California State Assembly

PUBLIC SAFETY

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AGENDA

Tuesday, April 16, 2024
8:30 a.m. -- State Capitol, Room 126

ANALYSIS PACKET PART II
(AB 2382 B. Rubio – AB 3171 Soria)

Date of Hearing: April 16, 2024
Counsel: Kimberly Horiuchi

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Kevin McCarty, Chair

AB 2382 (Blanca Rubio) – As Amended March 18, 2024

SUMMARY: Punishes a second or subsequent conviction for soliciting or engaging in any act of prostitution with a person over 18 years of age as a felony. Specifically, **this bill**:

1) States any person convicted of a second or subsequent offense for soliciting or engaging in prostitution with a person over the age of 18 in exchange for compensation, money, or anything of value, shall be punished as a felony, punishable by a maximum of three years in county jail.

2) States any person convicted of a second or subsequent offense for soliciting or engaging in prostitution with a person under the age of 18 in in exchange for compensation, money, or anything of value, shall be punished as a felony, punishable by a maximum of three years in county jail.

EXISTING LAW:

1) Provides that, except in cases where a different punishment is prescribed by any law of this state, every offense declared to be a misdemeanor is punishable by imprisonment in the county jail not exceeding six months, or by fine not exceeding one thousand dollars ($1,000), or by both. (Pen. Code, § 19.)

2) States any person who solicits anyone to engage in or who engages in lewd or dissolute conduct in any public place or in any place open to the public or exposed to public view is guilty of a misdemeanor and punishable by up to six months in county jail. (Pen. Code, § 647, subd. (a).)

3) States individual who solicits, or who agrees to engage in, or who engages in, any act of prostitution ***with the intent to receive compensation***, money, or anything of value from another person is guilty of a misdemeanor punishable by up to six months in the county jail. (Pen. Code, § 647, subd. (b)(1).)

4) States any individual who solicits, or who agrees to engage in, or who engages in, any act of prostitution with another person who is ***18 years of age or older in exchange for the individual providing compensation, money, or anything of value to the other person*** is guilty of a misdemeanor punishable by up to six months in county jail. (Pen. Code 647, subd (b)(2).

5) Defines an agreement to engage in an act of prostitution as any person, with specific intent to so engage the individual, manifests an acceptance of an offer or solicitation by another person who ***is 18 years of age or older to so engage***, regardless of whether the offer or solicitation was made by a person who also possessed the specific intent to engage in an act of prostitution. (Pen. Code, § 647, subd. (b)(2).)

6) States any individual who solicits, or who agrees to engage in, or who engages in, any act of prostitution with another person ***who is a minor (i.e., under the age of 18) in exchange for the individual providing compensation, money, or anything of value to the minor,*** is punishable by up to six months in county jail. (Pen. Code, § 647, subd. (b)(3).)

7) Provides that, notwithstanding existing law, the crime of solicitation does not apply to a child under 18 years of age who is alleged to have engaged in conduct to receive money or other consideration that would, if committed by an adult, violate the solicitation statute. A commercially exploited child may be adjudged a dependent child of the court pursuant Welfare and Institutions Code and may be taken into temporary custody, if the conditions allowing temporary custody without warrant are met. (Pen. Code, § 647, subd. (b)(5).)

8) States any person who deprives or violates the personal liberty of another with the intent to obtain forced labor or services, is guilty of human trafficking and shall be punished by imprisonment in the state prison for 5, 8, or 12 years and a fine of not more than $500,000. (Pen. Code, § 236.1, subd. (a).)

9) Specifies that a person who causes, induces, or persuades, or attempts to cause, induce, or persuade, a person who is a minor at the time of commission of the offense to engage in a commercial sex act, with the intent to commit specified crimes including pimping, pandering, or child pornography, is guilty of human trafficking. A violation is punishable by imprisonment in the state prison as follows:

   a) Five, 8, or 12 years and a fine of not more than $500,000; or

   b) Fifteen years to life and a fine of not more than $500,000 when the offense involves force, fear, fraud, deceit, coercion, violence, duress, menace, or threat of unlawful injury to the victim or to another person. (Pen. Code, § 236.1, subd. (c).)

10) Provides that if a defendant is convicted of a felony offense and it is pled and proved that the defendant has been convicted of one prior serious or violent offense as defined, the term of imprisonment is twice the term otherwise imposed for the current offense. (Pen. Code, § 667.)

11) Punishes any person who deprives or violates the personal liberty of another with the intent to procure a person under the age of 18 to engage in prostitution ("procurement"), prostituting a person for all or a portion of their earnings ("pimping"), producing by force, threat of force, trick, or scheme for purposes of prostitution ("pandering"), delivering or giving a person under the age of 16 for purposes of lewd and lascivious conduct with a child ("procurement of a child"), abduction of a minor for prostitution, sale or distribution of obscene matter, production or exhibition of obscene matter, sexual exploitation of a child,

employing a minor in the sale or distribution of child pornography, advertising or promoting obscene material, obscene live conduct, or extortion is guilty of human trafficking and shall be punished by imprisonment in the state prison for 8, 14, or 20 years and a fine of not more than $500,000. (Pen. Code, § 236.1, subd. (b).

12) Requires law enforcement agencies to use due diligence to identify all victims of human trafficking, regardless of the citizenship of the person. When a peace officer comes into contact with a person who has been deprived of his or her personal liberty, a minor who has engaged in a commercial sex act, a person suspected of engaging in prostitution, or a victim of a crime of domestic violence or sexual assault, the peace officer must consider whether the following indicators of human trafficking are present:

   a) Signs of trauma, fatigue, injury, or other evidence of poor care.

   b) The person is withdrawn, afraid to talk, or his or her communication is censored by another person.

   c) The person does not have freedom of movement.

   d) The person lives and works in one place.

   e) The person owes a debt to his or her employer.

   f) Security measures are used to control who has contact with the person.

   g) The person does not have control over his or her own government-issued identification or over his or her worker immigration documents. (Pen. Code, § 236.2, subd. (a)-(g).)

13) States a person who inflicts great bodily injury on a victim in the commission or attempted commission of human trafficking shall be punished by an ***additional and consecutive term*** of imprisonment in the state prison for 5, 7, or 10 years. (Pen. Code, § 236.4, subd. (b).)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement:** According to the author: "California is losing the fight against sex trafficking. The demand for prostitutes from solicitors drives criminals to traffic people and force them into prostitution. Under current law, solicitation of a prostitute is a misdemeanor, regardless of whether the perpetrator is a first time or repeat offender. Current law does not provide strong enough deterrents for those who repeatedly solicit prostitution. Without adequate deterrents in place, the State has allowed the demand for prostitutes to remain unchecked. This bill would make it a felony for any person who solicits a prostitute after already having a prior conviction of the same offense."

2) **Solicitation of Prostitution:** Current Penal Code section 647 is premised on an offense enacted in 1872 which generally prohibited "lewd," "immoral," or "obscene" conduct. Penal Code section 647, subdivision (b) criminalizes solicitation of prostitution meaning any person who accepts compensation for sex work or a person who pays for the services of a sex worker. Penal Code section (b)(2) criminalizes solicitation as either the offeror or offeree,

and without reference to the sex or gender of a person. Furthermore, Penal Code section 647, subdivision (b)(3) criminalizes soliciting a person under the age of 18, without reference to whether the person is cis-male or female, or Trans, or non-binary, and regardless of whether the person knew the person was under the age of 18. Penal Code section 647, subdivision (b) is punishable as either a six month or one year misdemeanor.

3) **Existing Penalties for Human Trafficking:** According to the author, this bill aims to stem the crime of commercial sex trafficking. "According to the Women's Rights Group: The presence of economic disparities and social inequalities in California contributes to the vulnerability of marginalized populations. Poverty, homelessness, and lack of access to education and employment opportunities create conditions where individuals are more susceptible to exploitation by traffickers. Traffickers prey upon those facing economic hardships, promising them better lives or employment opportunities, only to subject them to exploitation. By enforcing stronger deterrents on solicitors of prostitution, which in turn will reduce the demand and market for sex trafficking in California, this bill will lead to more equitable outcomes for the state's vulnerable and marginalized populations."

The penalties for commercial sex trafficking are substantially higher than a Realignment Act felony. The voters approved Proposition 35 in 2012, which made numerous changes to the human trafficking statute and substantially increased the sentences of any person who engages in either sex or labor trafficking. Specifically, human trafficking by force or fear is a 15 to life sentence – meaning the defendant will receive parole hearings to determine if a person is suitable for parole. This is different than a determinate term – i.e., someone sentenced to the mid-term on robbery – four years – will serve no more than four years barring a conviction for another offense. Inmates sentenced to life terms are often not paroled their first time before the Board of Parole Hearings. Human trafficking even without use of force or fear is subject to a sentence of up to 12 years in prison. Additionally, any proceeds purchased with or derived from human trafficking is subject to asset forfeiture. (See Pen. Code, § 236.7, subd. (a).) Finally, any person convicted of human trafficking must register as a sex offender for life and may not receive probation. (Pen. Code, § 1203.085, subd. (a).)

Penal Code section 236.1 was enacted in 2005 and specifically criminalized human trafficking – although most of the underlying bases for trafficking were criminalized by other sections of law. AB 22 (Lieber) Chapter 240, Statutes of 2005, criminal penalties for human trafficking, were as follows: (a) three, four, or five years in state prison for any person who traffics another for labor or sex purposes; (b) four, six, or eight years if the person is under the age of 18. (Former Penal Code, § 236.1, subds. (a) and (b) (2005).) Additionally, over the past dozen years, we have increased funding and services for victims of human trafficking, as well as law enforcement and district attorneys involved in the apprehension and prosecution of human trafficking. According to the author: *"California is losing the fight against sex trafficking. The demand for prostitutes from solicitors drives criminals to traffic people and force them into prostitution."* The California Department of Corrections and Rehabilitation ("CDCR") and the California Office of Attorney Open Justice portal do not break down

Penal Code section 236.1 convictions.[1] Arrest and conviction data for violation of Penal Code section 236.1 was not readily available. However, according to the National Human Trafficking Hotline, among others, law enforcement is improving their odds against cracking down on human sex trafficking because of numerous laws that have changed in the past 10 years.

Additionally, the amount of funding to combat trafficking has substantially increased. In 2023, California Office of Emergency Services ("Cal OES") allocated $27 million for human trafficking victim assistance and the federal Office of Victims Crime is awarding $6.3 million under the Field-Generated Strategies to Address the Criminalization of Minor Victims of Sex Trafficking program to end the criminalization of minor victims of sex trafficking and develop, expand or strengthen victim service programs to support victim-centered, trauma-informed, developmentally appropriate and evidence-based responses to minor victims of sex trafficking. (U.S. Department of Justice (October 26, 2022) Justice Department Awards Over $90 million to combat Human Trafficking.)[2]

The United States is widely regarded as a destination country for human trafficking. Federal reports have estimated that 14,500 to 17,500 victims are trafficked into the United States annually. This does not include the number of victims who are trafficked within the United States each year. According to the National Human Trafficking Hotline, 10,949 cases of human trafficking were reported in the United States in 2018. According to the hotline, California is one of the largest sites of human trafficking in the United States. In 2018, 1,656 cases of human trafficking were reported in California. Of those cases, 1,226 were sex trafficking cases, 151 were labor trafficking cases, 110 involved both labor and sex trafficking, and in 169 cases the type of trafficking was not specified. The Office of Attorney General specifies on its efforts to combat trafficking:

> Progressively stepping up their efforts since last year, the teams — one covering Northern California and another covering Southern California — are now nearly fully staffed and have already taken action across the state to support law enforcement partners in disrupting and dismantling human trafficking and the criminal exploitation of children. Attorney General Bonta today also issued an information bulletin to local authorities to provide guidance on key techniques meant to help reduce harm in law enforcement interactions with sexually exploited youth. In addition, the Attorney General today highlighted new funds included in the proposed state budget aimed at combatting the effects of the pandemic on human trafficking and directly supporting survivors across California through $30 million in new grants over the next 3 years. The new proposed funds are in

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[1] See https://www.cdcr.ca.gov/research/offender-outcomes-characteristics/offender-data-points/ https://openjustice.doj.ca.gov/exploration/crime-statistics/crimes-clearances [both last visited April 8, 2024.)
[2] https://www.justice.gov/criminal/criminal-ceos

addition to $10 million per year in grants already included in the budget.[3]

It is unclear whether the rates of human trafficking are "skyrocketing" as the author suggests, but even if arrest rates are higher now than in the arrest rates were in the past, that may mean we are using the laws we have already enacted and to crack down on the scourge of human trafficking.

There is no evidence that human trafficking has increased since the Legislature repealed Penal Code section 653.22 – loitering with intent to commit prostitution, or that most, or even a lot, of sex workers are victims of human trafficking. As explained in detail below, sex workers often describe inhuman and abusive treatment by law enforcement, especially if the sex worker is a Trans woman of color.

4) **Disparate Impact on Black, Indigenous, People of Color, and Members of the LGBTQ+ Community in Prostitution Cases:** This bill proposes to further protect Black, Indigenous, People of Color and members of the LGBTQ+ community by increasing penalties for prostitution. There seems to be little dispute between supporters and opponents of this bill that members of the LGBTQ+ community and Black, Indigenous, and People of Color are uniquely disadvantaged in sex work and at significantly higher risk of being trafficked.[4] A study conducted in 2019 through the Los Angeles County Public Defender's office compiled data from all of the charges of violations of loitering with the intent to commit prostitution reported from the Compton Branch of the Public Defender's office. During a one-week period of time in July 2019, a total of 48 cases were reported. (Derek J. Demeri, "*Policing of People in the Sex Trades in Compton: Analysis of Section 653.22 Clients,*" Law Offices of the Los Angeles County Public Defender (2019).)

The Demeri study also found that the majority of arrests were made up of young Black women. 42.6 percent of arrests were for people aged 21-24 with the next highest rate being 23.4 percent for people aged 18-20. (*Id.* at p. 2.) As for race, 72.3 percent were Black with the next highest rate being 17 percent for Hispanic. (*Id.*, at p. 4.) Additionally, the study showed the same four officers made the majority of arrests during that period. (*Id.*, p. 10.) Twenty-five percent (25%) of people arrested for loitering with intent had no prior sex work-related convictions.

In 76.7 percent of cases, alleged suspects were characterized as wearing revealing clothing as evidence in support of intent to solicit a sex act. (*Id.*, p. 12) Finally, in 45 out of 46 cases, the suspect's state of dress was the stated basis for probable cause to arrest. (*Ibid.*) In 71.7% of cases, possession of condoms was used to support probable cause. (*Ibid.*)[5]

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[3] Located at https://oag.ca.gov/human-trafficking [last visited April 8, 2024].
[4] See Micaela Anderson, Child Trafficking Hits Close to Home, UNICEF USA, January 12, 2021, found at https://www.unicefusa.org/stories/child-trafficking-hits-close-home, last visited February 23, 2024.
[5] 2019 is the same year the Legislature enacted SB 233 (Weiner), Chapter 141, Statutes of 2019 which explicitly prevents use of condoms as a basis for probable cause to arrest a person for solicitation or loitering with intent to commit prostitution.

According to the Yale Global Health Partnership in June 2020, arrest and conviction records for prostitution-related crimes make it harder for sex workers, and those cited for unlawful sex work, to find alternative employment - holding them in street economies and economic hardships - "exacerbating ongoing race and gender discrimination."[6] Criminalization exacerbates the barriers to housing, public benefits, and other social supports especially needed by street-based sex workers. These harms most often fall on People of Color and members of the LGBTQ+ community because there are higher rates of arrest and conviction for those groups.

As explained above, sex work takes on many forms. In many cases, sex workers do not "walk the stroll" offering services – they provide outcall services via an internet website. For the most part, sex workers who provide outcall services tend to be Caucasian and more affluent. However, sex workers who offer services to passersby on the street are at much greater risk of discrimination and harassment by law enforcement and are much more likely to be people of color. This particular statute – loitering with intent – is more often used against Black and Latinx sex workers because they are more likely be identified as sex workers on the street – even if they are not sex workers. According to the University of Southern California, Gould School of Law, International Human Rights Clinic's November 15, 2021 report, "*Over-Policing Sex Trafficking: How U.S. Law Enforcement Should Reform Operations,"* many sex workers reported abusive and even violent and dehumanizing encounters with law enforcement.

The Gould School of Law Report also notes that in most cases, the sex worker is prosecuted – not the trafficker. If the goal is addressing the horrors of sex trafficking, it may make more sense to immunize sex workers against any arrest and prosecution and offer trauma-informed medical and mental health care so they may feel confident assisting law enforcement in prosecuting traffickers.

The author of the bill intimates this change is premised on a law in Nordic countries. However, there are some important distinctions between the "Nordic model" and California's solicitation law. First, Nordic countries have robust social safety nets and sex for compensation is not against the law. Criminalizing sex is an American tradition rooted in our more puritanical roots. Citizens in Nordic counties are not generationally impoverished with little or no resources for a better life. Finally, this state continues to struggle with racial disparities in policing. Nordic countries do not have a history of racial violence in law enforcement.

5) **Immigration Consequences:** A conviction for any crime where the penalty following conviction is a year or more and specified crimes "of moral turpitude" will likely bar a person from receiving lawful permanent residence status and may result in deportation. Prostitution-related immigration laws developed primarily in the late 1800s and early 1900s to respond to the singular concern about the threat of the sexuality of noncitizen women to

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[6] Yale Global Health Justice Partnership, Sex Workers and Allies Network, *"The Harmful Consequences of Sex Work Criminalization on Health and Rights"* (June 2020) (last visited February 22, 2024 https://law.yale.edu/center.ghip.docoments .)

American morality. (Dadhania, Article: Deporting Undesirable Women (2018) 9 U.C. Irvine L. Rev. 53, 56.)

Federal law states any person "directly or indirectly procures or attempts to procure, or (within 10 years of the date of application for a visa, admission, or adjustment of status) procured or attempted to procure or to import, prostitutes or persons for the purpose of prostitution" may be denied admission, re-admission, or LPR status. (8 U.S.C. § 1182, subd. (a)(2)(D); See generally, Argot v. Superior Court of San Bernardino County [People of State of California] (June 8, 2022, No. E075674) ___Cal.App.5th___ [2022 Cal. App. Unpub. LEXIS 3535, at *6-7].)

Congress passed the Victims of Trafficking Violence and Protection Act (VTVPA) in 2000. This law was enacted in the wake of increased awareness of human trafficking, particularly commercial sex trafficking. The VTVPA was multi-faceted legislation targeting human trafficking. It created T and U nonimmigrant statuses for victims of severe forms of human trafficking to allow them to remain in the United States to assist in law enforcement efforts against their traffickers and for victims of serious crimes including human trafficking, respectively. (Dadhania, 9 U.C. Irvine L. Rev., at 73.)

However, U and T visas are frequently denied to trafficking victims unless they participate in a law enforcement investigation – which may risk their lives or even their families' lives. If a trafficking victim makes the decision to protect their family rather than speak to the police, the VTVPA may not provide any remedy. Hence, undocumented Californians may be uniquely penalized because an arrest or conviction for a prostitution-related crime may result in deportation or other serious immigration consequences. If the goal is protect human trafficking victims, does it make more sense to provide a full range of services to those who seek assistance and complex law enforcement actions to arrest traffickers –many of whom operate organized criminal operations?

6) **Arguments in Support:** According to the *Peace Officers Research Association of California*: Current law defines certain acts as disorderly conduct, punishable as a misdemeanor, including soliciting, agreeing to engage in, or engaging in any act of prostitution with another person in exchange for the individual providing compensation, money, or anything of value to the other person. This bill would make a 2nd or subsequent violation of this type of disorderly conduct punishable as a felony.

