 2020.
- i) SB 61 (Pavley), Chapter 663, Statutes of 2011, extended the sunset date on California's wiretapping law until January 1, 2015.
- j) AB 569 (Portantino), Chapter 391, Statutes of 2007, extended the sunset date on California wiretap law until January 1, 2012.
- k) AB 74 (Washington), Chapter 605, Statutes of 2002, extended the sunset date on California wiretap law until January 1, 2008.
- l) AB 2343 (Pacheco), of the 2001-2002 Legislative Session, would have deleted the sunset date of the current wiretap law, expanded the definition of "wire communication" to authorize the interception of information sent through e-mail media, and created the emergency authority to expand an existing interception order. AB 2343 died in this committee.

REGISTERED SUPPORT / OPPOSITION:

Support

Arcadia Police Officers' Association
Burbank Police Officers' Association
California Association of Highway Patrolmen

California Coalition of School Safety Professionals
California District Attorneys Association
California Family Council
California Narcotic Officers' Association
California Reserve Peace Officers Association
Claremont Police Officers Association
Corona Police Officers Association
Culver City Police Officers' Association
Deputy Sheriffs' Association of Monterey County
Fresno County District Attorneys Office
Fresno Police Department
Fullerton Police Officers' Association
Los Angeles School Police Management Association
Los Angeles School Police Officers Association
Madera Police Department
Murrieta Police Officers' Association
Newport Beach Police Association
Novato Police Officers Association
Palos Verdes Police Officers Association
Peace Officers Research Association of California (PORAC)
Placer County Deputy Sheriffs' Association
Pomona Police Officers' Association
Riverside Police Officers Association
Riverside Sheriffs' Association
Santa Ana Police Officers Association
Tuolumne County Sheriff's Office
Upland Police Officers Association

2 Private Individuals

Oppose

ACLU California Action
California Public Defenders Association
Drug Policy Alliance
Friends Committee on Legislation of California
Initiate Justice (UNREG)
Legal Services for Prisoners With Children
San Francisco Public Defender
Sister Warriors Freedom Coalition
Young Women's Freedom Center

Analysis Prepared by: Andrew Ironside / PUB. S. / (916) 319-3744

Date of Hearing: February 27, 2024

Consultant: Elizabeth Potter

ASSEMBLY COMMITTEE ON PUBLIC SAFETY

Kevin McCarty, Chair

AB 1810 (Bryan) – As Amended February 21, 2024

SUMMARY: Requires a person in a state prison, local detention facility, or state or local juvenile facility to have direct access to personal hygiene products and reproductive care without needing to request them. Specifically, **this bill:**

- 1) Removes the requirement that an incarcerated person in state prison who menstruates or experiences uterine or vaginal bleeding must ask for personal hygiene products relating to their menstrual cycle and reproductive system.
- 2) Requires a person confined in a local detention facility be allowed to continue to use materials necessary for personal hygiene with regard to their menstrual cycle and reproductive system, including, but not limited to, sanitary pads and tampons, at no cost to the incarcerated person.
- 3) Provides that a person confined in a local detention facility must be offered family planning services at least 60 days prior to a scheduled release date.
- 4) Requires a person confined in a state or local juvenile facility be allowed to continue the use of materials necessary for personal hygiene with regard to their menstrual cycle and reproductive system.
- 5) Provides that a person confined in a state or local juvenile facility must be offered family planning services at least 60 days prior to a scheduled release date.
- 6) Requires a person confined in a county juvenile justice facility overseen by the Office of Youth and Community Restoration (OYCR) must be allowed to continue to use materials necessary for personal hygiene with regard to the person's menstrual cycle and reproductive system.
- 7) Makes other technical and clarifying changes.

EXISTING LAW:

- 1) States that a person incarcerated in state prison who menstruates or experiences uterine or vaginal bleeding shall, upon request, have access to, and be allowed to use, materials necessary for personal hygiene with regard to their menstrual cycle and reproductive system, including, but not limited to, sanitary pad and tampons, at no cost to the incarcerated person. (Pen. Code, § 3409, subd. (a).)
- 2) Requires any person incarcerated in state prison who is capable of becoming pregnant to, upon request, have access to, and be allowed to obtain, contraceptive counseling and their choice of birth control methods, subject to provisions, as specified, unless medically

- contraindicated. (Pen. Code, § 3409, subd. (a).)
- 3) Requires any person confined in any local detention facility to, upon request, be allowed to continue to use materials necessary for personal hygiene with regard to their menstrual cycle and reproductive system, including, but not limited to, sanitary pads and tampons, at no cost to the incarcerated person. (Pen. Code, § 4023.5, subd. (a).)
 - 4) Requires any person confined in any local detention facility to upon request, be allowed to use for birth control measures as prescribed by a physician, nurse practitioner, certified nurse midwife, or physician assistant. (Pen. Code, § 4023.5, subd. (a).)
 - 5) Requires each and every person confined in any local detention facility to be furnished by the county with information and education regarding the availability of family planning services. (Pen. Code, § 4023.5, subd. (b).)
 - 6) Requires family planning services be offered to each and every incarcerated person at least 60 days prior to a scheduled release date. Upon request, any incarcerated person shall be furnished by the county with the services of a licensed physician or they shall be furnished by the county or by any other agency which contracts with the county with services necessary to meet their family planning needs at the time of their release. (Pen. Code, § 4023.5, subd. (c).)
 - 7) States that a “local detention facility” means any city, county, or regional facility used for the confinement of any prisoner for more than 24 hours. (Pen. Code, § 4023.5, subd. (d).)
 - 8) Requires any female confined in a state or local juvenile facility upon her request be allowed to continue to use materials necessary for personal hygiene with regard to her menstrual cycle and reproductive system, and birth control measures as prescribed by her physician. (Welf. & Inst. Code, § 221, subd. (a).)
 - 9) Requires any female confined in a state or local juvenile facility , upon her request, be furnished by the confining state or local agency with information and education regarding prescription birth control measures. (Welf. & Inst. Code, § 221, subd. (b).)
 - 10) Requires family planning services to be offered to each and every woman incarcerated person at least 60 days prior to a scheduled release date. Upon request, any woman incarcerated person shall be furnished by the confining state or local agency with the services of a licensed physician, or she shall be furnished by the confining state or local agency or by any other agency which contracts with the confining state or local agency, with services necessary to meet her family planning needs at the time of her release. (Welf. & Inst. Code, § 221, subd. (c).)
 - 11) States that “local juvenile facility” means any city, county, or regional facility used for the confinement of juveniles for more than 24 hours. (Welf. & Inst. Code, § 221, subd. (d).)
 - 12) Requires any female confined in a Department of the Youth Authority facility, upon her request, be allowed to continue to use materials necessary for personal hygiene with regard to her menstrual cycle and reproductive system, and birth control measures as prescribed by her physician. (Welf. & Inst. Code, § 1753.7, subd. (a).)

- 13) Requires any female confined in a Department of the Youth Authority facility, upon her request, be furnished by the department with information and education regarding prescription birth control measures. (Welf. & Inst. Code, § 1753.7, subd. (b).)
- 14) Requires family planning services shall be offered to each and every female confined in a Department of Youth Authority facility at least 60 days prior to a scheduled release date. Upon request, any such female shall be furnished by the department with the services of a licensed physician, or she shall be furnished by the department or by any other agency which contracts with the department with services necessary to meet her family planning needs at the time of her release. (Welf. & Inst. Code, § 1753.7, subd. (c).)

FISCAL EFFECT: Unknown

COMMENTS:

- 1) **Author's Statement:** According to the author, “Period products such as menstrual pads and tampons are a necessity for people who menstruate. Within our state correctional facilities, however, we limit access to these basic needs by requiring incarcerated people to request-- in many cases, beg-- their correctional officers for a pad or tampon. This has led to dehumanizing and unsafe conditions where incarcerated people have been forced to fashion period products out of toilet paper or bed sheets and wear bloodstained clothes between laundry days. There have been numerous reports of correctional officers leveraging access to menstrual products to sexually assault, mistreat, harass, or humiliate incarcerated people. This policy exacerbates the imbalance of power between incarcerated people and their jailers.

“AB 1810 will bring our state closer to menstrual health equity by requiring that menstrual products are free and readily available for people who need them, without the need to request access from correctional officers. This will remove a dangerous barrier for people who menstruate and allow them timely access to menstrual pads or tampons.”

- 2) **Current Access to Hygiene and Reproductive Care for Incarcerated Persons:** While current law requires that all incarcerated persons must have, upon request, access to personal care and hygiene products, such as tampons and sanitary napkins, a recent report by the California Department of Justice (DOJ) found a wide range of access throughout most of the counties. Counties were evaluated by their jail detention policies.

According to the DOJ report, “Of the 53 manuals evaluated, only 10 were ‘fully compliant’ with California law. Notably, 25 county manuals were ‘not compliant’ with the law. ‘Fully compliant’ manuals had clear language about sanitary napkins, tampons, and panty liners and specified that they were available on request as needed and at no charge for all inmates. Some manuals improperly imposed indigence requirements for cost-free access to menstrual products or only provided them for inmates incarcerated for longer than 24 hours.”
(Reproductive Healthcare in Jails Report, [as of Feb 9, 2024] at p. 15.)

This bill seeks to remove the requirement that an incarcerated person in state prison or local facility, or, a person confined to a state or local juvenile facility, must request personal hygiene products.

This committee has been informed by the California Department of Corrections and Rehabilitation (CDCR), that in state facilities, personal hygiene products are regularly

available without a formal request from an incarcerated person.

This bill would require facilities overseen by the OYCR to provide menstruation hygiene products to juveniles in custody. However, Section 3 of this bill arguably covers any juvenile facility. Therefore, Section 4 seems unnecessary and should arguably be stricken in its entirety.

- 3) **Argument in Support:** According to *The Los Angeles Regional Reentry Partnership (LARRP)*, a co-sponsor of this bill, “Although the California state Penal Code currently requires carceral facilities to enable incarcerated individuals to ask for menstrual products, facilities often fall short in practice. By amending the language of the Penal Code to make items like tampons and pads accessible by default, as opposed to the current system whereby individuals must request these products, we will promote the dignity of those who are incarcerated and who experience menstrual or uterine bleeding. Enabling greater access to these items protects the privacy of incarcerated individuals, ensures their ability to manage their menstruation healthfully and hygienically, and allows incarcerated individuals to take care of bodily needs promptly and with their own best judgment.

“Enabling greater access to these items protects the privacy of incarcerated individuals, promotes their ability to manage their menstruation in a healthy manner, and permits them to attend to their bodily needs promptly and autonomously, mitigating potential health risks associated with inadequate menstrual care. Along those same lines, the bill updates the language of the Penal Code to be more inclusive of those who menstruate or experience vaginal or uterine bleeding, further ensuring that we are doing justice to the varied identities of those who are incarcerated.

- 4) **Argument in Opposition:** According to *The California Family Council*, “On behalf of our tens of thousands of constituents, allied organizations, and over 2,000 churches across the state, the California Family Council is opposed to AB 1810, a bill requiring menstrual products and birth control to be available in adult and juvenile jails and prisons for both sexes.”
- 5) **Prior Legislation:**
- a) SB 1433 (Mitchell), Chapter 311, Statutes of 2016, provides that any incarcerated person in the state prison who menstruates shall, upon request, have improved access to personal hygiene materials, and contraceptive services, as specified.
 - b) AB 732 (Bonta), Chapter 321, Statutes of 2020, requires specified medical treatment and services for county jail and state prison inmates who are pregnant, and requires that incarcerated persons be provided with materials necessary for personal hygiene with regard to their menstrual cycle and reproductive system, upon request.

A New Way of Life Reentry Project
ACLU California Action
Alliance for Period Supplies
Amity Foundation
California Attorneys for Criminal Justice
California Pan - Ethnic Health Network
California Public Defenders Association
Chrysalis Center, the
Culver City Democratic Club
Days for Girls International
Ella Baker Center for Human Rights
Fresh Lifelines for Youth
Homeless Health Care Los Angeles
Initiate Justice (UNREG)
Initiate Justice Action
Legal Services for Prisoners With Children
Los Angeles Regional Reentry Partnership (LARRP)
San Francisco Public Defender
Sister Warriors Freedom Coalition
Ssg-hopics
The Transformative In-prison Workgroup
Western Center on Law & Poverty, INC.
What We All Deserve (WWAD)
Young Women's Freedom Center

Oppositor

California Family Council

Analysis Prepared by: Elizabeth Potter / PUB. S. / (916) 319-3744

Date of Hearing: February 27, 2024

Counsel: Andrew Ironside

ASSEMBLY COMMITTEE ON PUBLIC SAFETY

Kevin McCarty, Chair

AB 1814 (Ting) – As Introduced January 10, 2024

As Proposed to be Amended in Committee

SUMMARY: Establishes that law enforcement and peace officers need more than a facial recognition technology (FRT) match before making an arrest, conducting a search, or seeking an affidavit for a warrant. Specifically, **this bill:**

- 1) Prohibits law enforcement and peace officers from using a facial recognition technology (FRT) match as the sole basis for probable cause for an arrest, search, or affidavit for a warrant.
- 2) Requires a peace officer using information obtained from the use of FRT to examine the information with care and consider the possibility that matches could be inaccurate.
- 3) Defines “facial recognition technology” or “FRT” as “a system that compares a probe image of an unidentified human face against a reference photograph database, and, based on biometric data, generates possible matches to aid in identifying the person in the probe image.”
- 4) Defines “probe image” as “an image of a person that is searched against a database of known, identified persons or an unsolved photograph file.”
- 5) Defines “reference photo database” as “a database populated with photographs of individuals that have been identified, including databases composed of driver’s licenses or other documents made or issued by or under the authority of the state, a political subdivision thereof, any other state, or a federal agency, databases operated by third parties, and arrest photograph databases.”
- 6) Provides that nothing in the “reference photo database” definition abrogates any provision of law limiting the use of databases populated with photographs of individuals.

EXISTING FEDERAL LAW:

- 1) Provides that the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. (U.S. Const., 4th Amend.)

EXISTING STATE LAW:

- 1) Provides that all people have an inalienable right to privacy. (Cal. Const., art. I, § 1.)

- 2) Provides that the right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches may not be violated; and a warrant may not issue except on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized. (Cal. Const., art. I, § 13.)
- 3) Requires the magistrate, before issuing an arrest warrant, to examine a declaration of probable cause made by a peace officer or, when the defendant is a peace officer, an employee of a public prosecutor's office of this state, as specified. (Pen. Code, § 817, subd. (a)(1).)
- 4) Provides that a magistrate shall issue a warrant of probable cause for the arrest of the defendant only if the magistrate is satisfied after reviewing the declaration that there exists probable cause that the offense described in the declaration has been committed and that the defendant described therein has committed the offense. (Pen. Code, § 817, subd. (a)(1).)
- 5) Requires that the declaration in support of the warrant of probable cause for arrest be a sworn statement made in writing, but that the magistrate may accept an oral statement made under penalty of perjury, as specified. (Pen. Code, § 817, subd. (b) & (c).)
- 6) Requires the declarant to sign under penalty of perjury their declaration in support of the warrant of probable cause for arrest. (Pen. Code, § 817, subd. (d)(1).)
- 7) Prohibits cities and counties participating in the Speed Safety System Pilot Program from using facial recognition technology in conjunction with those systems. (Veh. Code, § 22425, subd. (l)(4).)
- 8) Declares that it is the intent of the Legislature to establish policies and procedures to address issues related to the downloading and storage of data recorded by a body-worn camera worn by a peace officer; these policies and procedures shall be based on best practices. (Pen. Code, § 832.18, subd. (a).)
- 9) Encourages agencies to consider best practices in establishing when data should be downloaded to ensure the data is entered into the system in a timely manner, the cameras are properly maintained and ready for the next use, and for purposes of tagging and categorizing the data. (Pen. Code, § 832.18, subd. (b).)
- 10) Encourages agencies to consider best practices in establishing specific measures to prevent data tampering, deleting, and copying, including prohibiting the unauthorized use, duplication, or distribution of body-worn camera data. (Pen. Code, § 832.18, subd. (b)(3).)
- 11) Instructs a law enforcement agency using a third-party vendor to manage the data storage system, to consider the following factors to protect the security and integrity of the data: Using an experienced and reputable third-party vendor; entering into contracts that govern the vendor relationship and protect the agency's data; using a system that has a built-in audit trail to prevent data tampering and unauthorized access; using a system that has a reliable method for automatically backing up data for storage; consulting with internal legal counsel to ensure the method of data storage meets legal requirements for chain-of-custody concerns; and using a system that includes technical assistance capabilities. (Pen. Code, § 832.18, subd. (b)(7).)

- 12) Encourages agencies to include in a policy a requirement that all recorded data from body-worn cameras are property of their respective law enforcement agency and shall not be accessed or released for any unauthorized purpose. Encourages a policy that explicitly prohibits agency personnel from accessing recorded data for personal use and from uploading recorded data onto public and social media Internet websites, and include sanctions for violations of this prohibition. (Pen. Code, § 832.18, subd. (b)(8).)
- 13) Provides, pursuant to the California Consumer Privacy Act (CCPA), effective January 1, 2020, that a business that collects personal information must inform the consumer at or before the time of collection, the category and purpose of the personal information that is to be collected. (Civ. Code, § 1798.100, subd. (b).)
- 14) Defines, for purposes of the CCPA, “biometric information” as including, but is not limited to, imagery of the iris, retina, fingerprint, face, hand, palm, vein patterns, and voice recordings, from which an identifier template, such as a faceprint, a minutiae template, or a voiceprint, can be extracted, and keystroke patterns or rhythms, gait patterns or rhythms, and sleep, health, or exercise data that contain identifying information. (Civ. Code, § 1798.140, subd. (b).)
- 15) Requires a person or business conducting business in California that owns or licenses computerized data that includes personal information to disclose a breach of the security of the system under specified circumstances, and defines personal information to include unique biometric data includes physical or digital photographs used or stored for facial recognition purposes. (Civ. Code, § 1798.82, subd. (h)(1)(F))

FISCAL EFFECT: Unknown

COMMENTS:

- 1) **Author's Statement:** According to the author, “I authored AB 1215 in 2019 which banned the use of biometric surveillance through police body cameras. The bill only passed with a three year moratorium that expired January 1, 2023. Consequently, current law has absolutely no parameters set regarding law enforcement’s use of facial recognition technology. It is critical that we ensure there are safeguards in place in order to avoid another year of unregulated use. California can’t go another year with no protections. AB 1814 is a modest step to setting safeguards in California law by prohibiting law enforcement agencies and peace officers from using facial recognition technology as the sole basis for probable cause for an arrest, search, or affidavit for a warrant. Most importantly, this bill does not prohibit nor deter local governments from choosing to ban the use of facial recognition technology.”
- 2) **Facial Recognition Technology:** Facial recognition technology is capable of identifying an individual by comparing a digital image of the person’s face to a database of known faces, typically by measuring distinct facial features and characteristics. Early versions of the technology were pioneered in the 1960s and 1970s, but true facial recognition technology as we understand it today did not come about until the early 1990s. In 1993, the United States military developed the Facial Recognition Technology (FERET) program, which aimed to

create a database of faces and recognition algorithms to assist in intelligence gathering, security, and law enforcement. (“Facial Recognition Technology (FERET).”) The National Institute of Standards and Technology, U.S. Dept. of Commerce (Jan. 25, 2011) <<https://www.nist.gov/programs-projects/face-recognition-technology-feret>> [last visited Jan. 23, 2024].) Since that time, advances in computer technology and machine learning have led to faster and more accurate recognition software, including real-time face detection in video footage and emotional recognition.

Today, facial recognition technology is used in a variety of applications. It is often a prominent feature in social media platforms, such as Facebook, Snapchat, and TikTok. For instance, DeepFace, a “deep learning” facial recognition system created by Facebook, helps the platform identify photos of users so they can review or share the content. (See Heilweil, *Facebook is backing away from facial recognition. Meta isn’t.*, Vox.com (Nov. 3, 2021) <<https://www.vox.com/recode/22761598/facebook-facial-recognition-meta>> [last visited Jan. 23, 2024].) Snapchat employs similar technology to allow users to share content augmented by “filters,” which can add features or alter an image of the user’s face. Facial recognition technology has also seen increasing use as a method of ID verification, such as with Apple’s Face ID and Google’s Android “Ice Cream Sandwich” systems.