7) **Arguments in Opposition:** According to the *California Public Defenders Association*: While well intentioned, ending human trafficking is a goal we all share, AB 2382 is bad public policy because it punishes sex workers and customers alike, is based on a flawed model "the Nordic model", undoes reforms that the Legislature has made a mere 8 years ago, wastes money and will endanger the very individuals it purports to want to protect.

- Proposed Penal Code section 647(m) states that a second conviction of section 647(b)(2) which prohibits soliciting or agreeing to prostitution with an individual 18 years or older is punishable as a felony. This will apply to both sex workers and their customers regardless of whether the sex workers are trafficked, suffer from drug addiction or mental illness.

- The "Nordic" model so called because it has been employed in some Scandinavian

countries decriminalizes the conduct of sex workers while increasing the penalties for consumers, in other words, end demand has not been found to actually decrease demand in one study from Northern Ireland and is certainly not appropriate for importing to the United States unless and until sex workers do not face criminal penalties. California still criminalizes sex workers.

- Eight years ago in 2016, the California Legislature enacted SB 1129 (Monning) which eliminated the 90-day mandatory sentence for a second or subsequent conviction of 647(b).

- Jailing sex workers and their clients wastes scarce public resources at a time that the State of California is facing a historic budget crisis.

- Further criminalizing prostitution does not end it but endangers sex workers.

"Citing studies and surveys from locales as diverse as Baltimore, Maryland, to Vancouver, Canada, the consensus is that further criminalizes sex workers.

> In criminalized contexts, sex workers face violence from clients, related both to the context of the interactions and the actual and perceived lack of police protection. For example, 22 percent of the 250 female20 sex workers surveyed in Baltimore, Maryland reported physical or sexual violence by a client in the past three months. Research suggests a strong association between rushing negotiation and experiences with client-perpetrated violence; when sex work is illegal workers may not be able to as effectively screen clients or negotiate fees or activities. The lack of time or conditions to agree upon a fee in advance can increase the risk of disagreement and violent or aggressive escalation by the client during or after the fact. For example, findings from three studies in Vancouver, Canada indicate that rushing client negotiations, often due to police presence, resulted in increased client violence to female workers. (Internal Citations Omitted.) ACLU Research Brief: *Is Sex Work Decriminalization the Answer? What The Research Tells Us*, Oct. 16, 2020 (Available online (https://www.aclu.org/publications/sex-work-decriminalization-answer-what-research-tells-us)

"Current law already carries elevated charges and penalties for individuals that engage in serious crimes related to prostitution. Human trafficking, pimping, and pandering are all felonies that carry significant prison sentences.

"AB 2382 would make a second or subsequent conviction for simply soliciting prostitution a felony, punishable by a maximum of three years imprisonment. This is disproportionate punishment for the behavior covered by this bill. AB 2382 will disproportionately impact lower socio-economic communities, black, brown and LGBTQ. Affluent individuals for the most part conduct their sexual business transactions online, at private clubs and fancy

hotels. The high end sex workers that they hire are not standing on street corners in the cold and rain seeking customers to pay their bills or their drug habits.

8) **Related Legislation:**

a) AB 1602 (Alvarez), expands the definition of solicitation to include an individual who operates a motor vehicle in any public place and repeatedly beckons to, contacts, or attempts to contact or stop pedestrians or other motorists with the intent to solicit prostitution. AB 1602 was referred to, but never heard in this committee.

b) AB 2646 (Ta), also re-enacts the crime of loitering with intent to commit prostitution. AB 2646 is pending referral to this committee.

c) AB 2828 (Rodriguez), creates a new felony for any solicitation or an agreement to engage in solicitation of prostitution in exchange for compensation when the person soliciting the prostitute has been convicted of the same crime on 2 prior occasions. AB 2828 is pending referral to this committee.

d) SB 1219 (Seyarto), expands the definition of solicitation to include loitering with the intent to solicit prostitution, as specified, and re-enacts the crime of loitering with intent to commit prostitution. SB 1219 is pending referral to the Senate Committee on Public Safety.

9) **Prior Legislation:**

a) AB 1193 (Blanca Rubio), of the 2021-22 Legislative Session, increased the penalty for misdemeanor solicitation of a minor, making it alternatively punishable as a felony by 16 months, two, or three years in the state prison regardless of whether the defendant knew or should have known the person was a minor. AB 1129 was referred to, but never heard, in this committee.

b) AB 1970 (Horvath), of the 2021-22 Legislative Session increased the penalty for misdemeanor solicitation of a minor, making it alternatively punishable as a felony by 16 months, two, or three years in the state prison regardless of whether the defendant knew or should have known the person was a minor. AB 1970 was referred to, but never heard in this committee.

REGISTERED SUPPORT / OPPOSITION:

Support

Peace Officers Research Association of California (PORAC)

Opposition

California Public Defenders Association
Ella Baker Center for Human Rights

Felony Murder Elimination Project
Legal Services for Prisoners With Children
Smart Justice California, a Project of Tides Advocacy
Together in Service
Uncommon Law

Analysis Prepared by: Kimberly Horiuchi / PUB. S. / (916) 319-3744

Date of Hearing: April 16, 2024
Counsel: Shaun Naidu

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Kevin McCarty, Chair

AB 2478 (Ramos) – As Introduced February 13, 2024

SUMMARY: Requires the disclosure of mental health records for an incarcerated person who is transferred by and between a county correctional facility, a county medical facility, the Department of State Hospitals (DSH), and a county agency caring for an incarcerated person, as specified. Specifically, **this bill**:

1) Requires, if jurisdiction of an incarcerated person is transferred from or between a county correctional facility, a county medical facility, DSH, and a county agency caring for incarcerated people, these entities to disclose mental health records for the transferred person who received mental health services while in the custody of the transferring facility.

2) Requires the mental health records to be disclosed at the time of transfer or within seven days of the transfer of custody, except that the records must be provided prior to, or at the time of transfer, when the person is transferred to a state hospital. Encourages electronic transmission of the records if possible.

3) Requires all county behavioral health departments and contractors to establish and maintain a secure and standardized system for sharing mental health records of an incarcerated person. Specifically, the system must ensure that all mental health records and information is kept confidential in a manner that complies with all privacy laws and that the records are guarded against unauthorized access. Requires the standardized system to have clear protocols and procedures for sharing records that include the secure transmission of records.

4) Requires each county to report to the Legislature, as specified, on or before June 30, 2028, on all of the following:

   a) The effectiveness of the data sharing.

   b) The continuity of care measures.

   c) An evaluation of the impact on the incarcerated population's wellbeing, safety, and recidivism rates of incarcerated people who move between behavioral health systems and the criminal justice system.

5) Requires all transmissions of mental health records of an incarcerated person by and between state and local correctional and medical facilities comply with the Confidentiality of Medical Information Act (CMIA), the Information Practices Act of 1977, the federal Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), the federal Health Information Technology for Economic and Clinical Health Act ("HITECH"), and the corresponding implementing regulations relating to privacy and security in federal regulations, as specified.

EXISTING LAW:

1) Requires, when jurisdiction of an incarcerated person is transferred from or between the Department of Corrections and Rehabilitation (CDCR), DSH, and county agencies caring for incarcerated people to disclose, by electronic transmission when possible, mental health records for any transferred incarcerated people who received mental health services while in the custody of the transferring facility. (Pen. Code, § 5073, subd. (a).)

2) Requires mental health records to be disclosed at the time of transfer or within seven days of the transfer of custody, except that the records must be provided prior to, or at the time of transfer, when the person is transferred to a state hospital. (Pen. Code, § 5073, subd. (a).)

3) Requires mental health records to be disclosed by the entities listed in 1) above to ensure sufficient mental health history is available for the purpose of evaluating the incarcerated person for a commitment as an offender with a mental health disorder (OMHD) and to ensure the continuity of mental health treatment of an incarcerated person being transferred between those facilities. (Pen. Code, § 5073, subd. (b).)

4) Defines "mental health records" to include, but is not limited to, the following:

   a) Clinician assessments, contact notes, and progress notes.

   b) Date of mental health treatment and services.

   c) Incident reports.

   d) List of an incarcerated person's medical conditions and medications.

   e) Psychiatrist assessments, contact notes, and progress notes.

   f) Suicide watch, mental health crisis, or alternative housing placement records. (Pen. Code, § 5073, subd. (c).)

5) Requires all transmissions of mental health records of an incarcerated person by and between state and local correctional and medical facilities comply with CMIA, the Information Practices Act of 1977, HIPAA, HITECH, and the corresponding implementing regulations relating to privacy and security in federal regulations, as specified. (Pen. Code, § 5073, subd. (d).)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "Protecting and supporting those suffering from mental health is a big part of rehabilitation within our correctional system. That is why it's important that our agencies have a system in place where information regarding an incarcerated person's medical history, like there[sic] mental health, is easily shared amongst each other. Any disruptions to that care or miscommunication between agencies can have serious consequences, not just for the individuals suffering from mental health, but for those

responsible for their care as well. AB 2478 will ensure that law enforcement has all the health information about an individual in one place so that they can make sure that the person in their custody is safe and continues to receive the same level of care, no matter where they're being transferred."

2) **Need for the Bill**: This bill seeks to mandate the transfer of mental health records for an incarcerated person who obtained mental health services by and between county correctional and medical facilities and DSH within seven days of the persons transfer (or no later than when the person is transferred when transferred to a state hospital). In 2022, the Legislature passed and the governor signed AB 2526, which required the transfer of these same records by and between these same agencies—with the addition of CDCR—within the same timeframe outlined in this measure. (Pen. Code, § 5073.) Consequently, the need to recodify this requirement in a new Penal Code section appears questionable.

   In addition to the transfer of mental health records, however, AB 2526 also would impose a novel requirement on county agencies. Specifically, this bill would require each county to report to the Legislature by June 30, 2028, on the effectiveness of the data sharing, the continuity of care measures, and an evaluation of the impact on the well being, safety, and recidivism rates of incarcerated individuals who move between behavioral health and criminal justice systems.

3) **Offender with Mental Health Disorder Evaluation**: As stated in the analysis of AB 2526 by this committee, the OMHD Law requires mental health evaluations of certain persons by CDCR psychologists prior to release on parole to aid in determining if they should be released into the community or need additional treatment from DSH. The OMHD Law is designed to confine an incarcerated person with a mental illness who is about to be released on parole when it is deemed that they have a mental illness which contributed to the commission of a violent crime. (Pen. Code, § 2960.) Rather than release the person to the community, CDCR paroles the person to the supervision of a state hospital, and the individual remains under hospital supervision throughout the parole period. The OMHD Law addresses treatment in three contexts: first, as a condition of parole (Pen. Code, § 2962); then, as continued treatment for one year upon termination of parole (Pen. Code § 2970); and, finally, as an additional year of treatment after expiration of the original, or previous, one-year commitment (Pen. Code § 2972). (*People v. Cobb* (2010) 48 Cal.4th 243, 251.)

   With respect to evaluations for OMHD commitments, existing law requires a practicing psychiatrist or psychologist from DSH, CDCR, or the Board of Parole Hearings be afforded prompt and unimpeded access to the person and their records for the period of confinement at that facility upon submission of current and valid proof of state employment and a departmental letter or memorandum arranging the appointment. (Pen. Code, § 2962.)

   The Confidentiality of Medical Information Act generally prohibits the sharing of a patient's medical information but allows health care providers, service plans, contractors, or other health care professionals or facilities to disclose medical information for purposes of diagnosis or treatment. (Civ. Code, § 56.10) Additionally, existing law requires CDCR to transmit electronically to a county agency, if the information is available, an incarcerated person's, specific medical, mental health, and outpatient clinic needs and any medical concerns or disabilities for the county to consider as the person transitions onto post-release community supervision for the purpose of identifying the medical and mental health needs of

the individual. (Pen. Code, § 3003, subd. (e)(2)-(5).)

Thus, under the OMHD Law, CMIA, and AB 2526 the state and local agencies specified in this bill currently have the authority to disclose an incarcerated person's mental health information to each other.

4) **Argument in Support**: According to the San Bernardino County Sheriff's Department, "Existing law (AB 2526, Cooper, 2021-22) already recognizes the importance of disclosing mental health records when transferring inmates between the California Department of Corrections and Rehabilitation and the California Department of State Hospitals. AB 2478 builds upon this foundation by extending the requirement to county facilities and behavioral health systems.

"Ensuring the continuity of mental health treatment is paramount in safeguarding the well-being and safety of individuals in custody. By mandating the disclosure of mental health records between medical professionals, AB 2478 will help prevent disruptions in care and ensure that inmates receive the support they need to address their mental health needs effectively.

"Moreover, AB 2478 will have a significant impact on reducing in-custody deaths within county jails. Often, individuals who are booked at county correctional facilities experience metal health crises during non-business hours, when county behavioral health systems typically do not operate. This delay in accessing mental health records can result in inadequate treatment, prolonging mental health crises and increasing the risk of harm to individuals in custody."

Additionally, the California Association of Psychiatric Technicians states, "Currently, one of the major challenges faced in the treatment of mentally ill forensic patients is the lack of access to their mental health records upon arrival at DSH. This absence significantly delays the process of restoring competency, as clinicians are forced to restart the assessment and treatment planning process from scratch. AB 2478 addresses this issue by mandating the transmission of mental health records with the individual as they move through the forensic process, ensuring continuity of care and minimizing unnecessary delays.

"While we commend the inclusion of provisions regarding the transfer of mental health records between local facilities and DSH, we believe it is imperative to extend these requirements to include CDCR facilities as well. Ensuring the seamless transfer of mental health records across all jurisdictions is essential in maintaining a comprehensive continuum of care for mentally ill individuals within the correctional system."

5) **Argument in Opposition**: None submitted.

6) **Prior Legislation**:

   a) AB 2526 (Cooper), Chapter 968, Statutes of 2022, required the transfer of mental health records when an incarcerated person is transferred from or between the CDCR, DSH, and county correctional and medical facilities, as specified.

b) AB 998 (Lackey), of the 2021-2022 Legislative Session, was substantially similar to AB 2526 and was held on the Suspense File of the Senate Committee on Appropriations.

c) SB 591 (Galgiani), Chapter 649, Statutes of 2019, requires a practicing psychiatrist or psychologist from DSH or CDCR to be afforded prompt and unimpeded access to an incarcerated person temporarily housed at a county jail, when the psychiatrist or psychologist is conducting an OMHD evaluation of the incarcerated person.

d) SB 350 (Galgiani), of the 2017-2018 Legislative Session, would have required the disclosure of medical, dental, and mental health information between a county correctional facility, a county medical facility, a state correctional facility, a state hospital, or a state-assigned mental health provider when an incarcerated person is transferred from or between state and county facilities, as specified. SB 350 was held on the Suspense File of the Senate Committee on Appropriations.

e) SB 1443 (Galgiani), of the 2015-2016 Legislative Session, would have permitted the sharing of medical, mental health and dental information between correctional facilities, as specified. SB 1443 was held on the Suspense File of the Senate Committee on Appropriations.

f) SB 1295 (Nielsen), Chapter 430, Statutes of 2016, authorized the use of documentary evidence for purposes of satisfying the criteria used to evaluate whether a person released on parole is required to be treated by the DSH as an OMHD.

REGISTERED SUPPORT / OPPOSITION:

Support

California Association of Psychiatric Technicians (Co-Sponsor)
San Bernardino County Sheriff's Department (Co-Sponsor)
California State Sheriffs' Association
Steinberg Institute

Opposition

None

Analysis Prepared by: Shaun Naidu / PUB. S. / (916) 319-3744

Date of Hearing: April 16, 2024
Counsel: Liah Burnley

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Kevin McCarty, Chair

AB 2547 (Ta) – As Amended March 21, 2024

SUMMARY: Requires a court to conduct a hearing on a defendant's eligibility for mental health diversion when they are declared incompetent to stand trial (IST) and charged with a misdemeanor. Specifically, **this bill**:

1) Requires, instead of permits, a court to conduct a hearing on a defendant's eligibility for mental health diversion, if the defendant is charged with a misdemeanor only and is found IST.

2) Requires, instead of permits, a court to, if the defendant is found ineligible for mental health diversion, determine which of the following actions to take:

   a) Order modification of the defendant's treatment plan in accordance with a recommendation from a treatment provider;

   b) Refer the defendant to outpatient treatment;

   c) Refer defendant to conservatorship proceedings; or,

   d) Refer the defendant to a CARE program.

3) Allows any party to these proceedings to request a reevaluation of the defendant's competence.

EXISTING LAW:

1) Guarantees that, in all criminal prosecutions, the accused shall enjoy the right to be informed of the nature and cause of the accusation. (U.S. Const. 6th Amend.)

2) States that a defendant is incompetent to stand trial (IST) if, as a result of a mental health disorder or developmental disability, they cannot understand the nature of the criminal proceedings or assist counsel in their defense in a rational manner. (Pen. Code, § 1367, subd. (a).)

3) Provides that a person shall not be tried or adjudged to punishment while mentally incompetent. (Pen. Code, § 1367, subd. (a).)

4) Allows the court to order that the question of the defendant's mental competence be determined in a hearing, and specifies the procedures for the hearing on defendant's competence. (Pen. Code, § 1368.)

5) Requires all the proceedings in the criminal prosecution to be suspended until the question of the defendant's mental competence has been determined. (Pen. Code, § 1368.)

6) Requires, if the defendant is found mentally competent, the criminal process to resume, and the trial on the offense charged to proceed. (Pen. Code, §§ 1370; 1370.01.)

7) Divides the procedures for the treatment of individuals found IST into four categories:

   a) Individuals charged with a felony and are found IST as a result of a mental health disorder;

   b) Individuals charged with misdemeanor(s) only and are found IST as a result of a mental health disorder;

   c) Individuals who are found IST as a result of a developmental disability and individuals who are found IST as a result of a mental health disorder and have a developmental disability; and,

   d) Individuals who are found IST and have violated the terms of their postrelease community supervision or parole. (Pen. Code, § 1367, subd. (b).)

8) Establishes the procedures for the treatment of individuals found IST and charged with a misdemeanor, as follows:

   a) The trial, judgment, or hearing on the alleged misdemeanor is suspended and the court may either (1) conduct a hearing on whether the defendant is eligible for mental health diversion; or, (2) dismiss the charge;

   b) If the court chooses to conduct a hearing on the defendant's eligibility for diversion, and finds that the defendant is not eligible for diversion, the court may hold a hearing to determine whether to do any of the following:

      i. Order modification of the defendant's treatment plan in accordance with a recommendation from a treatment provider;

      ii. Refer the defendant to outpatient treatment;

      iii. Refer defendant to conservatorship proceedings; or,

      iv. Refer the defendant to the CARE program.

   c) If the misdemeanor charges are dismissed, and the individual is not receiving the above-described services, the court must notify the defendant of their need for mental health services. The court shall additionally provide the individual with contact information of specified mental health services. (Pen. Code, §§ 1370.01, 1370.2; Welf. & Inst. Code, §

5623.6, subd. (b); Cal. Rules of Court, rule 4.130, subds. (f)(1) & (3).)

9) Allows the court to dismiss any misdemeanor charges pending against a defendant found IST. (Pen. Code, § 1370.2.)

10) Provides that, the judge may, either on motion of the court or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed. (Pen. Code, § 1385.)

11) Establishes mental health diversion for misdemeanor and felony offenses and sets forth eligibility requirements. (Pen. Code, §§ 1001.35 & 1001.36.)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "Homeless individuals with mental health disorders deserve compassion and effective care rather than release without access to essential resources. AB 2547 aims to help homeless individuals by giving them the care they need by addressing the root causes of their behavior thereby mitigating public safety concerns. With AB 2547, society can save public resources while promoting long-term well-being."