As facial recognition technology has become more widespread, so have concerns about its shortcomings and potential for misuse. Many critics highlight that the use of facial recognition systems result in serious privacy violations, and that mechanisms to protect against the unwanted sale or dissemination of personal biometric data are insufficient. (Schwartz, *Resisting the Menace of Face Recognition*, Electronic Frontier Foundation (Oct. 26, 2021) <<https://www.eff.org/deeplinks/2021/10/resisting-menace-face-recognition>> [last visited Jan. 23, 2024]) Others suggest that the technology is still too inaccurate and unreliable to be used in such a broad array of applications. For instance, facial recognition technology may be less accurate when identifying transgender people, women, or persons with darker complexions. (See e.g., *Facial Recognition Software Has a Gender Problem*, National Science Foundation (Nov. 1, 2019) <https://www.nsf.gov/discoveries/disc_summ.jsp?cntn_id=299486> [last visited Jan. 23, 2024]; Buolamwini et al., *Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification* PMLR 81:77-91, 2018 <<http://proceedings.mlr.press/v81/buolamwini18a/buolamwini18a.pdf>> [last visited Jan. 23, 2024] (Najibi, *Racial Discrimination in Face Recognition Technology*, Harvard University Graduate School of Arts and Sciences Blog (Oct. 24, 2020) <<https://sitn.hms.harvard.edu/flash/2020/racial-discrimination-in-face-recognition-technology/>> [last visited Jan. 23, 2024].)

- 3) **Law Enforcement Uses of Facial Recognition Systems:** Despite growing concerns, law enforcement agencies at the federal, state, and local level continue to use facial recognition programs. A Government Accountability Office report revealed that 20 federal agencies employ such programs, 10 of which intend to expand them over the coming years. (Facial Recognition Technology: Federal Law Enforcement Agencies Should Better Assess Privacy and Other Risks, United States Government Accountability Office. (June 3, 2021) <<https://www.gao.gov/products/gao-21-518>> [last visited Jan. 23, 2024].) Several years ago, one study found that one in four law enforcement agencies across the country can access some form of FRT, and that half of American adults – more than 117 million people – are in a law enforcement face recognition network. (Garvie et al., *The Perpetual Line-Up:*

Unregulated Police Face Recognition in America, Georgetown Law Center on Privacy and Technology (Oct. 18, 2016) <<https://www.perpetuallineup.org/>> [last visited Jan. 23, 2024].) Very few of these agencies have a formal facial recognition policy, but one such agency, the New York Police Department, defines the scope of its policy as follows: “Facial recognition technology enhances the ability to investigate criminal activity and increases public safety. The facial recognition process does not by itself establish probable cause to arrest or obtain a search warrant, but it may generate investigative leads through a combination of automated biometric comparisons and human analysis.” (Facial Recognition Technology Patrol Guide, City of New York Police Department (Mar. 12, 2020) <<https://www1.nyc.gov/assets/nypd/downloads/pdf/nypd-facial-recognition-patrol-guide.pdf>> [last visited Jan. 23, 2024].)

Proponents of facial recognition technology see it as a useful tool in helping identify criminals. It was reportedly utilized to identify the man charged in the deadly shooting at The Capital Gazette’s newsroom in Annapolis, Maryland in 2018. (Singer, *Amazon’s Facial Recognition Wrongly Identifies 28 Lawmakers*, *A.C.L.U. Says*, N.Y. Times, (July 26, 2018) <<https://www.nytimes.com/2018/07/26/technology/amazon-aclu-facial-recognition-congress.html>> [last visited Jan. 30, 2024].)

The inaccuracy, biases, and potential privacy intrusions inherent in many facial recognition systems used by law enforcement have led to criticism from civil rights advocates, especially in California. In March 2020, the ACLU, on behalf of a group of California residents, filed a class action lawsuit against Clearview AI, claiming that the company illegally collected biometric data from social media and other websites, and applied facial recognition software to the databases for sale to law enforcement and other companies. (*Clearview AI class-action may further test CCPA’s private right of action*, JD Supra (Mar. 12, 2020) <<https://www.jdsupra.com/legalnews/clearview-ai-class-action-may-further-14597/>> [last visited Jan. 23, 2024].) An investigation by BuzzFeed in 2021 found that 140 state and local law enforcement agencies in California had used or tried Clearview AI’s system. (Mac et al., *Your Local Police Department Might Have Used This Facial Recognition Tool To Surveil You. Find Out Here.*, BuzzFeed News, (Apr. 6, 2021) <<https://www.buzzfeednews.com/article/ryanmac/facial-recognition-local-police-clearview-ai-table>> [last visited Jan. 30, 2024].)

The controversy surrounding law enforcement use of facial recognition has led many California cities to ban the technology, including San Francisco, Oakland, Berkeley, Santa Cruz, and Alameda. Despite the ban in San Francisco, officers there may have skirted the city’s ban by outsourcing an FRT search to another law enforcement agency. (Cassidy, *Facial recognition tech used to build SFPD gun case, despite city ban*, S.F. Chronicle (Sept. 24, 2020) <<https://www.sfchronicle.com/bayarea/article/Facial-recognition-tech-used-to-build-SFPD-gun-15595796.php>> [last visited Jan. 30, 2024].)

In September 2021, The Los Angeles Times reported that the Los Angeles Police Department had used facial recognition software nearly 30,000 times since 2009, despite years of “vague and contradictory information” from the department “about how and whether it uses the technology.” According to The Times, “The LAPD has consistently denied having records related to facial recognition, and at times denied using the technology at all.” Responding to the report, the LAPD claimed that the denials were just mistakes, and that it was no secret that the department used such technology. Although the department could not determine how

many leads from the system developed into arrests, it asserted that “the technology helped identify suspects in gang crimes where witnesses were too fearful to come forward and in crimes where no witnesses existed.” (Rector et al., *Despite past denials, LAPD has used facial recognition software 30,000 times in last decade, records show*, L.A. Times, (Sept. 21, 2020) <https://www.latimes.com/california/story/2020-09-21/lapd-controversial-facial-recognition-software> [last visited Jan. 23, 2024].)

- 4) **Facial Recognition Technology Legislation in California:** In 2019, the Legislature passed AB 1215 (Ting), Chapter 579, Statutes of 2019, which banned the use of facial recognition technology and other biometric surveillance systems in connection with cameras worn or carried by law enforcement, including body-worn cameras (BWC), for the purpose of identifying individuals using biometric data. This ban covered both the direct use of biometric surveillance by a law enforcement officer or agency, as well as a request or agreement by an officer or agency that another officer or agency, or a third party, use a biometric surveillance system on behalf of the requesting party. The ban also included narrow exceptions for processes that redact a recording prior to disclosure in order to protect the privacy of a subject, and the use of a mobile fingerprint-scanning device to identify someone without proof of identification during a lawful detention, as long as neither of these functions result in the retention of biometric data or surveillance information. AB 1215 included a sunset date of January 1, 2023.

SB 1038 (Bradford), of the 2021-2022 Legislative Session, would have extended the ban on biometric surveillance and facial recognition systems in connection with cameras worn or carried by officers indefinitely. At its core, the question involved balancing the purported investigatory benefits of facial recognition technology against its demonstrated privacy risks, technical flaws, and racial and gender biases. Committee staff did not identify or receive any evidence demonstrating that the ban on facial recognition technology used in connection with BWC had significantly hampered law enforcement efforts in the two years since it became operative. (Sen. Com. on Public Saf., com. on Sen. Bill No. 1038 (2021-2022 Reg. Sess.).) Nevertheless, SB 1038 failed passage in the Senate.

In the 2023-2024 Legislative Session, the Legislature was asked once again to determine whether the investigatory benefits of facial recognition technology outweigh the risk to the communities served by law enforcement. AB 642 (Ting) would have set minimum standards for use of FRT by law enforcement, including requiring law enforcement agencies to have a written policy for FRT use, allowing for FRT use when a peace officer has reasonable suspicion that an individual has committed a felony, and providing that an FRT-generated match of an individual may not be the sole basis for probable cause for an arrest, search, or affidavit for a warrant. It did not include any limitation on the source of the input image submitted for comparison against the database of persons. Police could use traffic cameras, CCTV, and images from BWCs or dashcams. AB 642 was held in the Assembly Appropriations Committee.

In contrast, AB 1034 (Wilson), of the 2023-2024 Legislative Session, would have prohibited a law enforcement officer or agency from installing, activating, or using a biometric surveillance system solely in connection with a law enforcement agency’s body-worn camera. AB 642 would have allowed for input images from more sources than AB 1034 would ban, and therefore the two bills were reconcilable. Despite passing through the Assembly, however, AB 1034 was ordered to the inactive file in the Senate. Because neither

of these bills have become law, there currently are only a very few, context specific restrictions on law enforcement's use of FRT. (See, e.g., Veh. Code, § 22425, subd. (l)(4).)

Unlike previous efforts, this bill does not seek to limit the use of FRT by law enforcement. Rather, it seeks to prevent law enforcement from justifying an arrest, search, or an affidavit for a warrant when the sole basis for that action is an FRT match, which would remain legal in this state. This bill is also reconcilable with AB 1034, should AB 1034 be removed from the inactive file in the Senate and eventually become law. Because AB 1034 would only ban FRT in conjunction with body-worn cameras, this bill would still apply to all uses of FRT by law enforcement not in connection with a body-worn camera or data collected therefrom.

- 5) **Probable Cause to Search or Arrest:** This bill prohibits law enforcement and peace officers from using FRT as the sole basis for probable cause for an arrest, search, or affidavit for a warrant.