2) **Competency to Stand Trial**: The United States Constitution prohibits states from trying or convicting criminal defendants who are not mentally competent. (*Drope v. Missouri* (1975) 420 U.S. 162, 181; *People v. Rogers* (2006) 39 Cal.4th 826, 846.) According to the United States Supreme Court, to be competent, a defendant must have both a "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and "a rational as well as factual understanding of the proceedings against him." (*Dusky v. United States* (1960) 362 U.S. 402, 402.) Evidence of a mental disorder does not, in and of itself, render a defendant IST. (See, e.g., *People v. Ghobrial* (2018) 5 Cal.5th 250, 271.) The mental disorder must be the cause of the defendant's inability to understand of the proceedings in order to be found IST. (*Ibid.*)

3) **Misdemeanor IST:** The purpose of misdemeanor IST treatment is to provide a tailored approach to treat the defendant's underlying mental health condition instead of commitment. (See, Senate Public Safety Analysis for SB 317 (Stern), Chapter 599, Statutes of 2021.)

   Penal Code section 1370.01 sets forth the process for misdemeanor IST. For defendants who are IST and charged with only a misdemeanor(s), the trial, judgment, or hearing on the alleged misdemeanor is suspended and the court is permitted to either conduct a hearing on whether the defendant is eligible for mental health diversion or dismiss the charge.

   If the court chooses to conduct an eligibility hearing for diversion, and finds the defendant ineligible, the court is permitted to consider other specified options for the defendant. The Legislature passed SB 317 (Stern), Chapter 599, Statutes of 2021, which allows the court to (1) order modification of the treatment plan in accordance with a recommendation from the treatment provider; (2) refer the defendant to assisted outpatient treatment; or (3) refer for possible conservatorship proceedings if the defendant appears to be gravely disabled. More

recently, the Legislature passed SB 35 (Umberg), Chapter 283, Statutes of 2023, which added another treatment option, and the court can refer the defendant to the CARE program.

If the charges are dismissed, and the individual is not receiving any of these above-described court directed services, the defendant must be notified by the court of their need for mental health services. The court is required to provide the defendant with contact information for the county behavioral health department, the behavioral health professional that was providing services to them while incarcerated, a Medi-Cal program, and a list of available community-based organizations where the individual could obtain mental health services. (Pen. Code, § 1370.01; Welf. & Inst. Code, § 5623.6, subd. (b).)

This bill would require, instead of permit, the court to conduct an eligibility hearing for mental health diversion. This requirement is only applicable in cases where a defendant is charged with a misdemeanor(s) only, and is declared incompetent to stand trial. Along the same lines, this bill would also require the court, instead of permit the court, if it finds the defendant ineligible for diversion, to hold a hearing and either order the modification of the defendant's treatment plan, refer the defendant to assisted outpatient treatment, refer the defendant to conservatorship proceedings, or refer the defendant to a CARE program.

4) **Mental Health Diversion**: The purpose of mental health diversion is to "mitigate individuals' [with mental disorders] entry and reentry into the criminal justice system while protecting public safety." (Pen. Code, § 1001.35.) If a defendant can benefit from mental health diversion, the court may make hold a hearing to determine whether the defendant is an appropriate candidate for diversion. (Pen. Code, §§ 1370.01, 1370.2.) To be diverted, an IST defendant must meet the eligibility requirements specified in the mental health diversion statute. (*Ibid.*) A defendant is eligible for mental health diversion if they have been diagnosed with a mental disorder, as specified, and if the mental disorder was a significant factor in the charged offense. (Pen. Code, § 1001.36, subd. (b).) Accordingly, it is likely the case that many misdemeanant IST defendants could benefit from mental health diversion. However, the mental health diversion statue includes disqualifying criteria. For example, the defendant cannot be charged with specified offenses including murder, manslaughter, and registerable sex offenses, among others, and the defendant cannot pose an unreasonable risk of danger to public safety if treated in the community. (Pen. Code, § 1001.36, subd. (c).)

5) **Recent Changes Made by the Legislature for Misdemeanor Defendants found IST**: For IST defendants charged with a felony, treatment is specifically intended to restore the defendant to competency, at which time the criminal proceedings will resume. Competency restoration includes education on a person's criminal charges, plea bargaining, the various players in the courtroom – e.g. judge, jury, defense attorney, prosecutor, the role of evidence in a trial, and certain constitutional rights.[1] "The competency restoration process does nothing to interrupt cycles of criminal legal involvement because the goal of competency

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[1] Committee on the Revision of the Penal Code, *Competency to Stand Trial and Related Matters* (May 12, 2022) at p. 8. Available at: <http://www.clrc.ca.gov/CRPC/Pub/Memos/CRPC22-04.pdf> [as of Feb. 20, 2024]; see also, Department of Stat Hospitals, *Treatment of Incompetent to Stand Trial Patients*. Available at: <https://www.dsh.ca.gov/Treatment/Incompetent_Stand_Trial.html> [as of Feb. 20, 2024].

restoration is only to achieve a basic understanding of the court process, not to provide continuing care."[2]

For misdemeanor cases, unlike felonies, the Legislature has made recent changes to the law that makes the mental health treatment the objective, rather than the resumption of criminal proceedings. These changes went into effect less than two years ago. (See, SB 317 (Stern), Chapter 599, Statues of 2021.) SB 317 (Stern) was intended to provide "more options for appropriate mental health treatment for incompetent defendants charged with misdemeanors. Instead of months sitting on a waiting list, these defendants could be placed in a mental health diversion program or collaborative court where appropriate resources exist." (See, Assembly Public Safety Analysis for SB 317 (Stern), Chapter 599, Statutes of 2021.)

It is important to note that opponents of this bill aptly point out that a court would no longer be able to dismiss a misdemeanor offense when an individual is incompetent to stand trial and does not meet criteria for diversion, CARE, or conservatorship. While this bill eliminates the option for a court to dismiss misdemeanor charges under Penal Code section1370.1, a court would still have the option to dismiss any misdemeanor charge pursuant to Section 1370.2, which is unaffected by this bill. Additionally, a court could dismiss an action in this interest of justice under section 1385, which is also unaffected by this bill.

6) **Argument in Support**: According to *Be The Solution (BTS) Commission*, "AB 2547 will simply disallow a court to through out criminal charges on an individual who is found mentally incompetent unless there is a cohesive mental health plan in place. To drop charges and send these individuals back onto the streets is not compassionate, it is turning a blind eye to human suffering.

"This bill will ensure Collaborative Courts are doing what they are supposed to do – which is bringing communities together to ensure people are getting the help they need. Giving up on them should not be an option, we owe it to people struggling to help find solutions to these issues."

7) **Argument in Opposition**: According to *American Civil Liberties Union California Action*, "Under existing law, when a person is found incompetent to stand trial on a misdemeanor offense, the court may refer that person to mental health diversion. If the person does not qualify for diversion, the court may refer the individual to Assisted Outpatient Treatment (AOT), the CARE program, or conservatorship proceedings. Alternatively, the court may dismiss the case in the interest of justice.

"Existing law takes an evidenced-based approach that prioritizes treatment over incarceration and diversion over punishment. This bill does the opposite by creating more paths to prosecution for those suffering from severe mental illness.

"Under AB 2547, a court can no longer dismiss a misdemeanor offense when an individual is incompetent to stand trial and does not meet criteria for diversion, CARE, AOT, or conservatorship. This means that those who are not restored to competency have no means to

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[2] Committee on the Revision of the Penal Code, *Annual Report and Recommendations* (Dec. 2022), at p. 51. Available at: <http://www.clrc.ca.gov/CRPC/Pub/Reports/CRPC_AR2022.pdf> [as of Feb. 20, 2024].

move forward on their criminal case, but no path to dismissal. This bill allows misdemeanor offenses to remain open indefinitely, which not only infringes upon the person's right to due process, but also potentially impacts their access to government benefits and housing.

"AB 2547 also permits the prosecution to request the re-evaluation of a person's competency at any time with no limits and no prerequisites to such an evaluation. This procedure would be unique to individuals found incompetent to stand trial on misdemeanor offenses. No other civil committees are subject to potentially repeated, intrusive, mental health evaluations at the request of the opposing party. This bill does more harm than good because access to supportive services such as housing and treatment are the solutions for individuals suffering from severe mental illness."

8) **Related Legislation**:

a) AB 3077 (Hart), would remove borderline personality disorder as an exclusion for mental health diversion for defendants found IST. AB 3077 is pending in Assembly Appropriations Committee.

b) AB 2692 (Papan), would specify that the diversion period for an IST defendant commences when the defendant is admitted to receive treatment, as specified. AB 2692 is pending in this Committee.

c) SB 1400 (Stern), would, for misdemeanor IST proceedings, remove the option for the court to dismiss the case and would instead require the court to hold a hearing to determine if the defendant is eligible for diversion. If the defendant is not eligible for diversion, the court would be required to hold a hearing to determine whether the defendant will be referred to outpatient treatment, conservatorship, or the CARE program, or if the defendant's treatment plan will be modified. SB 1400 is pending in Assembly Public Safety Committee.

d) SB 1323 (Menjivar), would require the court, upon a finding a defendant charged with a felony IST, to determine if it is in the interests of justice to restore the defendant to competence, and if the restoration of the defendant's mental competence is not in the interests of justice, to hold a hearing to consider granting mental health diversion or other programs to the defendant, as specified, and, if none of those solutions are appropriate, to dismiss the charges against the defendant. SB 1323 is pending in Senate Appropriations Committee.

9) **Prior Legislation**:

a) SB 35 (Umberg), Chapter 283, Statutes of 2023, allows the court to refer a defendant found IST on misdemeanor charges to a CARE program.

b) SB 717 (Stern), Chapter 883, Statutes of 2023, requires any individual who has a misdemeanor charge dismissed by the court, who is found IST, and who is not receiving court directed services, to be notified by the court of their need for mental health services, and requires the court to provide the individual with information that, at a minimum, contact information of organizations where the individual can obtain mental health

services.

c) AB 1822 (Connolly), of the 2023-2024 Legislative Session, would have required a person charged with a misdemeanor sex offense and found IST to be committed to the DSH, a treatment facility, or to undergo outpatient treatment. AB 1822 was not heard by this Committee at the request of the author.

d) AB 1584 (Weber), of the 2023-2024 Legislative Session, would have required the court, upon a finding of mental incompetence of a defendant charged with a felony to determine if it is in the interests of justice to restore the defendant to competence, and if the restoration of the defendant's mental competence is not in the interests of justice, to hold a hearing to consider granting mental health diversion or other programs to the defendant, as specified, and, if none of those solutions are appropriate, to dismiss the charges against the defendant. AB 1584 was held under submission in Senate Appropriations Committee.

e) AB 1810 (Committee on Budget), Chapter 34, Statutes of 2018, specifies that when a defendant is found IST the court can find that they are an appropriate candidate for mental health diversion.

f) SB 317 (Stern), Chapter 599, Statutes of 2021, revised the procedures when a defendant is found IST on misdemeanor charges and specified that a defendant is entitled to conduct credits when they are committed to DSH or other treatment facility in the same manner as if they were held in county jail.

g) SB 1187 (Beall), Chapter 1008, Statutes of 2018, reduced the maximum term for commitment to a treatment facility when a defendant has been found IST on a felony from three years to two years and specified that when a defendant has been found IST and is held in a county jail treatment center while undergoing treatment for restoration to competency that person is entitled to custody credits in the same manner as any other inmate confined to a county jail.

REGISTERED SUPPORT / OPPOSITION:

Support

Be the Solution (BTS) Commission

Opposition

ACLU California Action
California Public Defenders Association
Ella Baker Center for Human Rights
San Francisco Public Defender

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

Date of Hearing: April 16, 2024
Counsel: Ilan Zur

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Kevin McCarty, Chair

AB 2624 (Waldron) – As Introduced February 14, 2024

AS PROPOSED TO BE AMENDED IN COMMITTEE

SUMMARY: Authorizes persons incarcerated in state prisons to be given bereavement leave from prison employment or educational programs they are enrolled in the event of a death of an immediate family member of the incarcerated person. Specifically, this bill:

1) States that a person incarcerated in state shall be allowed relief from prison employment after the death of an immediate family member of the incarcerated person.

2) Provides that if an incarcerated person is enrolled in an educational program instead of, or in addition to, being employed, they shall additionally be allowed relief from the educational program.

3) Provides that the incarcerated person shall request relief from the warden or their designee

4) Requires the incarcerated person to provide substantiation to support the request.

5) Requires the warden to approve or deny the relief as soon as practicable, upon receiving the request and substantiation,

6) Requires the incarcerated person to be paid their regular compensation for the time the person is scheduled to work during the period of relief.

7) Provides that the bereavement relief provided in this bill shall not exceed three days for any one occurrence.

8) Provides that to the extent resources are available, the incarcerated person shall have access to a mental health professional during their period of relief.

9) Provides that a warden or other administrator of the facility shall grant a request for relief from employment and access to a mental health professional offered to the incarcerated person pursuant to this bill, unless the incarcerated person is employed in a position requiring emergency response, including, but not limited to, a firefighter, and the warden or other administrator of the facility can demonstrate by clear and convincing evidence that an exigent circumstance requires the incarcerated person's employment during the period requested by the incarcerated person

10) If the warden or other administrator of the facility denies an incarcerated person's request for relief based on the above exigent circumstances, the relief shall be granted as soon as practicable after the exigent circumstance has ended.

11) Provides it shall be unlawful for a warden or other administrator of the facility to discipline, punish, refuse to hire, discharge, demote, fine, suspend, expel, or discriminate against, an individual because of either of the following:

    a) An individual's exercise of the right to bereavement relief under this bill.

    b) An individual's request for bereavement relief or provision of substantiation to support the request.

12) Provides that this does not authorize an incarcerated person to leave the prison facility.

13) Provides that bill does not authorize the prison to deny an incarcerated person access to other regularly scheduled activities, including, but not limited to, recreation, meals, group sessions, or counseling.

14) Defines "immediate family" means any spouse, whether by marriage or not, parent, child, any person related by consanguinity or affinity within the second degree, or any other person who, within six months before the commission of the crime for which the person was convicted to state prison, regularly resided in the household.

EXISTING LAW:

1) Prohibits involuntary servitude except to punish crime. (Cal. Constitution, Art. I, Sec. 6.)

2) Allows the Secretary of the California Department of Corrections and Rehabilitation (CDCR) to enter into contracts with public entities, organizations, and businesses for the purpose of conducting programs which use the labor of incarcerated persons. (Cal. Const., Art. XIV, § 5.)

3) States that CDCR shall require of every able-bodied prisoner imprisoned in any state prison as many hours of faithful labor in each day and every day during his or her term of imprisonment. (Pen. Code, § 2700.)

4) Provides that CDCR may revoke the privileges of any condemned inmate who refuses to work as required. (Pen. Code, § 2700.1.)

5) Allows CDCR to employ incarcerated persons for the rendering of services that are needed by the state or any political subdivision thereof, including any county, district, city, school or other public use or for use by the federal government, or any agency or department thereof and allows CDCR to enter into contracts for this purpose. (Pen. Code, § 2701.)

6) Allows CDCR to employ incarcerated persons for the rendering of emergency services for the preservation of life or property within the state, whether that property is owned by public entities or private citizens, when a county level state of emergency has been declared due to a natural disaster and the local governing board has requested assistance. (Pen. Code, § 2701.)

7) States that every able-bodied person committed to the custody of CDCR is obligated to work as assigned by department staff and by personnel of other agencies to whom the inmate's

custody and supervision may be delegated. Assignment may be up to a full day of work, or other programs including rehabilitative programs, as defined, or a combination of work or other programs. (Cal. Code Regs., Tit. 15, § 3040, subd. (a).)

8) Specifies that inmates in CDCR are expected to work or participate in rehabilitative programs and activities to prepare for their eventual return to society. Inmates who comply with the regulations and rules of CDCR and perform the duties assigned to them shall be eligible to earn good conduct credit as specified. (Cal. Code Regs., Tit. 15, § 3043, subd. (a).)

9) Provides that pay rates at each CDCR facility for paid inmate assignments should reflect the level of skill and productivity required, and will be set with the assistance of the Institutional Inmate Pay Committee. Monthly rates apply to full time employment in the job classifications and will be paid from the support budget or inmate welfare funds. (Cal. Code Regs., Tit. 15, § 3041.2, subd. (a)(1)(2).)

10) Establishes the Prison Industry Authority (PIA), a work program for incarcerated persons to provide goods and services used by CDCR and thereby reducing the costs of its operations. (Pen. Code, §§ 2800-2880.)

11) Provides that the compensation schedule for incarcerated employees in the PIA program shall be based on quantity and quality of work performed and shall be required, but in no event shall that compensation exceed one-half the minimum wage provided in the Labor Code, except as otherwise provided. (Pen. Code, § 2811.)

12) States that incarcerated persons not engaged in PIA programs, but who are engaged in productive labor outside of such programs may be compensated in like manner. (Pen. Code, § 2700.)

13) Authorizes a warden, sheriff, or jailer to receive judicial papers directed to a person in custody, and deliver such papers to the incarcerated person. (Pen. Code, § 4013.)

14) Requires a warden, sheriff or jailer to note the time of service of a judicial paper served on an incarcerated person. (Pen. Code, § 4013.)

15) Requires private employers with five or more employees and public sector employers to provide employees with at least 30 days of service up to five unpaid days of bereavement leave upon the death of a family member (Gov. Code, § 12945.7.)

16) Defines "family member," for purposes of bereavement leave for non-incarcerated persons as a spouse or a child, parent, sibling, grandparent, grandchild, domestic partner, or parent-in-law. (Gov. Code, § 12945.7.)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "In the passing of a close family member, every individual deserves the right to grieve; a need that goes beyond the walls of incarceration. By introducing Section 2710 to the Penal Code, a crucial step is taken towards

supporting individuals dealing with loss. This provision will ensure they are able to grieve for three days with dignity, unburdened from the weight of their work duties without financial concern. During this time, they receive compensation for missed work, alleviating any further worries. By allowing them to focus solely on their grieving process, it demonstrates a commitment to treat all individuals with empathy, regardless of their circumstances."

2) **Incarcerated Persons Work in Prisons:** The Thirteenth Amendment of the U.S. Constitution, ratified in 1865, prohibited slavery and involuntary servitude. However, an exception was allowed if involuntary servitude was imposed as punishment for a crime. Article I, section 6, of the California Constitution contains the same prohibitions on slavery and involuntary servitude and the same exception for involuntary servitude as punishment for crime. The California Supreme Court has interpreted the prohibition on slavery and involuntary servitude contained in Article I, section 6 of the California Constitution to be coextensive with the protection afforded by the Thirteenth Amendment. (*Moss v. Superior Court* (1998) 17 Cal.4th 396, 418.) Moreover, federal courts have held that the U.S. Constitution does not prohibit a requirement that incarcerated persons must work nor does it provide an incarcerated person a right to wages for work done in custody. Courts have consistently held that state prisoners are not employees entitled to minimum wage. (*Burleson v. California* (1996) 83 F.3d 311.)

   In addition to relying on the exception to involuntary servitude for punishment for a crime, federal courts have found that inmate work does not constitute "involuntary servitude" when the person has a choice to work. For example, the Fifth District Court of Appeals held that participation in a work release program did not constitute involuntary servitude, because the incarcerated persons were not "compelled" to participate in the work release program. The court acknowledged that the choice of whether to work outside of the jail for twenty dollars a day or remain inside the jail and earn nothing may have indeed been "painful" and quite possibly illegal under state law, but stated that the individuals were not forced to work or continued to work against their will. (*Watson v. Graves* (1990) 909 F.2d 1549, 1552.)

3) **Inmate Work at CDCR:** Persons incarcerated at CDCR are required to work or participate in rehabilitative or educational programs. When an individual arrives at a prison reception center they go through a classification process. The classification process determines the security level of the CDCR facility where the person will be housed. During the classification process, an incarcerated person is placed on waiting lists for jobs and for rehabilitative programs. The classification process for jobs begins upon reception and periodically throughout the prison term.

   Standard CDCR jobs do not have minimum requirements, such as a high school diploma/GED certificate. Standard jobs can be part-time, full-time, and can include weekend/night shifts. These jobs include clerks, porters, dining work, yard workers and plant operations (painter, plumber, carpenter, etc.).

   Some incarcerated persons are eligible to participate in jobs through PIA. PIA jobs have specific requirements that an incarcerated individual must possess in order to qualify for a particular job. This can include factors such as high school diploma/GED, being disciplinary free for a set period of time, as well as their release date history. There is an application process for PIA jobs and every job has a certification or multiple certifications attached to

it. PIA jobs are higher paying than the standard job and incarcerated individuals receive industry-accredited certifications, credits, and training that can be applied upon release for jobs such as meat cutting, coffee roasting, optical, dental, and health care facilities maintenance.

Participating in work while incarcerated can help promote rehabilitation. Inmates can potentially gain skills that can be utilized to facilitate their reintegration in society. Those skills can range from technical knowledge needed to pursue a specific trade or the life skills helpful in navigating work place environments. However, given the potentially coercive nature of work within a custodial environment there exists the danger for abuse of inmate work. Moreover, the payment for labor done by incarcerated persons is abysmally low.

4) **Bereavement Leave in California:** In the United States, workers' access to bereavement leave in the event of the tragic loss of a family member is inconsistent or nonexistent. The state of Oregon offers up to 2 weeks of bereavement leave for employees working for employers of a certain size under its unpaid but job-protected family leave law. There is no federal law requiring that employers provide bereavement leave. This leaves it up to employers and employees to make informal arrangements that may not adequately address the employee's need to grieve. California expanded access to bereavement leave in 2022, through the passage of AB 1989 (Low), Chapter 767, Statutes of 2022, which required private employers with five or more employees and public sector employers to provide employees with at least 30 days of service up to five unpaid days of bereavement leave upon the death of a family member. This expansion of bereavement leave did not include incarcerated persons.

5) **Effect of this Bill:** AB 2624 would permit persons incarcerated in state prisons who participate in prison employment or an educational program, to request bereavement leave from the warden of the prison, after the death of an immediate family member of the incarcerated person.[1] Additionally, and to the extent possible, AB 2624 would require incarcerated persons to be given access to a mental health professional during said bereavement period. Because AB 2624 only applies to state prisons, such bereavement leave would be available to approximately 50% of incarcerated persons in California. (Prison Policy Initiative, *How many California residents are locked up and where* (May 2023). Available at: <https://www.prisonpolicy.org/graphs/correctional_control2023/CA_incarceration_2023.html> (as of April 7, 2024).] Incarcerated persons requesting such relief would have to provide substantiation to support their request, and if granted, bereavement leave could be provided for up to 3 days. As proposed to be amended, a warden or other administrator of the facility must grant a request for relief, unless they can prove by clear and convincing evidence that exigent circumstances necessitate the denial of the request. Additionally, wardens or other administrators are prohibited from punishing or retaliating against incarcerated persons who request such relief. Given that bereavement leave is not currently available to incarcerated persons, AB 2624 would support the emotional and mental health of incarcerated persons by allowing incarcerated persons to ask for leave from prison work and education programs, to grieve the loss of their family members.

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[1] "Immediate family" means any spouse, whether by marriage or not, parent, child, any person related by consanguinity or affinity within the second degree, or any other person who, within six months before the commission of the crime for which the person was convicted to state prison, regularly resided in the household.

6) **Additional comments:** The author may wish to clarify how an incarcerated person can provide substantiation for their request. This bill provides that "an incarcerated person shall provide substantiation to support the [bereavement] request" but does not identity how an incarcerated person could do so. Given that incarcerated persons are confined in custody they are unlikely to have access to death certificates and other authenticated information pertaining to a family member's death. Utilizing the definition of "documentation" provided in in AB 1989 (Low), Chapter 767, Statutes of 2022. It may be more feasible to require the warden or facility to verify that a family member has died. Additionally, the author may wish to align the definition of "immediate family" to align with the definition of "family member" provided in AB 1989 (Low), Chapter 767, Statutes of 2022 to maintain conformity surrounding which family member deaths permit bereavement requests.

7) **Argument in Support**: According to ACLU California Action, this bill "seeks to add Section 2710 to the Penal Code, promoting dignity in periods of mourning and allowing incarcerated individuals to access mental health counseling when resources permit. This new provision will undoubtedly lead to a more effective reintegration of these individuals into society. The lack of this provision in current law denies compassion in those undeniably devastating times, which is inconsistent with our investments in effective rehabilitation."

8) **Argument in Opposition**: None

9) **Related Legislation**: ACA 8 (Wilson) of the 2023-2024 Legislative Session, would have removed language in the state Constitution that allows involuntary servitude as punishment to a crime. ACA 8 is pending in Assembly Rules Committee.

10) **Prior Legislation**:

a) AB 1949 (Low), Chapter 767, Statutes of 2022, requires private employers with five or more employees and public sector employers to provide employees with at least 30 days of service up to five unpaid days of bereavement leave upon the death of a family member.
b) ACA 3 (Kamlager), of the 2021-2022 Legislative Session, would have removed language in the state Constitution that allows involuntary servitude as punishment to a crime. ACA 3 was ordered to the Senate Inactive File.

REGISTERED SUPPORT / OPPOSITION:

Support

ACLU California Action
Ella Baker Center for Human Rights

Opposition

None

Analysis Prepared by: Ilan Zur / PUB. S. / (916) 319-3744

Amended Mock-up for 2023-2024 AB-2624 (Waldron (A))

Mock-up based on Version Number 99 - Introduced 2/14/24
Submitted by: Staff Name, Office Name

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

SECTION 1. Section 2710 is added to the Penal Code, to read:

2710. (a) (1) An incarcerated person imprisoned in a state prison shall be allowed relief from prison employment after the death of an immediate family member of the incarcerated person.

(2) If the incarcerated person is enrolled in an educational program instead of, or in addition to, being employed, the incarcerated person shall additionally be allowed relief from the educational program.

(3) The incarcerated person shall request relief from the warden or their designee.

(4) The incarcerated person shall provide substantiation to support the request.

(5) Upon receiving the request and substantiation, the warden shall approve or deny the relief as soon as practicable.

(b) The incarcerated person shall be paid their regular compensation for the hours and days the individual is scheduled to work during the period of relief.

(c) The relief shall not exceed three days for any one occurrence.

(d) To the extent resources are available, the incarcerated person shall have access to a mental health professional during their period of relief.

(e)(1) **A warden or other administrator of the facility shall grant a request for** ~~The final decision of~~ relief from employment and access to a mental health professional offered to the incarcerated person pursuant to this section **unless the incarcerated person is employed in a position requiring emergency response, including, but not limited to, a firefighter, and the warden or other administrator of the facility can demonstrate by clear and convincing evidence that an exigent circumstance requires the incarcerated person's employment during the period requested by the incarcerated person.** ~~shall be at the discretion of the warden or other administrator of the facility.~~

(2) If the warden or other administrator of the facility denies the relief pursuant to paragraph (1), the relief shall be granted as soon as practicable after the exigent circumstance has ended.

(f) It shall be unlawful for a warden or other administrator of the facility to discipline, punish, refuse to hire, discharge, demote, fine, suspend, expel, or discriminate against, an individual because of either of the following:

(1) An individual's exercise of the right to bereavement relief, as provided by subdivision (a).

(2) An individual's request for bereavement relief or provision of substantiation to support the request, as provided by subdivision (a).

(g) ~~(f)~~ (1) This section does not authorize an incarcerated person to leave the prison facility.

(2) This section does not authorize the prison to deny an incarcerated person access to other regularly scheduled activities, including, but not limited to, recreation, meals, group sessions, or counseling.

(h) ~~(g)~~ For purposes of this section, "immediate family" means any spouse, whether by marriage or not, parent, child, any person related by consanguinity or affinity within the second degree, or any other person who, within six months before the commission of the crime for which the person was convicted to state prison, regularly resided in the household.

Date of Hearing: April 16, 2024
Consultant: Elizabeth Potter

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Kevin McCarty, Chair

AB 2673 (McCarty) – As Amended March 18, 2024

SUMMARY: Establishes the Sacramento Youth Firearm Prevention Pilot Program (SYFPP) Specifically, **this bill**:

1) Allows the County of Sacramento (the county) to establish SYFPP and to require participation in a gun violence prevention class for eligible youth.

2) States that an eligible youth is a youth who has been granted probation for an offense in which the youth is found by a juvenile court to have either been in possession of a firearm or that the offense involved the use of a firearm, in addition to any other order it make, the juvenile court may order the youth to participate in a gun violence prevention class from a local community agency designated by the court, if the service is available and the youth is likely to benefit from the service.

3) Requires services to be evidence based or research supported, trauma informed, culturally relevant, developmentally appropriate, and focused on public health.

4) Allows a court to revoke the youth's probation for the failure to enroll in, participate in, or complete a program, except if the failure was with good cause.

5) States that a youth's probation shall not be revoked for failure to enroll in, participate in,, or complete a program if the court-ordered program does not have capacity to enroll the youth, or ceases to offer the services the youth has been ordered by the court to receive.

6) Requires a court to determine the youth's ability to pay.

7) Allows a court to develop a sliding fee schedule for a youth who is financially unable to pay.

8) States that a youth who meets certain financial conditions, as described in Government Code 68632, shall not be responsible for any costs.

9) Requires the county to collect and monitor all of the following data for each participant in the research program:

   a) Demographic information, including age, gender, race, ethnicity, familial status, and employment status;

   b) Criminal history;

c) Failure to enroll in, complete, or successfully complete, the program; and,

d) Outcomes at six months after completion, and one year completion, including subsequent arrests and convictions.

10) Requires an outcomes assessment of SYFPP by the county and to include, at minimum, all of the following:

a) The curriculum used by the program;

b) The number of participants enrolled in the program;

c) The total number of participant that failed to successfully complete the program;

d) Demographic data on the number of participants in the program;

e) The effects of the pilot program on participant recidivism, including a one- and three year evaluation of the number of subsequent arrests in adjudications of the participants; and,

f) A recommendation on whether to continue and expand the pilot program model beyond the conclusion of the pilot program.

11) Requires the outcomes assessment to be submitted to the Assembly Committee on Public Safety and the Senate Committee on Public Safety by January 1, 2030.

12) Sunsets the provisions of this bill on January 1, 2031.

13) Makes findings and declarations.

EXISTING LAW:

1) Establishes the Youth Reinvestment Grant Program (YRGP) within the Board of State and Community Corrections (BSCC) for the purpose of granting funds, as specified. (Welf. & Inst. Code, § 1450.)

2) Requires that three percent of funds allocated to YRGP be used for the purpose of implementing diversion programs for Native American children that use trauma-informed, community-based, and health-based interventions. (Welf. & Inst. Code, § 1453, subd. (a).)

3) States that priority must be given to diversion programs addressing the needs of Native American children who experience high rates of juvenile arrest, suicide, and alcohol abuse, among other things. (Welf. & Inst. Code, § 1453, subd. (b).)

4) Requires that a specified percentage of funds be allocated for the purpose of implementing diversion programs for children throughout local jurisdictions that are trauma-informed, evidence-based, and culturally relevant, among other things. (Welf. & Inst. Code, § 1454 subds. (a) & (b).)

5) States that jurisdictions with the highest need must be provide a certain minimum of funds and defines "highest needs" as areas with high juvenile arrest rates and high levels of racial or ethnic disparity in juveniles arrest rates. (Welf. & Inst. Code, §1454, subd. (b).)

6) Provides that BSCC is responsible for oversight and accountability of the program and that it must track funding, provide guidance to programs, and contract with a research firm to conduct a statewide evaluation of the grant, as specified. (Welf. & Inst. Code, § 1455.)

7) States that the YRGP funds must be allocated by the BSCC through a competitive grant process, as specified. (Welf. & Inst. Code, § 1458.)

8) Establishes the Office of Youth and Community Restoration (OYCR) in the California Health and Human Services Agency, whose mission is to promote trauma responsive, culturally informed services for youth involved in the juvenile justice system that support their successful transition to adulthood and help them become responsible, thriving, and engaged members of the community. (Welf. & Inst. Code, § 2200, subds. (a) & (b).)

9) Provides that all juvenile justice grant administration functions in the Board of State and Community Corrections shall be moved to the OYCR no later than January 1, 2025. (Welf. & Inst. Code, § 2200, subd. (h).)

10) Establishes the California Violence Intervention Program (CalVIP), to be administered by the BSCC. (Pen. Code, § 14131, subd. (a).)

11) States that the purpose of CalVIP is to improve public health and safety by supporting effective community gun violence reduction initiatives in communities that are disproportionately impacted by community gun violence. (Pen. Code, § 14131, subd. (b).)

12) Defines "community gun violence" to mean intentional acts of interpersonal violence involving a firearm, generally committed in public areas by individuals who are not intimately related to the victim, and which result in physical injury, emotional harm, or death. (Pen. Code, § 14131, subd. (b).)

13) States that CalVIP grants shall be used to develop, support, expand, and replicate evidence-based community gun violence reduction initiatives, including, without limitation, hospital-based violence intervention programs, evidence-based street outreach programs, and focused-deterrence strategies, that seek to interrupt cycles of community gun violence and retaliation in order to reduce the incidence of homicides, shootings, and aggravated assaults. (Pen. Code, § 14131, subd. (c).)

14) States that CalVIP grants shall be made on a competitive basis to cities that are disproportionately impacted by community gun violence, to community-based organizations that serve the residents of those cities, including tribal governments, and to counties that have on or more cities disproportionately impacted by community gun violence within their jurisdictions. (Pen. Code, § 14131, subd. (d).)

15) States that for purposes of CalVIP, a city is disproportionately impacted by community gun violence if any of the following are true:

a) The city experienced 20 or more homicides per calendar year during two or more of the three calendar years immediately preceding the grant application;

b) The city experienced 10 or more homicides per calendar year and had a homicide rate that was at least 50%higher than the statewide homicide rate during two or more of the three calendar years immediately preceding the grant application; or,

c) An applicant otherwise demonstrates a unique and compelling need for additional resources to address the impact of community gun violence in the applicant's community. (Pen. Code, § 14131, subd. (e)(1)-(3).)

16) States that an applicant for a CalVIP grant shall submit a proposal, in a form prescribed by the board, as specified. (Pen. Code, § 14131, subd. (f).)

17) States that in awarding CalVIP grants, the board shall give preference to applicants whose grant proposals demonstrate the greatest likelihood of reducing the incidence of community gun violence in the applicant's community, without contributing to mass incarceration. (Pen. Code, § 14131, subd. (g).)

18) Requires the amount of funds awarded to an applicant to be commensurate with the scope of the applicant's proposal and the applicant's demonstrated need for additional resources to address community gun violence in the applicant's community. (Pen. Code, § 14131, subd. (h).)

19) States that permission to proceed without paying court fees and costs because of an applicant's financial condition shall be granted initially to all of the following persons:

a) An applicant who is receiving public benefits under one or more of the following programs which includes, but is not limited to:

i) Supplemental Security Income (SSI) and State Supplementary Payment (SSP), as specified;

ii) Medi-Cal; and,

iii) Unemployment compensation.

b) An applicant whose monthly income is 200 percent or less of the current poverty guidelines updated periodically in the Federal Register by the United States Department of Health and Human Services under the authority of the United States Code, as specified, or a successor statute or regulation.

c) An applicant who, as individually determined by the court, cannot pay court fees without using moneys that normally would pay for the common necessaries of life for the applicant and the applicant's family, as specified.

d) A person who files a petition for appointment of a fiduciary in a guardianship or conservatorhship, or files pleadings as the appointed fiduciary of a conservatee or ward, when the financial condition of the conservatee or ward meets the standard for a fee

waiver, as specified above in (a), (b), or (c). (Gov. Code § 68632.)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "As the number of youth firearm convictions climbs, AB 2673 creates a Sacramento County Youth Firearm Prevention pilot program to disrupt the cycle of violence through education, preventing costly engagement with the criminal legal system and making our community safer."

2) **Programs for Harm Reduction in California:** The CalVIP grant program was established in 2017 and replaced the California Gang Reduction Intervention and Prevention grant program. According to the BSCC website "In October 2019 Governor Newsom signed the Break the Cycle of Violence Act (AB 1603). AB 1603 codified the establishment of CalVIP and defined its purpose: to improve public health and safety by supporting effective violence reduction initiatives in communities that are disproportionately impacted by violence, particularly group-member involved homicides, shootings, and aggravated assaults. The Break the Cycle of Violence act specifies that CalVIP grants shall be used to support, expand and replicate evidence-based violence reduction initiatives, including but not limited to:

   - Hospital-based violence intervention programs,
   - Evidence-based street outreach programs, and
   - Focused deterrence strategies.

   "These initiatives should seek to interrupt cycles of violence and retaliation in order to reduce the incidence of homicides, shootings, and aggravated assaults and shall be primarily focused on providing violence intervention services to the small segment of the population that is identified as having the highest risk of perpetrating or being victimized by violence in the near future." (https://www.bscc.ca.gov/s_cpgpcalvipgrant/ [as of April 3, 2024])

   In 2023 the purpose of CalVIP changed. Rather than focusing on various forms of violence, including shootings, assaults, and homicides in general, CalVIP's focus is community gun violence.

   The YRGP also has similar goals. In 2018, the YRGP was established for the purpose of implementing trauma-informed diversion programs for minors. This program covers local youth, including youth in tribal communities.

3) **Sacramento County Youth Firearm Convictions:** According to information provided by the author, "The number of minors being convicting of firearm offenses in Sacramento County is steadily increasing over the last five years.

Sacramento County Youth Firearm Convictions (2019-2023)	
Year	**Convictions**

2019	78
2020	118
2021	114
2022	110
2023	107

This bill would allow the County of Sacramento to establish SYFPP to require a gun violence prevention program for eligible youth over the next five years. In addition, this bill would require the County of Sacramento to collect relevant data to evaluate the efficacy of SYFPP.

4) **Argument in Support**: None submitted.

5) **Argument in Opposition**: *The Pacific Juvenile Defense Center* argues, "While PJDC is interested in the possibility of collaborative, youth- and community-centered, evidence-based approaches to addressing youth firearm possession in a manner that prevents firearm violence while also diverting youth from deep-end delinquency system involvement, this bill does not currently represent such an approach. As written, this bill simply reiterates the status quo while placing additional burdens on system-involved youth in Sacramento County. As detailed below, the current language would simply make juvenile probation more difficult and more likely to end in incarceration for Sacramento County youth while failing to do anything new to address the root causes of guns in the hands of youth in the community.

…

"First, the juvenile court under Welfare and Institutions Code Section 727 already has the authority to order youth to participate in various rehabilitative programs such as gun violence prevention programs, which is the same authority that this bill purports to create. The court may already order youth to enroll in and complete any available program that is reasonably related to the underlying offense and that would aid in the rehabilitation of the youth. There is no need to enact a new code section.

"Second, the bill unlawfully passes the cost of attending the gun violence prevention class onto the youth. We believe this language runs afoul of SB 190 (effective 1/1/2018). SB 190 prohibits counties from charging fees assessed to parents and guardians for their children's detention, representation by counsel, electronic monitoring, probation, supervision, and drug testing in the juvenile system.

"Third, it is counterproductive to order this program as a condition of formal probation because (a) buy-in from youth is needed for it to be effective and (b) loading kids up with probation conditions sets them up to fail. Youth placed on juvenile probation in Sacramento County are already subject to dozens of complex terms and conditions of probation, including a condition that this bill simply duplicates: to participate in community-based interventions as directed by the court. Studies have shown that excessive probation conditions lead to increased periods of incarceration based on technical violations (e.g.

missing classes or failing to complete a program), which counterproductively prolongs and deepens the youth's system involvement."