The Fourth Amendment to the U.S. Constitution protects against unreasonable searches and seizures by the government. Subject limited exceptions, a search or seizure is reasonable if it is supported by probable cause. Probable cause sufficient to justify a search warrant generally requires showing that “there is a fair probability that contraband or evidence of a crime will be found in a particular place” to be search. (*Illinois v. Gates* (1983) 462 U.S. 213, 238.) Probable cause to arrest an individual exists “when, under the totality of the circumstances known to the arresting officers, a prudent person would have concluded that there was a fair probability that [that individual] had committed a crime.” (See *U.S. v. Garza* (9th Cir. 1992) 980 F.2d 546, 550; *U.S. v. Gonzales* (9th Cir. 1984) 749 F.2d 1329, 1337.) In either case, whether justification for a search or an arrest exists is based on the totality of the circumstances known to law enforcement at the time of the arrest, search, or submitting of an affidavit for a warrant. (See e.g., *Illinois v. Gates*, supra, 462 U.S. at 238; *U.S. v. Buckner* (9th Cir. 1999) 179 F.3d 834, 837.) As such, under this bill, an FRT match would not, by itself, justify the conclusion that there is a fair probability that the subject of the match had committed a crime or the conclusion that they possessed contraband or evidence of a crime. More would be required.

Opponents of this bill observe that, in several cases, warnings similar to this bill's language accompanied FRT matches that misidentified individuals resulting in their wrongful arrest. One report observes that “there has been no jurisprudence establishing guidance on... what additional evidence, if any, is needed before officers can make an arrest” after an FRT match, and that, in many instances, “officers have relied heavily, if not exclusively, on leads generated by face recognition searches.” (Center on Privacy & Technology, Georgetown University, *A Forensic Without The Science* (Dec. 6, 2022) p. 6

<<https://www.law.georgetown.edu/privacy-technology-center/publications/a-forensic-without-the-science-face-recognition-in-u-s-criminal-investigations/>> [last visited Feb. 21, 2024].) Existing law does not prevent an FRT match alone from providing law enforcement with probable cause to arrest, search, or submit an affidavit for warrant. This bill establishes that more than an FRT match alone is needed to establish probable cause, albeit not how much more.

- 6) **Argument in Support:** According to the *California Police Chiefs Association*, “FRT has an unprecedented ability to combat criminal activity, identify persons of interest, develop actionable leads, and close cases faster than ever before. It is the objective of protecting our

communities and preventing future crime that is driving law enforcement to develop responsible, appropriate, and effective FRT programs. However, there remains a need to ensure the technology is not used in way it was not intended. Through setting meaningful protections, including those within AB 1814, the legitimate use of FRT can lead to significant benefits for public safety.

“Across the country, real-world examples of law enforcement using FRT to solve major crimes showcases just how important this new technology can be towards protecting our communities. In North America alone, FRT has been used in 40,000 human trafficking cases, helping rescue 15,000 children and identify 17,000 traffickers. In Detroit, law enforcement was successful in identifying a gunman who targeted and murdered three LGBTQ victims. In 2018, another gunman who killed five employees at a newspaper headquarters in Maryland was identified using FRT. And in New York, FRT was used to identify a perpetrator within 24-hrs of kidnapping and raping a young woman; and in a separate instance, a suspected subway bomber was identified through FRT.

“As California looks to host the 2026 World Cup and the 2028 Winter Olympics in Los Angeles, we must ensure our agencies have all the best possible tools necessary – including FRT – to defend against threats to the safety of the public at these worldwide events. For these reasons, the California Police Chiefs Association strongly supports AB 1814.”

- 7) **Argument in Opposition:** According to *Oakland Privacy*, “[T]he bill authorizes the use of “databases operated by third parties” as reference photo databases. The largest and most prominent third party database is Clearview AI, the notorious company that scraped the entire Internet at scale without permission, notification or consent and now claims to have 20 billion photographs in their database or 60x the population of the entire United States. Use of Clearview AI has been banned in Canada, Australia, has been deemed illegal by the European data protection agency, and the company has been fined repeatedly in EU nations including France, Italy and Greece for violations of privacy laws.

“Clearview AI is not the only third party database of faces available, but its collection is many magnitudes greater than any other product available to CA law enforcement agencies, and it is currently used (according to the company) by four law enforcement agencies in California, including the Inglewood Police Department and CDCR.¹⁰ By sanctioning the use of this widely-condemned database, the California State Legislature would be forfeiting its global leadership in privacy rights by falling short of accepted standards in the EU and Canada.

“Assembly Bill 1814 also fails to place critical restrictions on the use of facial recognition and in so doing so, signals to law enforcement agencies all over the state that such restrictions are not required. There are many that could be mentioned, but for the purposes of this letter, here are two prominent ones.

“The bill does not prohibit the use of facial recognition to monitor First Amendment protected activities. In order not to chill First Amendment rights and in deference to the right to privacy preserved in Article 1 of the California Constitution, FRT use must not encompass broad sweeps of large gatherings of people where each individual at a protest may be scanned and identified for a vague public safety purpose. While it is possible that the author *meant* to restrict use in this way by mentioning probable cause, the language in the bill

does not prevent use. It only prevents outcomes i.e. search, arrest or warrant and only when the FRT match is the sole basis for such an action. So its use to fish people out of crowd for further scrutiny is not prevented. This is not an academic concern, e.g in 2020, the Long Beach Police Department did over 700 facial recognition searches through LACRIS with the reason for the search logged as ‘PDProtest’

“The bill does not prohibit the use of live facial recognition on the street, via a tablet, smartphone or body camera. Recognition software has a significant error rate, especially with darker-skinned people. If patrol officers that a person they encounter is a felon or dangerous due to a mis-identification, they will act aggressively due to perceived danger, up to and including shooting someone who flees out of fear. When law enforcement thinks someone is a criminal and they run away, it is well-documented that they start shooting in far too many cases, and sometimes with lethal results. Allowing facial recognition use live in the field will reverse many of the criminal justice reforms that California adopted in the wake of the Black Lives Matter movement to reduce police shootings of unarmed black and brown men¹³. By not prohibiting it, the Legislature is sanctioning such use and lives will be lost. The author thinks he is addressing the problem of people being arrested for crimes they didn’t commit (which is a problem and has already happened at least seven different times), but out on the street a mis-identification can have lethal consequences before there is any search, arrest or warrant.

“Passing a law or policy stating that a facial recognition match is not a sole basis for an arrest, warrant or search is not a new idea. Such laws or policies are in place in many jurisdictions around the country. In fact, that was the standing policy in the City of Detroit when Robert Williams, an unassuming mid-forties automotive worker and a Black man, was dragged away from his suburban home in front of his screaming daughter for a crime he did not commit.¹⁴ Williams came to Sacramento in 2023 and talked to this Legislature about what happened to him and asked you to ban this pernicious technology, and you did not. He told you that his daughter is still in therapy and having nightmares about her father being a bad man. Literally, the equivalent to AB 1814 *was* the law at the time, and it did not stop a terrifying experience from happening to him. Assembly member Wilson will remember her conversation with Williams in 2023. AB 1814 is not effective public policy and will not protect Californians from false arrest and worse.

“If, and that is a very big if, this technology is not completely banned in the state (and to be absolutely clear, Oakland Privacy supports such a ban), the restrictions regarding its use must be extensive. A sentence will not do. At a minimum, such a proposal should:

1. Maintain the prohibition on the use of the DMV database for reference photos
2. Prohibit the use of Clearview AI and any private database that scrapes images without consent
3. Prohibit all use related to First Amendment-protected activities
4. Prohibit live facial recognition use in the field

AB 1814 does none of those things.”

8) Related Legislation:

- a) AB 1804 (Jim Patterson), would authorize a judge, upon receipt of a valid application, to issue an ex parte order authorizing interception of wire or electronic communications initially intercepted within the territorial jurisdiction of the judge's court if there is probable cause to believe that an individual is committing, has committed, or is about to commit the crime of importing, possessing for sale, transporting, manufacturing, or selling of a substance containing fentanyl or its precursors or analogs where the substance exceeds 1.67 gallons by liquid volume or eight ounces of solid substance by weight. AB 1804 will be heard today in this committee.
- b) AB 1892 (Flora), would authorize a judge, upon receipt of a valid application, to issue an ex parte order authorizing interception of wire or electronic communications initially intercepted within the territorial jurisdiction of the judge's court if there is probable cause to believe that an individual is committing, has committed, or is about to commit a crime related to specified obscene matter involving minors. AB 1892 is currently pending hearing in this committee.
- c) AB 2943 (Zbur), would provide that probable cause supporting a warrantless arrest of a person for shoplifting when the violation was not committed in the officer's presence is established when an officer receives a sworn statement obtained by the officer from a person who witnessed the person to be arrested committing the alleged violation, or when the officer observes video footage that shows the person to be arrested committing the alleged violation. AB 2943 is pending referral in the Assembly Rules Committee.
- d) SB 912 (Weiner), prohibits a law enforcement agency from using a colorimetric field drug test to support a finding of probable cause to arrest for simple drug possession, unless a test from a crime laboratory confirms the presence of the drug in the sample. SB 912 is pending hearing in the Senate Public Safety Committee.

9) Prior Legislation:

- a) AB 642 (Ting), of the 2023-2024 Legislative Session, would have set minimum standards for use of facial recognition technology (FRT) by law enforcement, including requiring law enforcement agencies to have a written policy for FRT use, allowing for FRT use when a peace officer has reasonable suspicion that an individual has committed a felony, and providing that an FRT-generated match of an individual may not be the sole basis for probable cause for an arrest, search, or affidavit for a warrant. AB 642 was held in the Assembly Appropriations Committee.
- b) AB 1034 (Wilson), of the 2023-2024 Legislative Session, would have prohibited a law enforcement officer or agency from installing, activating, or using a biometric surveillance system in connection with a law enforcement agency's body-worn camera or any other officer camera. AB 1034 was placed on the inactive file in the Senate.
- c) AB 645 (Friedman), Chapter 808, Statutes of 2023, established the Speed Safety Pilot Program authorizing designated cities and counties to install automated speed safety systems, but prohibiting those cities and counties from using facial recognition

technology in conjunction with those systems.