6) **Related Legislation**:

a) AB 2064 (Jones-Sawyer), would establish the Community Violence Interdiction Grant Program CVIGP and requires it to be administered by the California Health and Human Services Agency (HHSA) to provide funding to local community programs for community-driven solutions to decrease violence in neighborhoods and schools.

b) AB 2267 (Jones-Sawyer), would re-establish YRGP and designates OYCR to administer it. AB 2267 is pending hearing in the Assembly Appropriations Committee.

7) **Prior Legislation**:

a) AB 762 (Wicks), Chapter 421, Statutes of 2023, changed the purpose of the CalVIP, as well as the eligibility requirements for the grant, and makes the program permanent.

b) AB 912 (Jones-Sawyer), of the 2023-2024 Legislative Session, would have provided for the establishment, expansion, and funding for early-violence-intervention programs, school-based physical and mental health services, and youth-recreational activities, contingent upon appropriation. AB 912 was vetoed by the Governor and stricken from the file.

c) AB 1454 (Jones-Sawyer), Chapter 584, Statutes of 2019, revised and recast the Youth Reinvestment Grant Program by increasing the maximum grant award from $1,000,000 to $2,000,000 and allowing nonprofit organizations to apply for grants through the program.

d) AB 1603 (Jones-Sawyer) Chapter 735, Statutes of 2019, codified the establishment of the California Violence Intervention and Prevention Grant Program and the authority and duties of BSCC in administering the program, including the selection criteria for grants and reporting requirements to the Legislature

e) SB 493 (Bradford), of the 2021-2022 Legislative Session, would have revised components of the Juvenile Justice Crime Prevention Act, including by requiring funded programs to be modeled on trauma-informed and youth development approaches in collaboration with community-based organizations (CBOs), requiring no less than 95 percent of specified funds appropriated to counties be allocated to CBOs and non-law enforcement government entities, and changing the composition of county juvenile justice coordinating councils. SB 493 was held on the Senate Appropriations Suspense calendar.

REGISTERED SUPPORT / OPPOSITION:

Support

None

Opposition

Pacific Juvenile Defense Center

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

Date of Hearing: April 16, 2024
Counsel: Kimberly Horiuchi

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Kevin McCarty, Chair

AB 2691 (Quirk-Silva) – As Amended March 21, 2024

SUMMARY: Creates a new crime, referred to as "sexual harassment" where any person intentionally posts, distributes, creates, or threatens to post or create an intimate digital depiction of another without consent. Specifically, **this bill**:

1) States any person who is sentenced for the crime of "sexual harassment," as defined, may be sentenced as an alternate felony-misdemeanor pursuant to the 2011 Realignment Act and sentenced to up to three years in county jail.

2) Defines "intimate digital depiction" as any image or video of a person that has been created or altered using digital manipulation and that depicts and depicts the following:

   a) The uncovered genitals, public area, anus, or post pubescent nipple of an identifiable person;

   b) The display or transfer of bodily sexual fluid onto any part of the body of an identifiable person from the body of an identifiable person.

   c) Any identifiable person engaging in sexually explicit conduct.

EXISTING LAW:

1) Provides that every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press. (Cal. Const., art. I, § 2.)

2) Makes it a misdemeanor to look through a hole or opening, into, or otherwise view, by means of any instrumentality, including, but not limited to, a camera, motion picture camera, camcorder, mobile phone, electronic device, or unmanned aircraft system, the interior of a bedroom, bathroom, changing room, fitting room, dressing room, or tanning booth, or the interior of any other area in which the occupant has a reasonable expectation of privacy, with the intent to invade the privacy of a person or persons inside. (Pen. Code, § 647, subd. (j)(1).)

3) Makes it a misdemeanor to use a concealed camcorder, motion picture camera, or photographic camera of any type, to secretly videotape, film, photograph, or record by electronic means, another identifiable person under or through the clothing being worn by that other person, for the purpose of viewing the body of, or the undergarments worn by, that other person, without the consent or knowledge of that other person, with the intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of that person and invade the

privacy of that other person, under circumstances in which the other person has a reasonable expectation of privacy. (Pen. Code, § 647, subd. (j)(2).)

4) Makes it a misdemeanor to use a concealed camcorder, motion picture camera, or photographic camera of any type, to secretly videotape, film, photograph, or record by electronic means, another identifiable person who may be in a state of full or partial undress, for the purpose of viewing the body of, or the undergarments worn by, that other person, without the consent or knowledge of that other person, in the interior of a bedroom, bathroom, changing room, fitting room, dressing room, or tanning booth, or the interior of any other area in which that other person has a reasonable expectation of privacy, with the intent to invade the privacy of that other person. (Pen. Code, § 647, subd. (j)(3).)

5) Makes it a misdemeanor to intentionally distribute an image of another identifiable person's intimate body parts or depicting the person engaged in one of several specified sex acts, under circumstances in which the persons agree or understand that the image shall remain private, when the person distributing the image knows, or should know, that its distribution will cause serious emotional distress, and where the person depicted suffers that distress. (Pen. Code, § 647, subd. (j)(4)(A).)

6) Provides that a person intentionally distributes an image when that person distributes the image or arranges, specifically requests, or intentionally causes another person to distribute that image. (Pen. Code, § 647, subd. (j)(4)(B).)

7) Defines "intimate body part" as any portion of the genitals, the anus, and in the case of a female, also includes any portion of the breasts below the top of the areola that is either uncovered or clearly visible through clothing. (Pen. Code, § 647, subd. (j)(4)(C).)

8) Makes distribution of the image exempt from prosecution if:

   a) It is made in the course of reporting an unlawful activity;

   b) It is made in compliance with a subpoena or other court order for use in a legal proceeding;

   c) It is made in the course of a lawful public proceeding; or,

   d) It is related to a matter of public concern or public interest. (Pen. Code, § 647, subd. (j)(4)(D)(i)-(iv).)

9) Specifies a second or subsequent violation of the misdemeanors described above, also known as invasion of privacy, is punishable by imprisonment in the county jail not exceeding one year, and/or a fine not exceeding $2,000. (Pen. Code, § 647, subd. (k)(1).)

10) Specifies that if the victim of the invasion of privacy, as described above, was a minor at the time of the offense, the violation is punishable in a county jail not exceeding one year, and/or a fine not exceeding $2,000. (Pen. Code, § 647, subd. (k)(2).)

11) States that the invasion of privacy provisions do not preclude punishment under any section of law providing for greater punishment. (Pen. Code, § 647, subd. (j)(5).)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement:** According to the author: "With AI technology rapidly outpacing legislative safeguards, there has been a rise in the spread of intimate digital depictions posted without consent. Current laws lack the necessary teeth to adequately combat this behavior, leaving victims vulnerable and perpetrators emboldened. In a world where deepfake technology poses a clear and present danger to individuals' privacy and safety, AB 2691 clarifies that the intentional creation or distribution of an intimate digital depiction without consent is sexual harassment. This strengthens laws against revenge porn and ensures clear consequences for those responsible."

2) **Existing Penalties Related to Surreptitious Recordings of Sexual Conduct:** The intent of this bill is to criminalize a situation where a person may be secretly recorded and the material distributed without their consent or even knowledge that the image was taken. Penal Code section 647 subdivision (j) generally prohibits secretly filming, photographing, or recording another person who may be in a state of full or partial undress, for the purpose of viewing the body of, or the undergarments worn by, that other person, without the consent or knowledge of that other person, in any area in which that other person has a reasonable expectation of privacy, with the intent to invade the privacy of that other person. (Pen. Code, § 647, subd. (j)(3).)

   The act of secretly taking a picture or filming a person, with the intent to invade the privacy of that person, whether or not the image is subsequently distributed, is already criminal offense. For example, in *In re M.H.* (2016) 1 Cal.App.5th 699, evidence was sufficient to find that a minor invaded the privacy of a fellow high school student when he used his smart phone to surreptitiously record another student in a school bathroom stall while he was either masturbating or jokingly pretending to do so, and had the video disseminated on social media. Similarly, in *People v. Johnson* (2015) 234 Cal.App.4th 1432, the defendant was guilty of the offense for secretly photographing individuals under their skirts while shopping at Target.

   In addition, Penal Code section 502 makes unauthorized access to a computer network, which includes a phone or social media profile, a crime. Under Section 502, there is protection for traditional hacking, but the statute also protects individual users from unauthorized access, and the offence is chargeable as a misdemeanor or felony. (Pen. Code, § 502.) In 2015, the Attorney General prosecuted a cyber-hacker who hacked into email accounts and stole victims' private intimate images. The defendant pled guilty to computer intrusion. (Office of the Attorney General, Attorney General Kamala D. Harris Announces Guilty Plea of Hacker Involved in Cyber Exploitation Scheme (June 17, 2015).[1]

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[1] <https://oag.ca.gov/news/press-releases/attorney-general-kamala-d-harrisannounces-guilty-plea-hacker-involved-cyber> [last visited April 3, 2024].)

Code of Civil Procedure section 1708.85 allows a person to file a private right of action (i.e., lawsuit) against any person who intentionally distributes sexually explicit photographs or other images or recordings of another person, without the consent of that person. Under California law, intentional infliction of emotional distress requires "extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress." (See *Hughes v. Pair* (2009) 46 Cal. 4th 1035, 1050.) "A defendant's conduct is 'outrageous' when it is so extreme as to exceed all bounds of that usually tolerated in a civilized community." (*Id.* at pp. 1050–51.)

A person may also sue a former spouse, domestic partner, or person with whom the plaintiff cohabites for infliction of emotional distress pursuant to Civil Code section 1714.01. A person may recover up to $250,000 for non-economic injuries like pain or suffering. A plaintiff is also entitled to receive attorneys' fees (which are often significantly more than the actual damages) and economic damages, including medical (i.e., mental health) bills, costs of removing the images from the internet, lost wages, etc. This bill, as it pertains to images that may have been taken surreptitiously and disseminated without someone's consent, may be remedied by civil law pursuant to a private right of action or injunctive relief.

3) **Sexual Harassment Defined:** Harassment is most commonly used in a colloquial or pedestrian form. Sexual harassment is often used to characterize discrimination in society based on sex or gender, physical or assaultive touching in society, or more particularly, in the employment setting. However, "harassment" is a legal term of art. It is used in a criminal context in, for instance, Penal Code section 653m which criminalizes "obscene, threatening, harassing, or annoying" phone calls or via an electronic communications device. (Pen. Code, § 653m, subd. (a).)

Sexual harassment is a specific type of employment discrimination claim and specifically, usually means *quid pro quo* harassment. (See Gov. Code, §§ 12926, 12940, subd. (j).)

> There are two ways to understand a quid pro quo harassment claim. One view is that a quid pro quo harassment claim targets essentially the same unlawful conduct as a hostile work environment claim: the communication of an offensive message in the workplace.
>
> Hostile work environment harassment occurs when a sufficiently severe or pervasive offensive message is communicated to the aggrieved employee in the workplace; a quid pro quo harassment claim challenging an official employment action can be understood to target the offensive message conveyed by that action — namely, the message that an employment benefit has been conditioned on submission to unwanted sexual advances. Alternatively, quid pro quo harassment may be understood as the very act of conditioning an employment benefit on submission to unwanted sexual advances. The notion is that the act itself comprises a distinct wrong, separate and apart from communication of an offensive message in the workplace. On this view, a quid pro quo harassment claim alleging unlawful denial of a promotion directly challenges the denial as based on forbidden considerations; the promotion

> denial does not play a meaningfully different role from the one it would play in a discrimination lawsuit brought against an employer.

(*Pollock v. Tri-Modal Distribution Services, Inc.* (2021) 11 Cal.5th 918, 933.)

The conduct criminalized in this bill is not "sexual harassment," which would be a supervisor or employer conditioning an employment benefit on an agreement for sexual favors but rather a violation of the revenge porn statute.

4) **First Amendment:** The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." (U.S. Const, Amend. I, § 1.) The California Constitution also protects free speech. "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." (Cal. Const. Art. I, § 2.) "[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." (*Ashcroft v. American Civil Liberties Union* (2002) 535 U.S. 564, 573.)

Legislation that regulates the content of protected speech is subject to strict scrutiny, sometimes referred to by the courts as "exacting scrutiny" in this context. (*Reed v. Town of Gilbert, Ariz.* (2015) 135 S.Ct. 2218, 2226.) To survive strict scrutiny, state action must be narrowly tailored to address a compelling government interest. (*Ibid.*)

Nevertheless, First Amendment protections are not absolute. Restrictions on the content of speech have long been permitted in a few limited areas including obscenity, defamation, fraud, incitement, and speech integral to criminal conduct. (*United States v. Stevens* (2010) 559 U.S. 460, 130 S.Ct. 1577, 1584 [citations omitted].) The First Amendment permits "restrictions upon the content of speech in a few limited areas which are 'of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the societal interest in order and morality.'" (*R.A.V. v. City of St. Paul* (1992) 505 U.S. 377, 382-383.)

While some lower courts have grappled with First Amendment challenges to state "revenge porn" laws generally, the California Supreme Court has yet to weigh in. (Paul, *Is Revenge Porn Protected Speech? Lawyers Weigh in, and Hope for a Supreme Court Ruling*, The Washington Post (Dec. 26, 2019).[2] A former version of California's "revenge porn" law (Pen. Code, § 647, subd. (j)(4)(iii)) survived First Amendment scrutiny in *People v. Iniguez* (2016) 247 Cal.App.4th Supp. 1 (*Iniguez*). There, the defendant argued the statute was overbroad in violation of the First Amendment.

Overbreadth means a defendant "may challenge a statute not because their own rights of free expression are violated, but because the very existence of an overbroad statute may cause others not before the court to refrain from constitutionally protected expression. [Citations.]" (*In re M.S.* (1995) 10 Cal.4th 698, 709.) To avoid being overbroad, "statutes attempting to

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[2] Located at < https://www.washingtonpost.com/nation/2019/12/26/is-revenge-porn-protected-speech-supreme-court-may-soon-weigh/> [as of April 5, 2024].)

restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society." (*Broadrick v. Oklahoma* (1973) 413 U.S. 601, 611–612 [citations omitted].)

Without deciding whether a person has a free speech right to distribute such images, the *Iniguez* court concluded former subdivision (j)(4)(iii) of Penal Code section 647[3] was not constitutionally overbroad because it required specific intent to distribute sexually explicit material, with the intent to cause serious emotional distress. (*People v. Iniguez*, *supra*, 247 Cal.App.4th Supp. at pp. 7-8.) Accordingly, the statute would not apply if a person acted by mistake or accident. (*Id.* at pp. 7-8.)

The *Iniguez* court also explained that "it is not just *any* images that are subject to the statute, but only those which were taken under circumstances where the parties agreed or understood the images were to remain private. The government has an important interest in protecting the substantial privacy interests of individuals from being invaded in an intolerable manner." (*People v. Iniguez*, *supra*, 247 Cal.App.4th Supp. at p. 8 [citation omitted].) The court stated, "***It is evident that barring persons from intentionally causing others serious emotional distress through the distribution of photos of their intimate body parts is a compelling need of society***." (Emphasis added.) (*Ibid.*)

This bill, however, does not include a requirement that a person distribute intimate images with the intent to cause emotional distress. This is a critical element of the Iniquez decision because the statutory requirement of intent to cause emotional distress was a big part of the reason why the court determined it was not overbroad. Furthermore, the revenge porn statute is actually much broader in what it punishes. Specifically, Penal Code section 647, subdivision (j)(4), punishes:

> "A person who intentionally distributes or causes to be distributed the image of the intimate body part or parts of another identifiable person, or an image of the person depicted engaged in an act of sexual intercourse, sodomy, oral copulation, sexual penetration, or an image of masturbation by the person depicted or in which the person depicted participates, under circumstances in which the persons agree or understand that the image shall remain private, the person distributing the image knows or should know that distribution of the image will cause serious emotional distress, and the person depicted suffers that distress. …

"Intimate body part" means any portion of the genitals, the anus and, in the case of a female, also includes any portion of the breasts below the top of the areola that is either uncovered or clearly visible through clothing. (Pen. Code, § 647, subd. (j)(4)(c)(iii).)

This bill defines "intimate digital depiction" as any image or video of an individual that has been created or altered using digital manipulation and depicts the following: uncovered genitals, public area, anus, or post pubescent nipple of an identifiable person; or (2) the display or transfer of bodily sexual fluids onto any part of the body of an identifiable

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[3] Penal Code section 647, subdivision (j)(4)(A-D.)

individual from the body of an identifiable individual." That definition is different than the one approved in Iniquez and involves a narrower set of sexual imagery than is punished in the revenge porn statute. Does it make sense to adopt a more restrictive statute that is already more broadly covered in Penal Code section 647, subdivision (j)(4).)

This bill is also very similar to AB 1962 (Berman) which expands the crime of revenge porn to include the distribution of images recorded, captured, or otherwise obtained ***without the authorization of the person depicted or by exceeding authorized access from property, accounts, messages, files, or resources of the person depicted.*** This bill appears to be aimed at images a person may not know about, but actually states "without consent" rather than "without authorization" or knowledge. AB 1962 appears to more squarely address the harms caused by posting or distributing surreptitiously obtained images. Otherwise, the existing revenge porn statute already criminalizes the conduct at issue in this bill.

5) **Arguments in Support:** None submitted.

6) **Argument in Opposition:** According to the ACLU California Action: "While we appreciate the potential harms caused by new forms of digital technology, we fear that AB 2691 improperly restricts lawful speech and runs afoul of the First Amendment. Additionally, we oppose AB 2691 because we believe it will have an undue and disproportionate impact on young people.

"The U.S. Supreme Court has said that freedom of expression, including freedom of speech, is 'the matrix, the indispensable condition of nearly every other form of freedom.' (Palko v. State of Connecticut (1937) 302 U.S. 319, 327.) As such, the First Amendment protects nearly all speech, with only a handful of notable exceptions. One of those exceptions is 'defamation.' But there are numerous constitutional requirements that the Supreme Court has imposed before speech can be prohibited – even speech that is false and may harm someone's reputation and/or may cause emotional distress. (See generally *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) and *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964).)

"The constitutional requirements that are most relevant here are that even false speech against a public figure, such as a politician, cannot be prohibited unless the plaintiff can show by clear and convincing evidence that the speaker acted with actual malice, i.e that the speaker knew that the speech was false or acted with "reckless disregard" of its falsity. (*New York Times v. Sullivan,* 376 U.S. at 279-86.) AB 2691 does not take into account these constitutional safeguards. Under the bill, someone who distributed a false digital depiction of a politician who had staked their reputation on support for family values having sex with a sex worker – even if the person who distributed the image did not know that it had been digitally altered and believed it was authentic – would be subject to criminal penalties. The fact that the distribution may cause harm does not obviate the constitutional requirement for "actual malice." In *Hustler*, 485 U.S. 46 (1988), the United States Supreme Court held that the First Amendment protected speech directed at public figures even if it caused severe emotional distress unless "the publication contains a false statement of fact which was made with 'actual malice,' i.e., with knowledge that the statement was false or with reckless disregard as to whether or not it was true." (*Id.* at 56.)