- d) SB 1038 (Bradford), would have deleted the January 1, 2023 sunset date on provisions of law that prohibit a law enforcement officer from installing, activating or using a biometric surveillance system in connection with a body-worn camera or data collected by a body-worn camera. SB 1038 died on the inactive file in the Senate.
- e) AB 1281 (Chau), Chapter 268, Statutes of 2020, would require a business in California that uses facial recognition technology to disclose that usage in a physical sign that is clear and conspicuous at the entrance of every location that uses facial recognition technology.
- f) AB 2261 (Chau), of the 2019-2020 Legislative Session, would have established a legal framework governing the use of FRT by public and private entities, including requiring opt-in consent for the enrollment or disclosure of an individual's facial information, requiring probable cause that an individual committed a serious criminal offense to enroll without consent, requiring independent assessment of accuracy and discriminatory performance of FRT, and requiring that decisions informed by FRT are subject to review. AB 2261 was held in the Suspense File in the Assembly Appropriations Committee.
- g) AB 1215 (Ting), Chapter 579, Statutes of 2019, prohibited a law enforcement officer or agency from installing, activating, or using a biometric surveillance system in connection with a law enforcement agency's body-worn camera or any other camera.
- h) SB 21 (Hill), of the 2017-2018 Legislative Session, would have required local law enforcement agencies to have a policy, approved by the local governing body, in place before using surveillance technology. SB 21 was held in the Suspense File in the Assembly Appropriations Committee.
- i) SB 1186 (Hill), of the 2017-2018 Legislative Session, would have required local law enforcement agencies to have a policy, approved by the local governing body, in place before using surveillance technology, as defined. SB 1186 was held in the Suspense File in the Assembly Appropriations Committee.
- j) AB 69 (Rodriguez) Chapter 461, Statutes of 2015, requires law enforcement agencies to follow specified best practices when establishing policies and procedures for downloading and storing data from body-worn cameras.
- k) SB 34 (Hill) Chapter 532, Statutes of 2015, imposed a variety of security, privacy and public hearing requirements on the use of automated license plate recognition systems, as well as a private right of action and provisions for remedies.

REGISTERED SUPPORT / OPPOSITION:

Support

California Police Chiefs Association

Opposition

ACLU California Action
California Public Defenders Association
Electronic Frontier Foundation
Indivisible CA Statestrong
Oakland Privacy

Analysis Prepared by: Andrew Ironside / PUB. S. / (916) 319-3744

Amended Mock-up for 2023-2024 AB-1814 (Ting (A))

**Mock-up based on Version Number 99 - Introduced 1/10/24
Submitted by: Andrew Ironside, Assembly Public Safety Committee**

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

SECTION 1. Section 13661 is added to the Penal Code, to read:

13661. (a) A law enforcement agency or peace officer shall not use a facial recognition technology (FRT) match as the sole basis for probable cause for an arrest, search, or affidavit for a warrant.

(b) A peace officer using information obtained from the use of FRT shall examine results with care and consider the possibility that matches could be inaccurate.

(c) For purposes of this section, the following terms have the following meanings:

(1) “Facial recognition technology” or “FRT” means a system that compares a probe image of an unidentified human face against a reference photograph database, and, based on biometric data, generates possible matches to aid in identifying the person in the probe image.

(2) “Probe image” means an image of a person that is searched against a database of known, identified persons or an unsolved photograph file.

(3) “Reference photograph database” means a database populated with photographs of individuals that have been identified, including databases composed of driver’s licenses or other documents made or issued by or under the authority of the state, a political subdivision thereof, any other state, or a federal agency, databases operated by third parties, and arrest photograph databases. **Nothing in this paragraph shall be deemed to abrogate the provisions of Section 12800.7 of the Vehicle Code or any other provision of law limiting the use of databases populated with photographs of individuals.**

Date of Hearing: February 27, 2024

Chief Counsel: Sandy Uribe

ASSEMBLY COMMITTEE ON PUBLIC SAFETY

Kevin McCarty, Chair

AB 1859 (Alanis) – As Introduced January 18, 2024

SUMMARY: Requires coroners to report to the State Department of Public Health (DPH) and to the Overdose Detection Mapping Application Program (ODMAP) whether an autopsy revealed the presence of xylazine at the time of a person's death. Specifically, **this bill:**

- 1) Requires a coroner to test bodily fluid extracted during an autopsy to determine whether the decedent's bodily fluid contained any amount of xylazine in either of the following situations:
 - a) The coroner reasonably suspects the cause of a person's death to be the accidental or intentional overdose of an opioid; or
 - b) The person was given an overdose intervention drug before death and was unresponsive to the drug.
- 2) Requires the coroner to report a positive result indicating the presence of xylazine to both DPH and the ODMAP managed by the Washington/Baltimore High Intensity Drug Trafficking Area program.
- 3) Requires DPH to post the number of positive results on its Overdose Surveillance Dashboard located on the DPH website.

EXISTING LAW:

- 1) Requires coroners to determine the manner, circumstances, and cause of death in the following circumstances:
 - a) Violent, sudden, or unusual deaths;
 - b) Unattended deaths;
 - c) Known or suspected homicide, suicide, or accidental poisoning;
 - d) Drowning, fire, hanging, gunshot, stabbing, cutting, exposure, starvation, acute alcoholism, drug addiction, strangulation, aspiration, or sudden infant death syndrome;
 - e) Deaths in whole or in part occasioned by criminal means;
 - f) Deaths known or suspected as due to contagious disease and constituting a public hazard;

- g) Deaths from occupational diseases or occupational hazards;
 - h) Deaths where a reasonable ground exists to suspect the death was caused by the criminal act of another; and,
 - i) Deaths reported for inquiry by physicians and other persons having knowledge of the death. (Gov. Code, § 27491.)
- 2) Requires the coroner to sign the certificate of death if they perform a mandatory inquiry. (Gov. Code, § 27491, subd. (a).)
 - 3) Gives the coroner discretion when determining the extent of the inquiry required to determine the manner, circumstances and cause of death. (Gov. Code, § 27491, subd. (b).)
 - 4) States that the content of a death certificate must include, among other things, personal data of the decedent, date of death, place of death, disease or conditions leading directly to death and antecedent causes, accident and injury information, and information regarding pregnancy. (Health & Saf. Code, § 102875.)
 - 5) Requires a physician and surgeon, physician assistant, funeral director, or other person to notify the coroner when they have knowledge that a death occurred, or if they have charge of a body in which death occurred under any of the following, among others:
 - a) Without medical attendance;
 - b) During continued absence of attending physician and surgeon;
 - c) Where attending physician and surgeon, or physician assistant is unable to state cause of death; and,
 - d) Reasonable suspicion to suspect death was caused by criminal act. (Health & Saf. Code, § 102850.)
 - 6) Requires the California Department of Public Health (DPH) to establish an Internet-based electronic death registration system for the creation, storage, and transfer of death registration information. (Health & Saf. Code, § 102778.)
 - 7) Requires DPH to track data on pregnancy-related deaths and publish such data at least once every three years, as specified. (Health & Saf. Code, § 123630.4.)

FISCAL EFFECT: Unknown

COMMENTS:

- 1) **Author's Statement:** According to the author, "California's most rural and poor communities are being ravaged by Fentanyl and Tranq. Just recently, there have been three xylazine related overdose deaths detected in Stanislaus County. By establishing a centralized tracking system for the presence of xylazine in fatalities associated with opioid overdoses, we can help law enforcement and our medical community focus their resources and skills to

better respond and treat these overdoses and addictions. It will also serve as a critical data point for the legislature in our effort to better protect our constituents.”

- 2) **Reporting Drug Overdoses:** California’s Overdose Prevention Initiative (OPI) collects and shares data on fatal and non-fatal drug related overdoses, overdose risk factors, prescriptions, and substance use. (<https://www.cdph.ca.gov/Programs/CCDPHP/sapb/Pages/OPI-landing.aspx>) [as of February 20, 2024].) The OPI works with local and state partners to address the complex and evolving nature of the drug overdose epidemic by data collection and analysis, prevention programs, public awareness and education campaigns, and safe prescribing and treatment practices. (DPH Drug Overdose Response Partner Recommendations, <https://www.cdph.ca.gov/Programs/CCDPHP/sapb/Pages/Drug-Overdose-Response.aspx>) [as of Feb. 20, 2024].) One of the five recommendations it makes to local and statewide partners is to improve rapid identification of drug overdose outbreaks by partnering with coroner and medical examiner offices, healthcare facilities, and emergency medical services to obtain overdose data to form a timely response. (*Ibid.*)
- 3) **Department of Public Health Overdose Dashboard:** As part of DPH's Opioid Prevention Initiative, DPH maintains the California Overdose Surveillance Dashboard (dashboard). The Dashboard tracks deaths related to any opioid overdose, deaths related specifically to fentanyl, emergency department visits related to any opioid overdose, and the number of prescriptions issued for opioids in California. The data for deaths comes from death certificate data from DPH's Center for Health Statistics and Informatics, both preliminary quarterly data and the Comprehensive Master Death File that is filed annually. The data for emergency department visits and hospitalizations comes from annual hospital Emergency Care Data Record reports and hospital discharge data reports collected and maintained by the Department of Health Care Access and Information. However, due to the time lag of the source data for this information, the overdose data available on the dashboard for both deaths and emergency department visits/hospitalizations is only finalized for 2021, with preliminary data available through the second quarter of 2022. According to the Dashboard, there were 7,385 deaths related to opioids (6,473 involved fentanyl), and 21,316 emergency department visits for opioid overdoses, for the year 2022. ([CA Overdose Dashboard](#) [as of February 20, 2024].)

This bill would require a coroner to report to DPH any death in which the presence of xylazine is detected in the decedent’s body. This bill would also require DPH to reflect this information on its dashboard.

- 4) **Background on ODMAP:** In 1988, Congress created the High Intensity Drug Trafficking Areas (HIDTA) program to provide assistance to federal, state, local, and tribal law enforcement agencies operating in areas determined to be critical drug-trafficking regions of the United States. There are currently 33 HIDTAs, including four in California: Central Valley, Northern California, Los Angeles, and San Diego/Imperial Valley.

In January of 2017, the Washington/Baltimore HIDTA launched ODMAP as a response to the lack of a consistent methodology to track overdoses, which limited the ability to understand and mobilize against the crisis. According to the Washington/Baltimore HIDTA, ODMAP is an overdose mapping tool that allows first responders to log an overdose in real time into a centralized database in order to support public safety and public health efforts to mobilize an immediate response to a sudden increase, or spike, in overdose events. ODMAP

is only available to government agencies serving the interest of public safety and health, and each agency wishing to use the system must sign a participation agreement designed to protect the data within the system. The system currently serves more than 3,700 agencies with more than 28,000 users in all 50 states, and has logged 850,000 overdose events. According to the Washington/Baltimore HIDTA, there are seventeen states with statewide implementation strategies, including several with legislation requiring reporting to ODMAP. (<https://www.hidta.org/odmap/>)

The ODMAP Outreach Coordinator has informed this committee that ODMAP requires four mandatory inputs which include: location (geocoded and is not saved), date and time of incident, outcome of incident (non-fatal or fatal) and if naloxone was administered and if so, the dosage. When entering data, there is an option to input the primary suspected drug, as well as additional suspected drugs, if any. When clicking on a data point on the map ODMAP will show the drug/drugs involved of non-fatal and fatal overdose, if that information was entered.

This bill would require a coroner to report to ODMAP any death in which the presence of xylazine is detected in the decedent's body.

Last year SB 67 (Seyarto), Chapter 859, Statutes of 2023, was enacted and requires coroners to report overdose information to ODMAP. (See Health and Saf. Code, § 11758.04.) SB 67 did not specify or limit the types of controlled substances which could be involved in the overdose. Should this bill be amended to require a coroner to also report the presence of fentanyl?

- 5) **Argument in Support:** According to the *Peace Officers' Research Association of California*, "The ability to accurately track overdose deaths is very important and valuable. Those statistics help law enforcement and California understand the extent of various drug crises."
- 6) **Related Legislation:** AB 2871 (Maienschein), would authorize a county to establish an interagency overdose fatality review team to assist local agencies in identifying and reviewing overdose fatalities. AB 2871 is pending referral.
- 7) **Prior Legislation:**
 - a) SB 67 (Seyarto), Chapter 859, Statutes of 2023, requires a coroner or medical examiner to report deaths that are a result of a drug overdose to the Overdose Detection Mapping Application Program managed by the Washington/Baltimore High Intensity Drug Trafficking Area program.
 - b) AB 1351 (Haney), of the 2023-2024 Legislative Session, would have required all coroners or medical examiners to submit quarterly reports to the DPH on deaths caused by, or involving, overdoses of any drugs. AB 1351 was held by the Assembly Appropriations Committee.
 - c) SB 1695 (Escutia), Chapter 678, Statutes of 2002, among other things, requires DPH to create a webpage on drug overdose trends in California, including death rates, in order to ascertain changes in the cause or rate of fatal and nonfatal drug overdoses.

REGISTERED SUPPORT / OPPOSITION:

Support

Peace Officers' Research Association of California

Opposition

None submitted

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

Date of Hearing: February 27, 2024

Counsel: Liah Burnley

ASSEMBLY COMMITTEE ON PUBLIC SAFETY

Kevin McCarty, Chair

AB 1875 (McKinnor) – As Introduced January 22, 2024

SUMMARY: Requires, operative January 1, 2028, the California Department of Corrections and Rehabilitation (CDCR) and local jail and detention facilities to sell sulfate-free shampoos and conditioners, curl creams and gel at canteens.

EXISTING LAW:

- 1) Requires CDCR to provide each incarcerated person a bed, sufficient blankets, garments, and sufficient plain and wholesome food including plant-based meals. (Pen. Code, § 2084, subd. (a).)
- 2) Requires CDCR to maintain a canteen at institutions under its jurisdiction to sell incarcerated persons toilet articles, candy, notions, and other sundries, and to provide the necessary facilities, equipment, personnel, and merchandise for the canteen. (Pen. Code, § 5005.)
- 3) States that the Secretary of CDCR shall specify what commodities shall be sold in the canteen. (Pen. Code, § 5005.)
- 4) Requires, until January 1, 2028, the prices of the articles offered for sale in the canteen not to exceed a 35-percent markup above the amount paid to the vendors. (Pen. Code, § 5005.)
- 5) Requires, commencing January 1, 2028, the prices of the articles offered for sale in the canteen to be fixed by the Secretary of CDCR at amounts that will render each canteen self-supporting. (Pen. Code, § 5005.)
- 6) Allows the sheriff of each county to establish, maintain and operate a store in connection with the county jail and to purchase and sell confectionery, tobacco and tobacco users' supplies, postage and writing materials, and toilet articles and supplies to people incarcerated in the jail. (Pen. Code, § 4025, subd. (a).)
- 7) States that the prices of the articles offered for sale at the store shall be fixed by the sheriff. (Pen. Code, § 4025, subd. (b).)

FISCAL EFFECT: Unknown

COMMENTS:

- 1) **Author's Statement:** According to the author, “An incarcerated person under the custody of CDCR or a county jail should have reasonable access to safe and affordable personal care products to address the unique needs of ethnic hair. AB 1875 will provide this reasonable

access and further help an incarcerated person focus on their rehabilitation and future integration back into society.”

- 2) **Canteens:** Existing law requires CDCR to establish and maintain prison canteens for sale of toiletries, candy, canned goods, notions and other sundries to inmates. (Pen. Code, § 5005.) According to CDCR, canteens operate in all correctional institutions and have increasingly become a resource for the delivery of programs which benefit incarcerated persons. (*Increased Canteen Resources* (2021) Available at: <https://esd.dof.ca.gov/Documents/bcp/2122/FY2122_ORG5225_BCP4089.pdf> [as of Feb. 20, 2024].) For example, in collaboration with the California Correctional Health Care System, the canteens are now the distribution point for over-the-counter medications, reading glasses, and healthier food items, such as yogurt, fish, and vegetables (*Ibid.*) In addition, Title 15 Regulations require staff at each CDCR facility to consult with representatives of the incarcerated population when determining items to be stocked in the canteen. (Cal. Code Regs., tit. 15, 3090.)

Existing law does not require, but permits, local detention facilities to operate canteens. (Pen. Code, § 4025.) The sheriff at each jail is permitted to purchase and sell confectionery, tobacco and tobacco users’ supplies, postage and writing materials, and toilet articles and supplies to people incarcerated in the jail. (*Ibid.*)

This bill would require, operative on January 1, 2028, canteens at both CDCR and local correctional facilities to sell sulfate-free shampoos and conditioners, curl creams and gel. For canteens at CDCR facilities, the Secretary would fix the sale price of these products, in an amount that will render the canteen self-supporting. (Pen. Code, § 5005 subd. (a) [as repealed in Sec. 3 and added in Sec. 4 by Stats. 2023, Ch. 609.] For canteens at local correctional facilities, the sheriff would fix the sale price of these products. (Pen. Code, § 4025, subd. (b).)

Welfare and Institutions Code section 873 allows the chief probation officer to establish, a store in connection with a juvenile hall or other county juvenile facilities and to purchase “goods, articles and supplies, including, but not limited to, confectionery, snack foods and beverages, postage and writing materials, and toilet articles and supplies” and to sell these goods, articles, and supplies for cash to wards and detainees confined in the juvenile hall or other county juvenile facilities. The Legislature should consider also requiring canteens at juvenile halls to sell sulfate-free shampoos and conditioners, curl creams and gels.

- 3) **Sulfate-Free Shampoos and Conditioners, Curl Creams and Gels:** Prisoners retain the essence of human dignity inherent in all persons. Respect for that dignity animates the Eighth Amendment prohibition against cruel and unusual punishment. (*Brown v. Plata* (2011) 563 U.S. 493.) Although “routine discomforts in prison” are inadequate to form the basis of a Constitutional violation, even a justice of the U.S. Supreme Court has jested, that it is “undoubtedly arguable that many people in the country regard the choice of shampoo as just as important as who may be elected to local, state, or national political office.” (*Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council* (1976) 425 U.S. 748, 787 (dis. opn. of Rehnquist, J.); (*Hudson v. McMillian* (1992) 503 U.S. 1, 9 [stating the requirements for an Eight Amendment violation].)

Indeed, choice in shampoo and hair care products for people with textured hair is particularly significant for conceptualizing human dignity—particularly in regards to how it may relate to

caring for natural hair as a way of embracing racial and ethnic identity and challenging non-inclusive standards of beauty and race-based hair discrimination. (*Hair Discrimination Research: Dove CROWN Studies*. Available at: <[https:// www.thecrownact. com/research-s studies](https://www.thecrownact.com/research-studies)> [as of Feb. 20, 2024]; see also, Patton, Tracey Owens. “*Hey Girl, Am I More than My Hair?: African American Women and Their Struggles with Beauty, Body Image, and Hair.*” Johns Hopkins University Press (2006) at pp. 24–51. Available at: <[http:// www. jstor.org /stable/4317206](http://www.jstor.org/stable/4317206)> [as of Feb. 20 2024].)

This bill would require CDCR and local detention facilities to sell sulfate-free shampoos, conditioners, gels, and curl creams in canteens.

Sulfates are chemicals used as cleansing agents. They are found in household cleaners, detergents, and shampoo. The purpose of sulfates is to create a lathering effect to remove oil and dirt from hair. However, sulfates can be harsh and damaging to certain types of hair by stripping it of its natural oils. Sulfates can be particularly damaging to afro-textured hair that is more fragile and prone to dryness due to the nature of the curl pattern and differences in the hair shaft. (St. George’s University Hospitals, *Afro-textured hair* (Feb. 2022) Available at: <https://www.stgeorges.nhs.uk/wp-content/uploads/2022/02/DER_ATH.pdf> [as of Feb.20, 2024].)

Also, because of its cleansing abilities, sulfate can sometimes lead to skin dryness or irritation, especially in people who have a history of dry skin. Sulfate-free shampoo is recommended by the American Academy of Dermatology for people with rosacea, eczema, contact dermatitis, or sensitive skin. (Healthline, *Should You Avoid Shampoos with Sulfates?* (July 3, 2019). Available at: <<https://www.healthline.com/health/sulfate-in-shampoo#when-to-avoid-sulfates>> [as of Feb.20, 2024]; see also Today, *Are Sulfates Bad For Your Hair? We Asked An Expert And You Might Be Surprised* (Feb. 25, 2022). Available at:<[https://www .today. com/shop/are-sulfates-bad-hair-sulfate-free-shampoo-t248276](https://www.today.com/shop/are-sulfates-bad-hair-sulfate-free-shampoo-t248276)> [as of Feb.20, 2024].)