"AB 2691 likewise suffers from vagueness and overbreadth, raising additional constitutional concerns. "The Constitution gives significant protection from overbroad laws that chill speech within the First Amendment's vast and privileged sphere." (*Ashcroft v. Free Speech Coalition* (2002) 535 U.S. 234, 244.) The U.S. Supreme Court has found statutes unconstitutional on their face when they prohibit "a substantial amount of protected expression." (*Id.*) Here, the definition of intimate digital depiction" is both vague and overbroad: It is not clear whether it would prohibit constitutionally protected speech such as the creation of real photos digitally altered to enhance color for printing purposes of a matter of public concern (New York Times v. Sullivan, 376 U.S. at 269-71); a parody of a public figure (*Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46); or non-obscene artistic or political expression (Miller v. California (1973) 413 U.S. 15, 23). Because it is highly likely that the bill as written violates the First Amendment, we respectfully oppose it.

"Also, we fear that AB 2691will result in further criminalization of youth, particularly youth of color, who engage in the proscribed behavior. A recent study found that 73% of teenagers 17 years old or younger had been exposed to online pornography. Young people access pornography in a variety of ways, including by sharing it with one another and through social media. Under AB 2691, a young person could be convicted of a crime and sentenced to jail if they share digitally created pornography or intimate images without knowledge that it was shared without the depicted person's consent. While this conduct may very well be inappropriate and sometimes harmful, sending young people to jail is counterproductive and fails to appreciate that there are less punitive corrective actions that can be taken.

7) **Related Legislation:**

a) AB 1380 (Berman), would expand the crime of "revenge porn" to include the distribution of specified images obtained without the authorization of the person depicted or by exceeding authorized access from the property, accounts, messages, files, or resources of the person depicted. AB 1380 was held on the Assembly Committee on Public Safety suspense file.

b) AB 1856 (Ta), would create a new crime for intentionally distributing or causing to be distributed a deepfake of an intimate body part of an identifiable person, or a deepfake of the person engaged in an act of sexual intercourse, sodomy, oral copulation, sexual penetration, and the person distributing the deepfake knows or should know that the person depicted did not consent to the distribution and that distribution will cause serious emotional distress, and the person depicted suffers that distress. AB 1856 is pending hearing in this committee today.

c) AB 1962 (Berman), would expand the crime of posting an intimate image of another identifiable person without their consent with the intent cause serious emotional distress (referred to as "revenge porn") to include the distribution of images recorded, captured, or otherwise obtained without the authorization of the person depicted or by exceeding authorized access from property, accounts, messages, files, or resources of the person depicted. AB 1962 is pending in the Assembly Appropriations Committee.

2) **Prior Legislation:**

a) SB 23 (Rubio), Chapter 783, Statutes of 2021, extends the statute of limitations for the crime of "revenge porn" to allow prosecution to commence within one year of the

discovery of the offense, but not more than four years after the image was distributed

b) SB 1081 (Rubio), Chapter 882, Statutes of 2022, defines the terms "distribute" and "identifiable" for purposes of the existing crime of unlawful distribution of a private image, also known as "revenge porn."

REGISTERED SUPPORT / OPPOSITION:

Support

None

Opposition

ACLU – California Action

Analysis Prepared by: Kimberly Horiuchi / PUB. S. / (916) 319-3744

Date of Hearing: April 16, 2024
Counsel: Liah Burnley

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Kevin McCarty, Chair

AB 2692 (Papan) – As Introduced February 14, 2024

SUMMARY: Limits presentence custody credits for defendants declared mentally incompetent to stand trial (IST). Specifically, **this bill**:

1) Provides that, when a certificate of restoration of competency is rejected by the court, the court shall, in its computation or statement setting forth the amount of credit for time served, limit the credits to be deducted from a defendant's maximum term of commitment to the original date of admission to a treatment facility to the date the certificate of restoration of competency was filed with the court.

2) States that, for all defendants, the period of mental health diversion shall begin on the day in which mental health treatment commences according to the defendant's treatment plan.

3) States that, for defendants found IST, the period of mental health diversion shall begin on the day in which mental health treatment commences according to the defendant's treatment plan.

EXISTING LAW:

1) Guarantees that, in all criminal prosecutions, the accused shall enjoy the right to be informed of the nature and cause of the accusation. (U.S. Const. 6th Amend.)

2) States that a defendant is incompetent to stand trial (IST) if, as a result of a mental health disorder or developmental disability, they cannot understand the nature of the criminal proceedings or assist counsel in their defense in a rational manner. (Pen. Code, § 1367, subd. (a).)

3) Provides that a person shall not be tried or adjudged to punishment while mentally incompetent. (Pen. Code, § 1367, subd. (a).)

4) Allows the court to order that the question of the defendant's mental competence be determined in a hearing, and specifies the procedures for the hearing on defendant's competence. (Pen. Code, § 1368.)

5) Requires all the proceedings in the criminal prosecution to be suspended until the question of the defendant's mental competence has been determined. (Pen. Code, § 1368.)

6) Requires, if the defendant is found mentally competent, the criminal process to resume, and the trial on the offense charged to proceed. (Pen. Code, §§ 1370; 1370.01.)

7) Divides the procedures for the treatment of individuals found IST into four categories:

   a) Individuals charged with a felony and are found IST as a result of a mental health disorder;

   b) Individuals charged with misdemeanor(s) only and are found IST as a result of a mental health disorder;

   c) Individuals who are found IST as a result of a developmental disability and individuals who are found IST as a result of a mental health disorder and have a developmental disability; and,

   d) Individuals who are found IST and have violated the terms of their postrelease community supervision or parole. (Pen. Code, § 1367, subd. (b).)

8) Establishes the procedures for individuals found IST and charged with a felony offense, as follows:

   a) The trial, judgment, or hearing on the alleged charge is suspended until the person becomes mentally competent;

   b) The court orders the community program director to evaluate the defendant and to submit to the court within 15 days a written recommendation as to whether the defendant should be required to undergo outpatient treatment, or be committed to DSH or to any other treatment facility;

   c) The court holds a hearing to determine whether the defendant lacks capacity to make decisions regarding the administration of antipsychotic medication;

   d) The court orders the sheriff to deliver the defendant to a DSH facility, or a treatment facility, or orders the defendant to be placed on outpatient status;

   e) If, at any time after the court finds that the defendant is IST and before or after the defendant is transported to a facility, the court is provided with any information that the defendant may benefit from mental health diversion, the court may make a finding that the defendant is an appropriate candidate for diversion. A defendant granted diversion may participate for the lesser of (1) two years from the date of commitment; (2) a period equal to the maximum term of imprisonment provide by law for the most serious offense charged; or, (3) two years if the charge is a felony and one year if the charge is a misdemeanor;

   f) The defendant is entitled to presentence custody credit for the time served to be deducted from the maximum term of commitment;

   g) The defendant is entitled to earn conduct credits while committed. A term of four days will be deemed to have been served for every two days spent in custody;

   h) If, at any time after the court has declared a defendant IST, the defendant has regained competence, the criminal process resumes, and the trial on the offense charged proceeds.

The time spent by the defendant at committed as a result of IST proceedings is credited against the sentence, if any, imposed in the underlying criminal case;

i) The criminal action remains subject to dismissal in the interest of justice; and,

j) In the event of dismissal of the criminal charges before the defendant recovers competence, the person may be subject to specified civil commitment procedures. (Pen. Code, §§ 1370, 1375.5, subds. (a) & (b), 2900.5, & 4019; Cal. Rules of Court, rule 4.130, subd. (f)(1) & (2).)

9) Provides that, if the medical director of a state hospital or designated person at an entity contracted DSH to provide services to a defendant prior to placement in a treatment program or other facility to which the defendant is committed, or the community program director, county mental health director, or regional center director providing outpatient services, determines that the defendant has regained mental competence, the director or designee shall immediately certify that fact to the court by filing a certificate of restoration with the court by certified mail, return receipt requested, or by confidential electronic transmission. (Pen. Code, § 1372, subd. (a)(1).)

10) States that the court's order committing an individual to a DSH facility or other treatment facility shall include direction that the sheriff shall redeliver the patient to the court without any further order from the court upon receiving from the state hospital or treatment facility a copy of the certificate of restoration. (Pen. Code, § 1372, subd. (a)(2).)

11) Requires that the defendant be returned to the committing court no later than 10 days after the filing of a certificate of restoration of competency as follows:

a) A patient who remains confined in a state hospital or other treatment facility shall be redelivered to the sheriff of the county from which the patient was committed. The sheriff shall immediately return the person from the state hospital or other treatment facility to the court for further proceedings; and,

b) A patient who is on outpatient status shall be returned by the sheriff to court through arrangements made by the outpatient treatment supervisor. (Pen. Code, § 1372, subd. (a)(3).)

12) States that, when a defendant is returned to court with a certification that competence has been regained, the court shall notify either the community program director, the county mental health director, DSH, or the regional center director and the Director of Developmental Services, as appropriate, of the date of any hearing on the defendant's competence and whether or not the defendant was found by the court to have recovered competence. (Pen. Code, § 1372, subd. (c)(1).)

13) Provides that if the court rejects a certificate of restoration, the court shall base its rejection on a written report of an evaluation, conducted by a licensed psychologist or psychiatrist, that the defendant is not competent. The evaluation shall be conducted after the certificate of restoration is filed with the committing court as specified. (Pen. Code, § 1372, subd. (c)(2).)

14) Provides that if the committing court approves the certificate of restoration to competence as to a person in custody, the court shall notify DSH by providing a copy of the court order or minute order approving the certificate of restoration to competence. The court shall hold a hearing to determine whether the person is entitled to be admitted to bail or released on own recognizance pending conclusion of the proceedings. (Pen. Code, § 1372, subd. (d).)

15) States that if the court approves the certificate of restoration to competence on outpatient status, unless it appears that the person has refused to come to court, that person shall remain on outpatient status, or, in the case of a developmentally disabled person, either on the defendant's promise or on the promise of a responsible adult to secure the person's appearance in court for further proceedings. If the person has refused to come to court, the court shall set bail and may place the person in custody until bail is posted. (Pen. Code, § 1372, subd. (d).)

16) States that, a person who has been restored to competence, who is not admitted to bail or released on own recognizance, may, at the discretion of the court, upon recommendation of the director of the facility where the defendant is receiving treatment, be returned to the hospital or facility of their original commitment in order to receive continued treatment to maintain competence to stand trial. (Pen. Code, § 1372, subd. (e).)

17) Provides that in all felony and misdemeanor convictions, when the defendant has been in custody, including, but not limited to, any time spent in a jail, rehabilitation facility, hospital, prison, juvenile detention facility, or similar residential institution, all days of custody of the defendant shall be credited upon the term of imprisonment. If the total number of days in custody exceeds the number of days of the term of imprisonment to be imposed, the entire term of imprisonment shall be deemed to have been served. (Pen. Code, § 2900.5.)

18) Provides that individuals are entitled to earn credits for all of the days spent in custody from the date of arrest to the date when the sentence commences, when a person is confined in or committed to a county jail, and when a person is confined in or committed to a state hospital or other mental health treatment facility, or to a county jail treatment facility pursuant to IST proceedings. (Pen. Code, § 4019, subd. (a).)

19) Establishes mental health diversion for misdemeanor and felony offenses and sets forth eligibility requirements. (Pen. Code, §§ 1001.35 & 1001.36.)

20) Provides that the period for which a defendant can be diverted shall be limited as follows:

    a) No longer than two years if the defendant is charged with a felony; and,

    b) No longer than one year if the defendant is charged with a misdemeanor. (Pen. Code, § 1001.36, subd. (f)(C)(1.)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "When a defendant is found to be incompetent to stand trial due to a mental disorder, they can be placed in a diversion

program. The goal of diversion is mental health treatment and charges can be dismissed if a defendant performs satisfactorily and has a plan in place for long-term health care. While these programs can be up to two years long, current law starts the clock at the determination of incompetence, not when treatment starts. It can take up to four months for a professional to determine eligibility and find a facility. That's four months that a defendant is not getting critical treatment. This bill will ensure that defendants are receiving the benefit of a full two years of mental health treatment to ensure their long-term stability."

2) **The Changes Made By This Bill Limiting Credits Raise Serious Constitutional Concerns:** This bill would require credit computation for specified IST defendants to begin from the original date of *admission* to a treatment facility, to the date the certificate of restoration was *filed* with the court. This raises serious constitutional concerns because defendants are entitled to earn credits for the time they spend in custody before admission and for the time they spend in custody after a certificate of restoration is filed. (Pen. Code, § 4019.)

   Pursuant to this bill, a defendant would not earn credits for any of the time they spent waiting in jail prior to being declared IST and for the time spent in custody waiting to be admitted into a treatment facility. To deprive defendants of custody credits for the time spent awaiting admission to a facility would be a substantial deprivation for IST defendants, especially given the considerable wait times and backlogs for DSH admissions.[1]

   There are similar problems with limiting the credits earning to the date a certificate of restoration is filed with the court. If an IST defendant is determined to have regained mental competence after receiving treatment, the treatment provider is required to certify that fact to the court by filing a certificate of restoration with the court. (Pen. Code, § 1372, subd. (a)(1).) Upon receiving a copy of the certificate of restoration, the sheriff is required to deliver the defendant to the court. (Pen. Code, § 1372, subd. (a)(2).) The defendant must be returned to the committing court no later than 10 days following the filing of a certificate of restoration. (Pen. Code, § 1372, subd. (a)(3)(C).) The filing of the certificate does not automatically mean the defendant is suddenly declared competent to stand trial and released from custody. Rather, the court must find the defendant competent. The court must notify the treatment provider of the date of any hearing on the defendant's competence and whether or not the defendant was found by the court to have recovered competence. (Pen. Code, § 1372, subd.

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[1] There currently a statewide waitlist crisis for defendants who are IST awaiting transfer to a state hospital to receive treatment to restore their competency. (Incompetent to Stand Trial Solutions Workgroup, *Report of Recommended Solutions* (Nov. 2021). Available at <https://www.chhs.ca.gov/wp-content/uploads/2021/12/IST_Solutions_Report_Final_v2.pdf>; see also DSH, *Governor's Budget Proposals and Estimates* (Jan. 10, 2024) at p. 16. Available at: <https://www.dsh.ca.gov/About_Us/docs/2024-25_Governors_Budget_Estimate.pdf>.)The number of people found incompetent to stand trial in California has increased significantly, far outpacing the state's ability to provide timely services in response. According to DSH data from August 2022, over 1700 people declared IST were awaiting transfer to a state hospital or other medical facility for treatment. The average wait time for transfer is now five months. (Committee on the Revision of the Penal Code, *Annual Report and Recommendations* (Dec. 2022), at p. 50. Available at: <http://www.clrc.ca.gov/CRPC/Pub/Reports/CRPC_AR2022.pdf>.) DSH has not admitted IST defendants in a timely manner, leaving them to languish in county jail. (*People v. Kareem A.* (2020) 46 Cal.App.5th 58, 63-64.) In *Stiavetti v. Clendenin* (2021), 65 Cal. App. 5th 691, a court of appeal held that the state's long waitlist for competency restoration treatment violates the due process rights of people found incompetent to stand trial.

(c)(1).) If the court rejects a certificate of restoration, the court bases its rejection on a written report of an evaluation conducted by a licensed psychologist or psychiatrist that the defendant is not competent. This evaluation is conducted after the certificate of restoration is filed with the committing court. (Pen. Code, § 1372, subd. (c)(2).) When a court rejects a certificate of restoration, it is required to include in its order a new computation or statement setting forth the amount of credit for time served to be deducted from the defendant's maximum term of commitment. (Pen. Code, § 1370, subd. (a)(3)(C)(ii).)

Accordingly, defendants may spend significant amounts of time in custody between the time a certificate of restoration is filed, and the time it is rejected by the court, including the time it takes for the court to issue an order, the time it takes for the defendant to be delivered back to court by the sheriff when a certificate is filed, and the time it takes for any further evaluations and hearings on the defendant's competency. During this time, the defendant remains in custody. Thus, preventing credits from being earned after the date the certificate was filed has substantial implications on the defendant's maximum commitment time and sentence. If there are any backlogs or delays in a defendant's case, this time could be substantial.

Defendants are entitled to both presentence credits and conduct credits for all time spend in custody prior to and during admission. The right to credit is based not on the procedure by which a defendant is placed in such a facility, but on the requirements that the placement be "custodial." (*People v. Mobley* (1983) 139 Cal.App.3d 320, 323.) The concept of "custody" applies to "anyone subject to restraints not shared by the 'public generally.'" (*People v. Rodgers* (1978) 79 Cal.App.3d 26, 31.) This bill would upend decades of precedent which establishes that a defendant who is found to be IST is entitled to presentence custody credit **for the period starting with their arrest and concluding with their sentencing**, including the time spent in the state hospital. (*People v. Cowsar* (1974) 40 Cal.App.3d 578, 579; *People v. Ravaux* (2006) 142 Cal.App.4th 914, 919–920; *People v. Bryant* (2009) 174 Cal.App.4th 175,184; Pen. Code, §§ 4019, subd. (a)(8) & 2900.5, subd. (d).) It is the duty of the sentencing judge to calculate both presentence actual credit and any presentence conduct credit to which a defendant is entitled and to record the custody credit calculation on the abstract of judgment or commitment. (Pen. Code, § 2900.5, subd. (d); Cal. Rules of Court, rules 4.310, 4.472.)

Indeed, this is a constitutional requirement. In *Jackson v. Indiana* (1972) 406 U.S. 715, 738, the United States Supreme Court held that "due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." Therefore, the Supreme Court ruled, a person charged by a state with a criminal offense who is committed solely because of his incapacity to proceed to trial cannot be held more than the reasonable period necessary to determine whether there is a substantial probability that they will attain that capacity in the foreseeable future. If it is determined that this is not the case, then the state must either institute the customary civil commitment proceeding that would be required to commit indefinitely any other citizen, or release the defendant. (*Ibid.*) Accordingly, IST defendants may be committed for a period no longer than maximum term of imprisonment for the most serious underlying offense. At the end of the applicable maximum term of commitment, if the defendant has not been restored to competency, they must be returned to the original committing court. (*Ibid.*) The trial court must either release the defendant, and dismiss the charges, or dismiss charges and initiate appropriate civil commitment proceedings. (Pen. Code, § 1370, subds. (b)(1)(A) & (c)(1)-(2); see also *In re Davis* (1973) 8 Cal.3d 798, 807.)

Were this not the case, such defendants could end up serving more time in custody than the maximum punishment authorized by statute simply by virtue of having been found IST, a significant due process violation. (Pen. Code, §§ 1370 & 4019; see also *In re Banks* (1979) 88 Cal.App.3d 864, 867 [a defendant has an equal protection and due process right to have their precommitment credits deducted from his or her maximum term of commitment].) To deprive individuals of the credits for the time they actually spend in custody, as this bill attempts to do, would be fundamentally unfair and constitutionally impermissible. Given substantial DSH backlogs for admitting IST defendants to a treatment facility, in many cases, defendants would spend more time in custody than the punishment proscribed for their alleged offense, ***without ever being convicted of a crime***—a fundamental miscarriage of justice.

3) **Some Provisions of This Bill Apply To More Than IST Defendants**: Proponents of this bill comment that the intent of this bill is to ensure defendants who are incompetent have enough treatment time to "regain competence." However, this bill makes wide-sweeping changes to mental health diversion statute for all defendants, not just IST defendants. Materials submitted by the author's office do not identify any need or the purpose for this wide-reaching change to the mental health diversion statute.

   Specifically, this bill would, **for ALL defendants**, require that the period of diversion "shall begin on the day in which mental health treatment commences according to the defendant's treatment plan." Under existing law, "the period which criminal proceedings against the defendant may be diverted is limited": for defendants charged with a felony, the period "shall be no longer than two years," and for defendants charged with a misdemeanor, the period "shall be no longer than one year." (Pen. Code, § 1001.36, subd. (f)(1)(c).) Within these parameters, judges have discretion, based off of the advice of the prosecution, defense counsel, and qualified mental health experts, to conclude when and if the defendant has satisfactorily completed diversion.