Textured hair needs moisture. A lack of moisture causes stress along the hair shaft, which can lead to breakage. Accordingly, clinicians recommend that people with afro-textured hair adopt a regime that keeps their hair moisturized. (St. George’s University Hospitals, *Afro-textured hair* (Feb. 2022) Available at: <https://www.stgeorges.nhs.uk/wp-content/uploads/2022/02/DER_ATH.pdf> [as of Feb.20, 2024].) Hair gels can moisturize, prevent dryness, accentuate curl, and strengthen the hair. Most afro and curly hair types benefit from a gel to preserve and protect the curl for longer retention and less frizz. (Naturally Curly, *This is Who Should Use Gel (and Who Shouldn't)* (July 15, 2019). Available at: <[https://www. naturally curly.com/curlreading/curl-products/this-is-who-should-use-gel-and-who-shouldnt](https://www.naturallycurly.com/curlreading/curl-products/this-is-who-should-use-gel-and-who-shouldnt)> [as of Feb.20, 2024].)

Similarly, curl creams aid in providing a soft hold and definition to curls. They can often be more nourishing than gels and leave less product build up. Curl creams can help tame some frizz, aid in detangling, and moisturize dry hair. (Naturally Curly, *How to Use Curl Creams* (June 13, 2013). Available at: <<https://www.naturallycurly.com/curlreading/wavy-hair-type-2/how-to-use-curl-creams>> [as of Feb.20, 2024].)

“To incarcerate, society takes from prisoners the means to provide for their own needs.” (*Brown v. Plata* (2011) 563 U.S. 493.) By requiring correctional institutions to make these products available for purchase, this bill will allow incarcerated persons of all ethnic

backgrounds, skin, and hair types to provide for the care and health of their hair and skin.

- 4) **Regulations on Personal Hygiene Products in Correctional Facilities:** While incarcerated persons may not have the same degree of autonomy over their grooming as individuals outside of prison, they still have basic human rights, including the right to access basic hygiene necessities. Title 15 regulations require incarcerated persons at CDCR institutions to “practice good health habits.” (Cal. Code Regs., tit. 15, § 3060.) The regulations further provide that incarcerated persons “must keep themselves clean, and practice those health habits essential to the maintenance of physical and mental well-being.” (Cal. Code Regs., tit. 15, § 3061.) “All inmates shall receive basic supplies necessary for maintaining personal hygiene. Inmates shall be provided products for washing hands, bathing, oral hygiene, and other personal hygiene, including but not limited to: soap, toothpaste or toothpowder, toothbrush, and toilet paper.” (*Ibid.*) In local detention facilities, the regulations provide, vaguely that “hair care services shall be available.” (Cal. Code Regs., tit. 15 § 1267.) The regulations further provide that, “there shall be written policies and procedures developed by the facility administrator for the issue of personal hygiene items.” (Cal. Code Regs., tit. 15 § 1265.)

This bill will encourage inclusive hygiene habits by ensuring that incarcerated persons are able to purchase products suited to address a more diverse range of hair care routine needs.

- 5) **Argument in Support:** According to the *California Public Defenders Association* (CPDA), “Sulfate-free shampoos and hair products are important because according to the Food and Drug Administration, sulfates when used as surfactants strip naturally curly hair of moisture, making it drier and more likely to break potentially irritating the scalp. Since people of African descent are more likely to have curly hair, failing to stock sulfate-free shampoo and conditioners disproportionately affects the health of black individuals who are incarcerated.

“While we strongly support AB 1875, we would urge you to consider adding shampoo and conditioner to the list of necessities provided to indigent people who are incarcerated. Under existing law shampoo and conditioner are not provided to indigent incarcerated persons. The only personal health items that are provided are “soap, toothpaste or toothpowder, toothbrush, and toilet paper. Deodorant, shampoo, and conditioner are considered luxuries which must be purchased through the canteen. Not only does washing your hair with bar soap leave soap scum, but for many individuals it irritates the scalp, potentially leading to seborrheic dermatitis in older men. Shampoo and conditioner are necessities for keeping clean and practicing good health habits.”

- 6) **Related Legislation:** AB 1810 (Bryan) would require incarcerated persons who menstruate to have access to materials necessary for personal hygiene with regard to their menstrual cycle and reproductive system, including, but not limited to, sanitary pads and tampons. AB 1810 is being heard in this committee today.

7) **Prior Legislation:**

- a) AB 353 (Jones-Sawyer), Chapter 429, Statutes of 2023, requires persons incarcerated at CDCR to be permitted to shower at least every other day.

- b) SB 309 (Cortese), Chapter 388, Statutes of 2023, added to the list of civil rights afforded to incarcerated persons the right to access, or purchase, religious clothing and headwear, not exceeding the purchase price and normal taxes of the item.
- c) SB 474 (Becker), Chapter 609, Statutes of 2023, requires CDCR to maintain a canteen at its active facilities, and, until January 1, 2028, prohibits the sale prices of the articles offered for sale from exceeding a 35% markup above the price of the articles paid to the vendors.
- d) AB 732 (Bonta), Chapter 321, Statutes of 2020, requires persons incarcerated in county jails be provided with materials necessary for personal hygiene with regard to their menstrual cycle and reproductive system, upon request.
- e) SB 188 (Mitchell), Chapter 58, Statutes of 2019, includes, in the definition of “race,” “hair texture and protective hairstyles for purposes of specified anti-discrimination statutes.
- f) SB 1433 (Mitchell), Chapter 311, Statutes of 2016, requires persons incarcerated in state prisons be provided with materials necessary for personal hygiene with regard to their menstrual cycle and reproductive system, upon request.

REGISTERED SUPPORT / OPPOSITION:

Support

California Public Defenders Association
Ella Baker Center for Human Rights
Initiate Justice (UNREG)
Initiate Justice Action
San Francisco Public Defender
Sister Warriors Freedom Coalition
The Transformative In-prison Workgroup

Opposition

None submitted.

Analysis Prepared by: Liah Burnley / PUB. S. / (916) 319-3744

Date of Hearing: February 27, 2024

Counsel: Liah Burnley

ASSEMBLY COMMITTEE ON PUBLIC SAFETY

Kevin McCarty, Chair

AB 1909 (Quirk-Silva) – As Introduced January 24, 2024

SUMMARY: Makes any restitution order that remains unsatisfied after a defendant has completed diversion enforceable by a victim as if the restitution order were a civil judgment, and enforceable in the same manner as is provided for the enforcement of any other money judgment. Specifically, **this bill:**

- 1) Makes any portion of a restitution order that remains unsatisfied after a defendant has completed diversion enforceable by the victim in the same manner as a civil judgment.
- 2) Authorizes a local collection program to continue to enforce restitution orders after a defendant has completed diversion.

EXISTING LAW:

- 1) Establishes pretrial diversion as the procedure of postponing prosecution at any point in the judicial process from the point at which the accused is charged until adjudication. (Pen. Code, § 1001.1.)
- 2) States that, at no time shall a defendant be required to make an admission of guilt as a prerequisite for placement in a pretrial diversion program. (Pen. Code, § 1001.3.)
- 3) States that, if the defendant has performed satisfactorily during the period of diversion, the criminal charges shall be dismissed at the end of the period of diversion. (Pen. Code, § 1001.7.)
- 4) States that, upon successful completion of a diversion program, the arrest upon which the diversion was based shall be deemed to have never occurred and the court may issue an order to seal the records pertaining to the arrest. (Pen. Code, § 1001.9.)
- 5) Establishes specified pretrial diversion programs, including but not limited to, misdemeanor diversion, diversion of defendants with cognitive developmental disabilities, mental health diversion, bad check diversion, military diversion, parental diversion, primary caregiver diversion, and theft diversion. (Pen. Code, §§ 1001.20 - 1001.97.)
- 6) Requires a defendant who is diverted to complete all conditions ordered by the court and to make full restitution to have their charges dismissed. (Pen. Code, § 1001.96.)
- 7) Specifies that a defendant's inability to pay restitution due to indigence shall not be grounds for denial of diversion or a finding that the defendant has failed to comply with the terms of

diversion. (Pen. Code, § 1001.96.)

- 8) Requires the court to impose on the defendant a diversion restitution fee. (Pen. Code, § 1001.90, subd. (a).)
- 9) Provides that a diversion restitution fee shall not be imposed upon persons whose case is diverted by the court for cognitive developmental diversion. (Pen. Code, § 1001.90, subd. (a).)
- 10) States that the diversion restitution fee shall be set at the discretion of the court and shall be commensurate with the seriousness of the offense, but shall not be less than \$100 and not more than \$1,000. (Pen. Code, § 1001.90, subd. (b).)
- 11) Requires the diversion restitution fee to be ordered regardless of the defendant's present ability to pay, unless there are compelling and extraordinary reasons, to waive imposition of the fee. When the waiver is granted, the court shall state on the record all reasons supporting the waiver. (Pen. Code, § 1001.90, subd. (c).)
- 12) Provides that the state can enforce the diversion restitution fee imposed in the manner of a judgment in a civil action. (Pen. Code, §§ 1001.90, subd. (e) & 1214, subd. (a).)
- 13) Provides that the diversion restitution fee imposed shall be immediately deposited in the Restitution Fund. (Pen. Code, § 1001.90, subd. (f).)
- 14) Provides that any portion of a restitution fine or restitution fee that remains unsatisfied after a defendant is no longer on probation, parole, postrelease community supervision, mandatory supervision, or after completing diversion is enforceable by the California Victim Compensation Board (CalVCB). (Pen. Code, § 1214, subd. (a).)
- 15) States that any portion of a victim restitution order that remains unsatisfied after a defendant is no longer on probation, parole, postrelease community supervision or mandatory supervision, after a term in custody, is enforceable by the victim. (Pen. Code, § 1214, subd. (b).)
- 16) States that victims shall have access to all resources available under the law to enforce the victim restitution order, including, but not limited to, access to the defendant's financial records, use of wage garnishment and lien procedures, information regarding the defendant's assets, and the ability to apply for restitution from any fund established for the purpose of compensating victims in civil cases. (Pen. Code, §1214, subd. (b).)
- 17) Allows local collection programs to continue to enforce victim restitution orders once a defendant is no longer on probation, postrelease community supervision, or mandatory supervision or after completion of a term in custody. (Pen. Code, § 1214, subd. (b).)

FISCAL EFFECT: Unknown.

COMMENTS:

- 1) **Author's Statement:** According to the author, “The California Justice System is centered on rehabilitation and the transformative power of second chances for those who have done wrong. However, we must recognize that while we do all we can to support redemption, we cannot forget those who have been harmed along the way. Ensuring that victims receive their compensation is not just fair, it is a fundamental part of the very nature of justice. AB 1909 is about striking that balance – supporting individual’s opportunities to turn their lives around, while also making sure that those who have suffered receive the support they need to heal and move forward.”
- 2) **Victim Restitution vs. Restitution Fines and Fees:** California law provides for two types of restitution: victim restitution and restitution fines and fees. The purposes of the two kinds of restitution are different. The imposition of a restitution fine is to inflict additional punishment. (*People v. Dueñas* (2019) 30 Cal.App.5th 157, 1169; *People v. Hanson* (2000) 23 Cal.4th 355, 363.) The purpose of victim restitution is to reimburse the victim for economic loss caused by the crime. (*People v. Giordano* (2007) 42 Cal.4th 644, 652.)

Payment of victim restitution goes directly to the victim and compensates them for economic losses they have suffered because of the defendant’s crime, i.e., to make the victim reasonably whole. (*People v. Guillen* (2013) 218 Cal.App.4th 975, 984.) 1) Victim restitution is a constitutional requirement and all persons who suffer losses as a result of criminal activity shall have the right to seek and secure restitution from the persons convicted of the crimes causing the losses they suffer. (Cal. Const., art. I, § 28, subd. (b)(13)(A).) A victim restitution order is an enforceable civil money judgment, and typical post-judgment enforcement tools are available to the victim. (Pen. Code, § 1214, subd. (b).) Victims have access to all available resources to enforce the order, including wage garnishment and lien procedures, even if the defendant is no longer in custody or on supervision. (*Ibid.*) Also, victim restitution orders can be referred to the California Franchise Tax Board (FTB) for collection and crime victims are entitled to their preference of collection agencies. (Rev. & Tax. Code, § 19820.)

On the other hand, restitution fines and fees, which are separate from victim restitution, are deposited in the Restitution Fund in the State Treasury. (Pen. Code, §§ 1204.4 & 1214, subd. (a); *Guillen, supra*, 218 Cal.App.4th at p. 985.) Restitution fines are enforceable by the CalVCB, even after a defendant is no longer in custody or on supervision, and can be referred to the FTB for collection. (Pen. Code, § 1214; Rev. & Tax Code, § 19820.)

Combined, the restitution fine and victim restitution, can easily exceed amounts in the tens of thousands of dollars, not including the accruing interests. The obligation to pay restitution does not vanish, even if expungement relief is granted. (*Seymour, supra*, 239 Cal.App.4th 1418 at p.1430 [“victim restitution is still an obligation [the defendant must meet”]; *In Re Timothy N.* (2013) 216 Cal.App.4th 725, 738 [the defendant “is not escaping his restitution obligation” and “will be required to pay the restitution pursuant to the trial court’s orders, which the victims may enforce as they would a civil judgment.”]; *People v. Allen* (2019) 41 Cal.App.5th 312, 329.) The obligation to pay restitution does not vanish after the defendant is no longer on probation, parole, postrelease community supervision or mandatory supervision, after a term in custody. (Pen. Code, § 1214.)

- 3) **Restitution and Diversion:** Diversion programs are “criminal justice interventions that try to address the root cause of what is driving criminal conduct and incentivize treatment and services. ... Upon successful completion of diversion, defendants can avoid criminal convictions” (Judicial Council of California, *Memorandum* (Sept. 29, 2023). Available at <<https://www.courts.ca.gov/documents/ceac-diversion-programs-memo-092923.pdf>> [as of Feb. 20, 2024].) Defendants facing felony or misdemeanor charges may enter a diversion program either pretrial or postconviction, depending on the charges and nature of the case. (*Ibid.*)

Whenever a case is diverted, the court is required to impose on the defendant a diversion restitution fee in addition to any other administrative fee provided or imposed under the law. (Pen. Code, § 1001.90.) Under existing law, the diversion restitution fee shall not be imposed upon persons whose case is diverted by the court for cognitive developmental disability diversion. (*Ibid.*) The diversion restitution fee imposed pursuant to is set at the discretion of the court commensurate with the seriousness of the offense, but may not be less than \$100, and not more \$1,000. (*Ibid.*)

Even though the defendant has not been *convicted* of a crime, generally courts are allowed to order a defendant in diversion to pay the victim restitution, in addition to the diversion restitution fee. For example, for mental health diversion, upon request, the court is required to conduct a hearing to determine whether restitution is owed to any victim as a result of the diverted offense and, if owed, order its payment during the period of diversion. However, a defendant’s inability to pay restitution due to indigence or mental disorder cannot be grounds for denial of diversion or a finding that the defendant has failed to comply with the terms of diversion. (Pen. Code, § 1001.36, subd. (f)(1)(D); see also, Pen. Code, § 1001.64, subd. (b) [allowing restitution to the victim for bad check diversion; & Pen. Code, § 181, subd. (e)(2) [allowing restitution to the victim for theft diversion].)

Under existing law, restitution fees and fines, including diversion restitution fees are enforceable by the state after the defendant is no longer on probation, parole, postrelease community supervision or mandatory supervision, or after a term in custody, *or after completing diversion*. (Pen. Code, § 1214, subd. (a) & 1001.90, subd. (e).) Likewise, any portion of a victim restitution order remaining after the defendant is no longer on probation, parole, postrelease community supervision or mandatory supervision, or after a term in custody, is enforceable by the victim in the same manner as a civil judgement. (Pen. Code, § 1214, subd. (b).) However, unlike the diversion restitution fee, the statute does not explicitly specify that a victim restitution order is enforceable by the victim upon the completion of diversion. This bill would make a victim restitution order enforceable by the victim in the same manner as a civil judgement after a defendant successfully completes diversion.

Similarly, existing law allows local collection programs to enforce victim restitution orders once a defendant is no longer on probation, postrelease community supervision, or mandatory supervision or after completion of a term in custody. (Pen. Code, § 1214, subd. (b).) This bill would extend this authorization to local collection programs to enforce victim restitution orders once a defendant completes diversion.

- 4) **Argument in Support:** According to the *Los Angeles County District Attorney’s Office*, the sponsor of this bill, “existing statutes are silent as to the viability of unpaid restitution orders once diversion is otherwise successfully completed. This vagueness has created confusion in

the courts, resulted in inconsistent interpretations, and created a two-tier system for victims of crime. [...]

“AB 1909 does not impact a defendant’s eligibility for diversion or change any existing laws around a defendant’s inability to pay. It also does not expand a court’s right to order restitution during the period of diversion or as part of a criminal sentence. Courts already have the right to order restitution under the diversion statutes mentioned. AB 1909 merely cures a vagueness in the law by closing the existing gap between obtaining a restitution order during the period of diversion and converting it to a money judgment upon completion of diversion. The clarifying amendment in this bill will ensure that defendants eligible for diversion are afforded that opportunity without shifting the expense of their crimes to their victims once diversion is completed, and a crime victim’s Constitutional right to restitution is fully protected regardless of whether a defendant is sentenced or provided the benefit of diversion.”

- 5) **Argument in Opposition:** According to the *California Public Defenders Association* (CPDA), “AB 1909 seeks to extend the restitution requirement and impose it on Californians who have not been found guilty of any criminal offense, including Californians whose cases were diverted as a result of serious mental illness pursuant to Penal Code section 1001.36.

“Among the significant concerns we have this proposal are the following:

- The fact that a person has been diverted (including pursuant to § 1001.36) does not mean that that person is guilty of the charged (or any) offense. Section AB 1909 therefore seeks to treat presumptively innocent vulnerable people who have not been convicted of any offense as if they have been convicted of criminal wrong-doing.
- Because section 1001.36 is routinely applied to defendants who are incompetent to stand trial, this bill would unconstitutionally (and pointlessly) impose criminal restitution liability on people who are unable to defend themselves and unable to comprehend the nature of the charges against them, let alone any corresponding restitution order.

“Although we firmly believe that treating presumptively innocent men and women as if they have been found guilty of criminal offenses is morally, legally, and factually erroneous, we also believe that there are modifications that could address these concerns, including:

- Adding procedural protections to restitution hearings for diverted individuals and clarifying that this procedure does not apply to diversion ordered during incompetency proceedings.
- Adding time limits to the period for which the post-diversion restitution order applies.
- Adding “ability to pay” provisions to allow courts to opt out of pointless attempts to seek restitution from unhoused, mentally ill Californians.”

- 6) **Related Legislation:** SB 1035 (Ashby), would change the annual interest rate on restitution orders and the annual interest rate charged by the FTB on certain delinquent payments, including fines, fees, and restitution, to no more than 1%. SB 1035 is pending referral by Senate Rules Committee.
- 7) **Prior Legislation:** AB 1530 (Skinner), Chapter 359, Statutes of 2010, provided express authority for the FTB to collect orders of restitution awarded to the FTB in criminal proceedings in the same manner and with the same priority as tax liabilities.

REGISTERED SUPPORT / OPPOSITION:

Support

- Los Angeles County District Attorney's Office (Sponsor)
- Arcadia Police Officers' Association
- Burbank Police Officers' Association
- California Coalition of School Safety Professionals
- California Narcotic Officers' Association
- California Reserve Peace Officers Association
- Claremont Police Officers Association
- Corona Police Officers Association
- Crime Victims Alliance
- Culver City Police Officers' Association
- Deputy Sheriffs' Association of Monterey County
- Fullerton Police Officers' Association
- Los Angeles School Police Management Association
- Los Angeles School Police Officers Association
- Murrieta Police Officers' Association
- Newport Beach Police Association
- Novato Police Officers Association
- Palos Verdes Police Officers Association
- Peace Officers Research Association of California (PORAC)
- Placer County Deputy Sheriffs' Association
- Pomona Police Officers' Association
- Riverside Police Officers Association
- Riverside Sheriffs' Association
- Santa Ana Police Officers Association
- Upland Police Officers Association

Opposition

- Legal Services for Prisoners With Children
- California Public Defenders Association
- Californians United for A Responsible Budget

Analysis Prepared by: Liah Burnley / PUB. S. / (916) 319-3744