   SB 1223 (Becker), Chapter 735, Statues of 2022, which just went into effect on January 1, 2023, made several chances to the mental health diversion statute, including, among others, specifying that the maximum term of diversion for persons diverted for a misdemeanor offense is one year, and stating that a county mental health agency's inability to provide services to a defendant does not mean that the defendant is unsuitable for diversion. Notably, these changes made by SB 1223 intended to harmonize "the mental health diversion statute into accord with existing law by establishing a 12-month limit on the period for misdemeanor diversion, thereby decreasing costs and making the mental health diversion period equivalent to the probation period for misdemeanor cases." (Assem. Appropriations Committee Analysis of SB 1223 (Becker), Chapter 735, Statues of 2022.) This bill takes a step in the wrong direction, and chips away at these changes just recently passed by the Legislature.

   In addition to making general changes to the mental health diversion statute, this bill separately makes changes to the statute as it relates to individuals who are charged with a felony and declared IST. Specifically, this bill requires, if an IST defendant has been found to be an appropriate candidate for diversion in lieu of a commitment, the period of diversion shall begin on the day in which mental health treatment commences, according to the defendant's treatment plan.

Under existing law, anytime after the court finds that the defendant is IST and before or after a defendant is transferred to a treatment facility, the court may determine the defendant's eligibly for diversion. (Pen. Code, § 1370, subd. (a)(1)(B)(iv)(I)- (II).) A defendant granted diversion may participate for the lesser of (1) two years from the date of commitment; (2) a period equal to the maximum term of imprisonment provide by law for the most serious offense charged; or, (3) two years if the charge is a felony and one year if the charge is a misdemeanor. (Pen. Code, §§ 1370, subd. (a)(1)(B)(v); 1370, subd. (c)(1); 1001.36, subd. (f)(1)(C).) During this period, a court can determine if the criminal proceedings should be reinstated if defendant's competency has been restored, modify the treatment plan, or refer the defendant to civil commitment or conservatorship. (Pen. Code, §§ 1370, subd. (a)(1)(B)(v); 1001.26, subd. (g).) If the defendant performs satisfactorily, at the conclusion of the period of diversion, the defendant is no longer deemed to be incompetent to stand trial, and the charges are dismissed. (Pen. Code, §§ 1370, subd. (a)(1)(B)(v); 1001.36, subd. (h).)

This bill would require the diversion period to start when treatment in the mental health diversion program commences. In so doing, this bill would strip away discretion of the court to take into consideration any mental health treatment the defendant may have received while in custody awaiting the diversion hearing. This bill could strip away the discretion of the court to determine how long a defendant needs to be in mental health diversion.

4) **Argument in Support**: According to the *Riverside County District Attorney's Office*, "When a defendant is found mentally incompetent, the criminal proceedings are suspended until the defendant regains competence after mental health treatment. The law also provides for a diversion program opportunity for some incompetent defendants. In diversion, the defendants receive mental health treatment and, if they perform satisfactorily in the diversion program, the criminal charges are dismissed. AB 2692 would clarify that the period of treatment provided by law begins on the day the defendant is admitted to treatment. This clarification will ensure that defendants receive the full period of mental health treatment and every opportunity to regain competence, rather than being prematurely released, without sufficient treatment, onto the streets."

5) **Argument in Opposition**: According to the *California Public Defenders Association (CDAA)*, "Unfortunately, AB 2692 increases the likelihood of undue confinement for those suffering from mental illness by limiting the court's discretion to order that the term of diversion begin on the date the court finds the person eligible for treatment as opposed to the date the person enters treatment. Additionally, the bill limits the court's authority to credit previous state hospital commitment time, community-based treatment, or custody time against a person's maximum term of mental health diversion. As a result, individuals who agree to a term of diversion may serve double, if not triple the sentence they would have otherwise served had they entered a guilty plea.

"In Riverside County, for example, individuals may be held in custody for more than six months after an order granting diversion but prior to admission to treatment. If AB 2692 passes, those individuals would not receive credit for any of the time awaiting treatment.

"AB 2692 creates inequities within and across county lines that raise due process and equal protection concerns. Individuals may serve drastically different terms of diversion based solely on a county's available resources, disproportionately impacting persons of color and those who live in under-resourced communities. By limiting statutory guardrails, AB 2692

perpetuates existing treatment delays and runs the risk of disincentivizing those facing lesser sentences to agree to lengthier periods of diversion."

6) **Related Legislation**:

a) AB 3077 (Hart) would remove borderline personality disorder as an exclusion for mental health diversion for defendants found IST. AB 3077 is pending in Assembly Appropriations Committee.

b) AB 2547 (Ta) would require a court to conduct a hearing on a defendant's eligibility for mental health diversion when they are declared IST and charged with a misdemeanor. AB 2547 is pending in this Committee.

c) SB 349 (Roth) would provide that a certificate of restoration for a defendant who was found IST shall apply to all cases pending against the defendant at the time of restoration. SB 349 is pending this Committee.

d) SB 1400 (Stern) would, for misdemeanor IST proceedings, remove the option for the court to dismiss the case and would instead require the court to hold a hearing to determine if the defendant is eligible for diversion. If the defendant is not eligible for diversion, the court would be required to hold a hearing to determine whether the defendant will be referred to outpatient treatment, conservatorship, or the CARE program, or if the defendant's treatment plan will be modified. SB 1400 is pending in Senate Public Safety Committee.

e) SB 1323 (Menjivar) would require the court, upon a finding a defendant charged with a felony IST, to determine if it is in the interests of justice to restore the defendant to competence, and if the restoration of the defendant's mental competence is not in the interests of justice, to hold a hearing to consider granting mental health diversion or other programs to the defendant, as specified, and, if none of those solutions are appropriate, to dismiss the charges against the defendant. SB 1323 is pending in Senate Appropriations Committee.

7) **Prior Legislation**:

a) SB 35 (Umberg), Chapter 283, Statutes of 2023, allows the court to refer a defendant found IST on misdemeanor charges to a CARE program.

b) SB 717 (Stern), Chapter 883, Statutes of 2023, requires any individual who has a misdemeanor charge dismissed by the court, who is found IST, and who is not receiving court directed services, to be notified by the court of their need for mental health services, and requires the court to provide the individual with information that, at a minimum, contact information of organizations where the individual can obtain mental health services.

c) AB 1822 (Connolly), of the 2023-2024 Legislative Session, would have required a person charged with a misdemeanor sex offense and found IST to be committed to the DSH, a treatment facility, or to undergo outpatient treatment. AB 1822 was not heard by this

Committee at the request of the author.

d) AB 1584 (Weber), of the 2023-2024 Legislative Session, would have required the court, upon a finding of mental incompetence of a defendant charged with a felony to determine if it is in the interests of justice to restore the defendant to competence, and if the restoration of the defendant's mental competence is not in the interests of justice, to hold a hearing to consider granting mental health diversion or other programs to the defendant, as specified, and, if none of those solutions are appropriate, to dismiss the charges against the defendant. AB 1584 was held under submission in Senate Appropriations Committee.

e) SB 1223 (Becker), Chapter 735, Statues of 2022, which just went into effect on January 1, 2023, made several chances to the mental health diversion statute, including, among others, specifying that the maximum term of diversion for persons diverted for a misdemeanor offense is one year, and stating that a county mental health agency's inability to provide services to a defendant does not mean that the defendant is unsuitable for diversion.

f) SB 317 (Stern), Chapter 599, Statutes of 2021, revised the procedures when a defendant is found IST on misdemeanor charges and specified that a defendant is entitled to conduct credits when they are committed to DSH or other treatment facility in the same manner as if they were held in county jail.

g) AB 1810 (Committee on Budget), Chapter 34, Statutes of 2018, specifies that when a defendant is found IST the court can find that they are an appropriate candidate for mental health diversion.

h) SB 1187 (Beall), Chapter 1008, Statutes of 2018, reduced the maximum term for commitment to a treatment facility when a defendant has been found IST on a felony from three years to two years and specified that when a defendant has been found IST and is held in a county jail treatment center while undergoing treatment for restoration to competency that person is entitled to custody credits in the same manner as any other inmate confined to a county jail.

REGISTERED SUPPORT / OPPOSITION:

Support

Riverside County District Attorney

Opposition

ACLU California Action
California Public Defenders Association
San Francisco Public Defender

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

Date of Hearing: April 16, 2024
Counsel: Ilan Zur

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Kevin McCarty, Chair

AB 2763 (Essayli) – As Amended March 21, 2024

SUMMARY: Requires that a state agency, board, or commission that directly or by contract collects demographic data as to the ancestry or ethnic origin of Californians shall use separate collection categories for the Middle Eastern and North African group; and that the California Department of Corrections and Rehabilitation offers and reports new categories of self-reported data about inmate race, ancestry, and ethnic origin. Specifically, **this bill**:

1) States that it shall be known, and may be cited as, the Middle Eastern and North African inclusion Act.

2) Requires a state agency, board, or commission that directly or by contract collects demographic data as to the ancestry or ethnic origin of Californians to use separate collection categories for the Middle Eastern and North African group in the provided forms that offer respondents the option of selecting one or more ethnic or racial designations or languages and tabulations.

3) Requires a state agency, board, or commission to do all of the following with the data collected pursuant to 2):

    a) Include the data in every demographic report on ancestry or ethnic origins of Californians by the state agency, board, or commission published or released on or after January 1, 2026.

    b) Make the data available to the public in accordance with state and federal law, including by posting the data on the internet website of the state agency, board, or commission, except for personal identifying information, which shall be deemed confidential and shall not be disclosed.

4) Prohibits a state agency, board, or commission from making available to the public data that would permit the identification of individuals. The state agencies, boards, or commissions may, to prevent the identification of individuals, aggregate data categories at a state, county, city, census tract, or ZIP Code level to facilitate comparisons and identify disparities; and from making available to the public data that would result in statistical unreliability.

5) Requires, within 18 months after a decennial United States Census is released to the public, a state agency, board, or commission to update its data collection to reflect the additional Middle Eastern and North African groups as they are reported by the United States Census Bureau.

6) Defines "Middle Eastern and North African" to mean any of the following:

a) A major Middle Eastern group, including, but not limited to, Afghan, Bahraini, Emirati, Iranian, Iraqi, Israeli, Jordanian, Kuwaiti, Lebanese, Omani, Palestinian, Qatari, Saudi Arabian, Syrian, Turkish, and Yemeni.

b) A major North African group, including, but not limited to, Algerian, Djiboutian, Egyptian, Libyan, Mauritanian, Moroccan, Sudanese, and Tunisian.

c) A major transnational Middle Eastern and North African group, including, but not limited to, Amazigh or Berber, Armenian, Assyrian, Chaldean, Circassian, Kurdish.

7) Requires the California Department of Corrections and Rehabilitation to collect voluntary self-identification information pertaining to race or ethnic origin of people admitted, in custody, and released and paroled, which shall include, but not be limited to, Afghan, Algerian, Amazigh or Berber, Armenian, Assyrian, Bahraini, Chaldean, Circassian, Djiboutian, Egyptian, Emirati, Iranian, Iraqi, Israeli, Jordanian, Kurdish, Kuwaiti, Lebanese, Libyan, Mauritanian, Moroccan, Omani, Other Middle Eastern Not Listed, Other North African Not Listed, Other Transnational Middle Eastern and North African Not Listed, Palestinian, Qatari, Saudi Arabian, Sudanese, Syrian, Tunisian, Turkish, Yemeni, in addition to voluntary self-identification information pertaining to race or ethnic origin that the department currently collects.

8) Makes the following findings to justify the necessity for limitations placed by 4), above, upon the release of writings of public agencies: In order to protect the privacy of California residents, while also gathering and publicizing useful demographic data, it is necessary that personal identifying information remain confidential.

EXISTING LAW:

1) Empowers the Congress to carry out the census in "such manner as they shall by Law direct" and mandates that an apportionment of representatives among the states must be carried out every 10 years. (U.S. Constitution, Article I, Section 2.)

2) Describes the census as the "linchpin of the federal statistical system … collecting data on the characteristics of individuals, households, and housing units throughout the country." (*Dept. of Commerce v. U.S. House of Representatives* (1999) 525 U.S. 316, 341.)

3) Requires, as of January 1, 2024, the California Department of Corrections (department) to collect voluntary self-identification information pertaining to race or ethnic origin of people admitted, in custody, and released and paroled, which shall include, but not be limited to, American Indian/Alaskan Native, Bangladeshi, Black, Cambodian, Chinese, Colombian, Cuban, Fijian, Filipino, Guamanian or Chamorro, Guatemalan, Native Hawaiian, Other Hispanic Not Listed, Hmong, Indian, Indonesian, Jamaican, Japanese, Korean, Laotian, Malaysian, Mexican, Nicaraguan, Other, Other Asian Not Listed, Other Pacific Islander Not Listed, Pakistani, Puerto Rican, Salvadorian, Samoan, Sri Lankan, Taiwanese, Thai, Tongan, Unknown, Vietnamese, and White. Based on that voluntary self-identification information, the department shall prepare and publish monthly demographic data pertaining to the race or ethnic origin of people admitted, in custody, and released and paroled, disaggregated by the same race and ethnicity categories used by the department for the purpose of voluntary self-identification information. (Penal Code Section 2068 (a).)

4) Requires, as of January 1, 2025, the data, in 3), except for personally identifying information, which shall be deemed confidential, to be publicly available on the department's internet website via the Offender Data Points dashboard. (*Id.,* at (b).)

5) Provides that if the population number of any race or ethnicity category is under 50, the department shall only reference, in the published data, those numbers as "fewer than 50" in order to protect personally identifying information. (*Id.*, at (c).)

6) Requires a state agency, board, or commission that directly or by contract collects demographic data as to the ancestry or ethnic origin of Californians to use separate collection categories and tabulations for the following:

   a) Each major Asian group, including, but not limited to, Chinese, Japanese, Filipino, Korean, Vietnamese, Asian Indian, Laotian, and Cambodian.

   b) Each major Pacific Islander group, including, but not limited to, Hawaiian, Guamanian, and Samoan. (Government Code Section 8310.5 (a).)

7) Provides that the data collected pursuant to the different collection categories and tabulations described in 6) shall be included in every demographic report on ancestry or ethnic origins of Californians by the state agency, board, or commission published or released on or after July 1, 2012. The data shall be made available to the public in accordance with state and federal law, except for personal identifying information, which shall be deemed confidential. (*Id.,* at (b).)

8) Requires specified agencies, in addition to the duties imposed under 6) and 7), in the course of collecting demographic data directly or by contract as to the ancestry or ethnic origin of California residents, to collect and tabulate data for the following:

   a) Additional major Asian groups, including, but not limited to, Bangladeshi, Hmong, Indonesian, Malaysian, Pakistani, Sri Lankan, Taiwanese, and Thai.

   b) Additional major Native Hawaiian and other Pacific Islander groups, including, but not limited to, Fijian and Tongan. (Government Code Section 8310.7 (b).)

9) Requires the same state agencies subject to 8) to, within 18 months after a decennial United States Census is released to the public, update their data collection to reflect the additional Asian groups and additional Native Hawaiian and Pacific Islander groups as they are reported by the United States Census Bureau and prohibits them from reporting demographic data that would result in statistical unreliability. (*Id.,* at (d) – (e).)

10) Makes 8) and 9) applicable to the following state agencies:

   a) The Department of Industrial Relations.

   b) The Civil Rights Department.

   c) To the extent funding is specifically appropriated for this purpose, the State Department of Public Health, on or after July 1, 2022, whenever collecting demographic data as to the ancestry or ethnic origin of persons for a report that includes rates for major diseases,

leading causes of death per demographic, subcategories for leading causes of death in California overall, pregnancy rates, or housing numbers. (*Id.*, at (a).)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "I'm proud to be authoring AB 2763, the Middle East or North African (MENA) Inclusion Act, which will provide demographic data representation to MENA identity groups. More than 700,000 individuals in California identify as Middle Eastern or North African but are typically classified as "White" for data collection purposes. Current demographic data collection in California is entirely inadequate in capturing the unique experiences that MENA communities face, from health issues to socioeconomic outcomes.

   As a Lebanese-American and the first Muslim elected to the California State Assembly, I authored House Resolution 30 in 2023, which called for a MENA category to be established as part of federal data collection standards. The MENA Inclusion Act is a continuation of my office's important work with the Arab American Civic Council to give MENA communities long overdue recognition in state data collection efforts. Recognizing the MENA community will allow public and private institutions, agencies, and commissions to have accurate and effective information to understand our unique California communities better."

2) **Need for this Bill:** This bill is consistent with a new policy of the Biden Administration, relating to the U.S. Census. When the next federal census is conducted in 2030, with the White House Office of Management and Budget (OMB) announcing new federal standards on collecting race and ethnicity data. For the first time, Americans who trace their ancestral roots to the Middle East and North Africa (MENA) will have their own category on the decennial survey. (Stepansky, Joseph. "'Transformative': US Census to Add Middle Eastern, North African Category." Al Jazeera, Al Jazeera, 28 Mar. 2024, available at www.aljazeera.com/news/2024/3/28/transformative-us-census-to-add-middle-eastern-north-african-category.) In the U.S., official counts of populations by means of the U.S. Census have wide-ranging impacts, affecting how federal dollars are disbursed to meet the needs of certain communities, how congressional districts are drawn, and how certain federal anti-discrimination and racial equity laws are enforced. (*Ibid.*) U.S. residents with ethnic and racial ties to MENA had previously fallen into the "white" category, although they could still write in the country with which they ethnically identify. Observers say this has long resulted in a vast undercount of the community, which can make it near impossible to conduct meaningful research on health and social trends. (*Ibid.*)

3) **Argument in Support**: According to the Arab American Civic Council and other specified organizations, "Having a MENA standard in California would create appropriate and accurate measures to facilitate the development of interventions geared toward enhancing the well-being of the MENA population. Better data would lead to better services, fostering a healthier and more satisfied community. The MENA standard will ensure accurate data collection, which is paramount for developing interventions that could enhance the lives of MENA-identifying individuals. Accurate data on the MENA community will improve the efficacy of the products/services of organizations serving MENA community members.

California has always provided recognition and opportunity to communities long ignored by the federal government. It has taken initiatives to recognize and protect communities of color, religious communities, and LGBTQ+ communities. Unfortunately, the MENA population has regularly been rendered "invisible" or an "other" despite being contributors and impactful members of Californian society. MENA Californians have established beloved neighborhoods and community centers such as Little Armenia, Persian Square (Tehrangeles), and Little Arabia. They have also contributed an enormous amount in taxes. According to a 2015 New American Economy study, MENA immigrants in California paid more than $1.5 billion in state and local taxes in 2015—or 1.6% of all state and local taxes. In Los Angeles alone, MENA immigrants contributed $145.6 million in state and local taxes in 2015.[1]

With its diverse and large MENA population, California could set the tone and lead other states to collect, measure, and utilize data on the MENA populations. Armenians, Somalis, and Sudanese, currently not considered by the national standard, are a large and important population in California. Recognizing them alongside Iranians, Iraqis, Lebanese, and others sets the tone of California's dedication to equal protection, opportunity, and civil dignity for all Americans.

For all the reasons above, the MENA Inclusion Act represents a pivotal step toward advancing equity, diversity, and inclusion in California. This legislation embodies the principles of social justice and equality by addressing historical injustices, rectifying data disparities, and fostering political representation. By cultivating trust, the government empowers MENA constituents to play an active role in their communities, leading to positive cascading effects. Higher levels of trust and equality advance civic engagement, underscoring the importance of inclusive policies to strengthen societal cohesion. The proposed MENA standard is a critical step toward dismantling the institutional barriers that impede the MENA community's access to these fundamental rights. Our government must provide indispensable safeguards and a measure of protection to MENA communities in California."

4) **Argument in Opposition**: None

5) **Related Legislation**:

   a) HR 30 (Essayli), of the 2023-2024 Legislative Session, encouraged the federal Office of Management and Budget to include "Middle Eastern or North African" ancestry as a response option on all federal forms collecting demographic information. HR 30 was adopted.

   b) AB 943 (Kalra), of the 2023-2024 Legislative Session, required the California Department of Corrections and Rehabilitation (CDCR) to publish its monthly demographic data in a manner disaggregated by race and ethnicity, as specified.

6) **Prior Legislation**:

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[1] <https://www.newamericaneconomy.org/wp-content/uploads/2018/07/MENA-Report.pdf>

c) AB 1726 (Bonta), Chapter 607, Statutes of 2016, required, among other things, the State Department of Public Health to collect data as specified.

d) AB 176 (Bonta), of the 2015-2016 Legislative session, would have required state health and education agencies collect population data disaggregated as specified. AB 176 was vetoed by the Governor.

e) AB 1088 (Eng) Chapter 689, Statutes of 2011, applied data disaggregation requirements to the Department of Industrial Relations and the Department of Fair Employment and Housing.

f) AB 1737 (Eng) of the 2009-2010 Legislation Session, would have applied data disaggregation requirements to the departments of Health Care Services, Public Health, Social Services, Employment Development, State Personnel Board, and other specified agencies. AB 1737 was held in Assembly Appropriations Committee.

g) AB 295 (Lieu) of the 2007-2008 Legislative Session, would have required various state entities to report collected demographic data according to each major Asian-Pacific Islander groups and make that data available to the public to the extent that disclosure did not violate confidentiality. AB 295 was vetoed by the Governor.

REGISTERED SUPPORT / OPPOSITION:

Support

Access California Services
American Arab Anti-discrimination Committee
Arab American Civic Council
Arab Cultural and Community Center in San Francisco Bay Area
Armenian-american Action Network
Council on American-islamic Relations, California
National Iranian American Council Action
Somali Family Service of San Diego

Opposition: None

Analysis Prepared by: Ilan Zur / PUB. S. / (916) 319-3744

Date of Hearing: April 16, 2024
Counsel: Andrew Ironside

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Kevin McCarty, Chair

AB 2782 (Jim Patterson) – As Introduced February 15, 2024

SUMMARY: Lowers the amount of fentanyl required for weight enhancements that increase the penalty and fine for the sale or distribution of fentanyl. Specifically, **this bill**:

1) Provides that a person convicted of specified crimes involving possession of a substance containing fentanyl for the purpose of sale/distribution, or for sale/distribution of a substance containing fentanyl, shall receive the following enhanced punishments:

   a) If the substance exceeds 28.35 grams by weight, the person shall receive an additional term of three years.

   b) If the substance exceeds 100 grams by weight, the person shall receive an additional term of five years.

   c) If the substance exceeds 500 grams by weight, the person shall receive an additional term of seven years.

   d) If the substance exceeds one kilogram by weight, the person shall receive an additional term of 10 years.

   e) If the substance exceeds four kilograms by weight, the person shall receive an additional term of 13 years.

   f) If the substance exceeds 10 kilograms by weight, the person shall receive an additional term of 16 years.

   g) If the substance exceeds 20 kilograms by weight, the person shall receive an additional term of 19 years.

   h) If the substance exceeds 40 kilograms by weight, the person shall receive an additional term of 22 years.

   i) If the substance exceeds 80 kilograms by weight, the person shall receive an additional term of 25 years.

2) Prohibits the application of the enhancements to conspirators unless the trier of fact finds that the defendant conspirator was substantially involved in the planning, direction, execution, or financing of the underlying offense.

EXISTING LAW:

1) Provides the following penalties for trafficking of cocaine, cocaine base, heroin and specified opiates, including fentanyl:

   a) Possession for sale is punishable by imprisonment for two, three, or four years in the county jail (Health & Saf. Code, § 11351);

   b) Sale is punishable as by imprisonment for three, four, or five years in county jail. Sale includes any transfer or distribution (Health & Saf. Code, § 11352.); and,

   c) Transportation of fentanyl, to a noncontiguous county, for purposes of sale is punishable by imprisonment for up to nine years in the county jail. (Health & Saf. Code, § 11352.)

2) Provides the following additional sentencing enhancements based on the weight of a substance containing heroin, cocaine base, cocaine, or fentanyl possessed for sale or sold.

   a) 1 kilogram = 3 years

   b) 4 kilograms = 5 years

   c) 10 kilograms = 10 years

   d) 20 kilograms = 15 years

   e) 40 kilograms = 20 years

   f) 80 kilograms = 25 years (Health and Saf. Code, § 11370.4, subd. (a).)

3) States that in addition to the term of imprisonment provided by law for persons convicted of violating specified drug trafficking crimes, the trial court may impose a fine not exceeding $20,000 for each offense. (Health & Saf. Code, § 11372, subd. (a).)

4) Specifies that a person receiving an additional prison term for trafficking more than a kilogram of a substance containing heroin, cocaine base, or cocaine may, in addition, be fined by an amount not exceeding $1,000,000 for each offense. (Health & Saf. Code, § 11372, subd. (b).)

5) Specifies that a person receiving an additional prison term for trafficking more than four kilograms of a substance containing heroin, cocaine base, or cocaine may, in addition, be fined by an amount not to exceed $4,000,000 for each offense. (Health & Saf. Code, § 11372, subd. (c).)

6) Specifies that a person receiving an additional prison term for trafficking more than four kilograms of a substance containing heroin, cocaine base, or cocaine may, in addition, be fined by an amount not to exceed $8,000,000 for each offense. (Health & Saf. Code, § 11372, subd. (d).)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "AB 2782 modernizes the penalties for the fentanyl drug market by restructuring the penalty for those in possession of 28.35 grams or more. This bill would specifically target dealers while simultaneously avoiding addicted victims. The weight limit was selected after working with a local Drug Enforcement Agency agent who specializes in targeting dealers."

2) **Fentanyl Use and Distribution:** Drug overdoses have increased dramatically in recent years. In California, the number of deaths involving opioids, and fentanyl in particular, has increased significantly over the course of the last decade. Between 2012 and 2018, while opioid-related overdose deaths increased by 42%, overdose deaths related to fentanyl specifically increased by more than 800%—from 82 to 786. (CDPH, Overdose Prevention Initiative <https://www.cdph.ca.gov/Programs/CCDPHP/DCDIC/SACB/Pages/PrescriptionDrugOverdoseProgram.aspx?msclkid=99f1af92b9e411ec97e3e1fe58cde884> [last viewed Mar. 7, 2023].) In 2021, there were 21,016 emergency room visits resulting from an opioid overdose, 7,176 opioid-related overdose deaths, and 5,961 overdose deaths from fentanyl. (CDPH, Overdose Surveillance Dashboard <https://skylab.cdph.ca.gov/ODdash/?tab=Home> [last visited Mar. 7, 2023].). According to the CDC, "[i]t is a major contributor to fatal and nonfatal overdoses in the U.S." (CDC, Fentanyl Facts <https://www.cdc.gov/stopoverdose/fentanyl/index.html> [last visited Apr. 25, 2023].)

   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].).

   Illicit fentanyl is typically available as either a liquid or powder. It is often mixed with other drugs like heroin, cocaine, or methamphetamine, and is widely used in counterfeit prescription opioids. Because of mixing, many users might not be aware that they are consuming fentanyl. (CDC, Fentanyl Facts <https://www.cdc.gov/stopoverdose/fentanyl/index.html> [last visited Apr. 25, 2023].)

   Intentional fentanyl use is also on the rise. "One of the deadliest street drugs, illicit fentanyl,

has transitioned from a hidden killer that people often hope to avoid to one that many drug users now seek out on its own." (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].) "More than half of drug users [in the Tenderloin district in San Francisco] purposely seek fentanyl, despite its dangers, according to harm reduction workers who talk to hundreds of drug users every day." (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-seek-out-deadly-fentanyl-heres-why> [last view Apr. 24, 2023].)

7) **AB 701 (Villapudua), Chapter 540, Statutes of 2023**: AB 701 (Villapudua) applied the existing weight enhancements that increase the penalty and fine for trafficking controlled substances containing heroin, cocaine base, and cocaine to fentanyl. (Pen. Code, § 11370.4, subd. (a).) AB 701 took effect on January 1 of this year—roughly four months ago. This bill would further reduce the amounts required to receive an enhancement for specified drug enhancements involving fentanyl, before the effects (to the extent there is even a reasonable expectation that increasing penalties will achieve meaningful results) of AB 701 can be measured.

8) **AB 3171 (Soria), of the 2023-2024 Legislative Session**: Under existing law, a person convicted of possession for sale of a substance containing fentanyl may be incarcerated for up to four years. (Health & Saf. Code, § 11351.) AB 3171 (Soria) would increase this penalty for a person who possesses for sale 28.35 grams or more of a substance containing fentanyl to a term of imprisonment of up to six years. This bill would add an additional three years to that term. That is, if both this bill and AB 3171 were to become law, the term of incarceration for possessing for sale 28.35 grams or more of a substance containing fentanyl would increase from up to four years to up to nine years. Similarly, a conviction for transporting, importing, or giving away 28.35 grams or more of a substance containing fentanyl would increase from up to 5 years to as many as 12 years; and a conviction for transportation to a noncontiguous county for purposes of sale would increase from up to nine years to 16 years.

Further, the enhancement proposed by this bill would increase as the amount possessed increases. For example, if both this bill and AB 3171 were to become law, the term of incarceration for possessing for sale 100 grams or more of a substance containing fentanyl would increase from up to four years to up to 11 years; a conviction for transporting, importing, or giving away 100 grams or more of a substance containing fentanyl would increase from up to 5 years to as many as 14 years; and a conviction for transportation to a noncontiguous county for purposes of sale would increase from up to nine years to 18 years.

3) **Harsher Sentences for Drug Trafficking Unlikely to Reduce Drug Use or Deter Criminal Conduct:** This bill attempts to reduce the number of people dying of

overdoses involving fentanyl by deterring people who traffic fentanyl with a sentencing enhancement ranging from three to 25 years based on amount. Ample research on the impact of increasing penalties for drug offenses on criminal behavior has called into question the effectiveness of such measures. In a report examining the relationship between prison terms and drug misuse, PEW Charitable Trusts found "[n]o relationship between drug imprisonment rates and states' drug problems," finding that "high rates of drug imprisonment did not translate into lower rates of drug use, arrests, or overdose deaths." (PEW, More Imprisonment Does Not Reduce State Drug Problems (Mar. 2018) p. 5 <https://www.pewtrusts.org/-/media/assets/2018/03/pspp_more_imprisonment_does_not_reduce_state_drug_problems.pdf> [last viewed Feb. 6, 2023]; see generally, Przybylski, Correctional and Sentencing Reform for Drug Offenders (Sept. 2009) < http://www.ccjrc.org/wp-content/uploads/2016/02/Correctional_and_Sentencing_Reform_for_Drug_Offenders.pdf> [last visited Mar. 20, 2023].) Put differently, imprisoning more people for longer periods of time for drug trafficking offenses is unlikely to reduce the risk of illicit drugs in our communities.

Unduly long sentences are counterproductive for public safety and contribute to the dynamic of diminishing returns as the incarcerated population expands. (Long-Term Sentences: Time to Reconsider the Scale of Punishment, 87 UMKC L.Rev. 1 (Nov. 5, 2018).) According the U.S. Department of Justice, "Laws and policies designed to deter crime by focusing mainly on increasing the severity of punishment are ineffective partly because criminals know little about the sanctions for specific crimes. More severe punishments do not 'chasten' individuals convicted of crimes, and prisons may exacerbate recidivism." (National Institute of Justice, U.S. Department of Justice, Five Things About Deterrence (June 5, 2016) <https://nij.ojp.gov/topics/articles/five-things-about-deterrence> [last visited Feb. 2, 2023.]) Increasingly punitive sentences add little to the deterrent effect of the criminal justice system; and mass incarceration diverts resources from program and policy initiatives that hold the potential for greater impact on public safety. (Long-Term Sentence, supra.)

The Council on Criminal Justice reviewed the evidence on the effect of harsher punishments on criminal behavior and came to the same conclusion. It reported:

> The empirical evidence on selective incapacitation suggests that long sentences may produce short- and long-term public safety benefits for individuals engaged in violent offending, but may produce the opposite effect for those engaged in drug-related offending…where an incarcerated individual is quickly replaced by a new recruit. This "replacement effect" occurs—and undermines the overall crime-reducing effects of incapacitation—when there is "demand" for a particular criminal activity. The illicit drug business offers the most obvious example: when someone who plays a role in a drug trafficking organization is incarcerated, someone else must take his or her place.

(Long Sentences Task Force, Council on Criminal Justice, The Impact of Long Sentences on Public Safety: A Complex Relationship (Nov. 2022) p. 8 https://counciloncj.org/wp-content/uploads/2022/11/Impact-of-Long-Sentences-on-Public-Safety.pdf [last visited Apr. 2023] [internal citations omitted] [emphasis added].)

According to PEW, "[A] large body of prior research…cast[s] doubt on the theory that stiffer prison terms deter drug misuse, distribution, and other drug-law violations." (PEW, supra.) PEW concludes:

> Putting more drug-law violators behind bars for longer periods of time has generated enormous costs for taxpayers, but it has not yielded a convincing public safety return on those investments. Instead, more imprisonment for drug offenders has meant limited funds are siphoned away from programs, practices, and policies that have been proved to reduce drug use and crime. (Ibid.)

Based on this research, one might reasonably question whether increasing the penalties for drug trafficking fentanyl would meaningfully impact the drug's availability or the number of deaths resulting from its illicit fentanyl use.

4) **Argument in Support**: According to the *Madera Police Department*, "Under existing law, penalties, including additional terms of imprisonment and fines, are determined based on the weight of controlled substances such as fentanyl. AB 2782 aims to address perceived issues with the current weight thresholds in fentanyl-related cases.

"The identified problem lies in the potential for disproportionate consequences faced by individuals involved in fentanyl-related offenses due to existing weight thresholds. This issue underscores the importance of reassessing and refining the weight requirements exclusively for fentanyl to ensure a fair and just legal system.

"AB 2782 offers a pragmatic solution by proposing a targeted modification to the weight thresholds exclusively for offenses involving fentanyl. This focused reevaluation aims to align the legal framework with the unique characteristics of cases involving fentanyl-containing substances, fostering a more equitable approach."

5) **Argument in Opposition**: According to the *Vera Institute of Justice*, "With more than sixty years of experience helping to implement practical and equitable policies for safety and justice, we know that the threatened punishments in AB 2782 are the latest iteration of ineffective public safety strategies that are perceived as 'tough on crime' but do little to make communities safer.

"The threat of fentanyl and other deadly drugs to our communities is evident and urgent, and this legislature has an important role to play in helping to save lives and prevent overdoses. But while increased penalties for controlled substances may signal that lawmakers are "tough on crime," they are not effective at delivering public safety.

"Increasing penalties will do little to deter drug activity. Study after study has shown that because the perceived harshness of a potential sentence is not a significant consideration for those who engage in criminal activity, increased penalties are ineffective at deterring crime.1 Indeed, evidence shows there is no relationship between imprisonment for drug crimes and three important indicators of drug activity: self-reported drug use, drug overdose deaths, and drug arrests.

"Rather than resorting to ineffective harsh penalties to address dangerous drug use, the legislature should invest in real solutions through a public health approach. Research has

consistently shown that community-based substance use treatment effectively reduces drug use. Likewise, medication treatment has been shown to reduce overdose deaths by 34 to 38 percent. California should put resources towards preventative evidence-backed public health solutions rather than reflexively reaching for harsh and ineffective sentences.

"Fentanyl and other deadly drugs pose real risks to our communities, and the legislature must act boldly to prevent more overdoses and deaths. But decades of unambiguous evidence make clear that harsher sentences are not the answer, and it is irresponsible for lawmakers to return to this well of ineffective and destructive policies expecting a different result. It is long past time to reject the reach for 'tough' drug sentencing policies in favor of real solutions that address substance use."

6) **Related Legislation**:

   a) AB 3171 (Soria), would increase the penalties for drug trafficking of fentanyl, an analog of fentanyl, or a substance containing fentanyl or an analog of fentanyl, if the amount of fentanyl weighs more than 28.35 grams. AB 3171 will be heard today in this committee.

   b) AB 1848 (Davies), would expand an existing one year sentencing enhancement for any person over the age of 18 who induces a minor to transport, carry, sell, give away, prepare for sale, or sell heroin, cocaine, or cocaine base on any church, synagogue, youth center, day care, or public swimming pool grounds to include the transport, carry, sell, give away, prepare for sale, or sell heroin, cocaine, cocaine base, and fentanyl either on the grounds of, or within 1000 feet from a church, synagogue, youth center, day care, or public swimming pool. The hearing on AB 1848 was canceled at the request of the author.

   c) AB 2045 (Hoover), would add fentanyl to the list of controlled substance for which a defendant may be sentenced to an additional period of incarceration for using, inducing, or employing a minor to transport or possess specified controlled substances. AB 2045 is pending hearing in the Assembly Appropriations Committee.

7) **Prior Legislation**:

   a) AB 701 (Villapudua), Chapter 540, Statutes of 2023, applied the existing weight enhancements that increase the penalty and fine for trafficking controlled substances containing heroin, cocaine base, and cocaine to fentanyl.

   b) AB 955 (Petrie-Norris), of the 2023-2024 Legislative Session, would provide that a person who sells fentanyl on a social media platform in California shall be punished by imprisonment for a period of three, six, or nine years in county jail. This committee retained AB 955 of interim study.

   c) AB 1058 (Jim Patterson), of the 2023-2024 Legislative Session, was identical to AB 3171 above. AB 1058 failed passage in this committee.

   d) SB 62 (Nguyen), of the 2023-2024 Legislative Session, was substantially similar to AB 701 above. SB 62 failed passage in the Senate Public Safety Committee.

e) SB 237 (Grove), of the 2023-2024 Legislative Session, was identical to AB 3171 above. SB 237 failed passage in the Senate Public Safety Committee.

f) AB 1955 (Nguyen), of the 2021-2022 Legislative Session, was substantially similar to AB 701 above. AB 1955 failed passage in this committee.

g) AB 1351 (Petrie-Norris), of the 2021-2022 Legislative Session, was substantially similar to AB 701 above. The hearing on AB 1351 was canceled at the request of the author.

h) AB 2975 (Petrie-Norris), of the 2019-2020 Legislative Session, was substantially similar to AB 701 above. AB 2975 was not heard in this committee.

i) AB 2467 (Jim Patterson), of the 2017-2018 Legislative Session, was identical to AB 3171 above. SB 2467 failed passage in this committee.

j) SB 1103 (Bates), of the 2017-2018 Legislative Session, was substantially similar to AB 701 above. SB 1103 failed passage in the Senate Public Safety Committee.

k) SB 1323 (Bates), of the 2015-2016 Legislative Session, was substantially similar to AB 701 above. SB 1323 was held on the Assembly Appropriations Committee Suspense File.

REGISTERED SUPPORT / OPPOSITION:

Support

California Association of Highway Patrolmen
California District Attorneys Association
California Police Chiefs Association
California State Sheriffs' Association
Fresno County Sheriff's Office
Madera Police Department
Peace Officers Research Association of California (PORAC)

Opposition

ACLU California Action
California Public Defenders Association
Californians for Safety and Justice
Felony Murder Elimination Project
Friends Committee on Legislation of California
Initiate Justice
Initiate Justice Action
Legal Services for Prisoners With Children
San Francisco Public Defender
Smart Justice California, a Project of Tides Advocacy
Vera Institute of Justice

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

Date of Hearing: April 16, 2024
Counsel: Ilan Zur

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Kevin McCarty, Chair

AB 2842 (Papan) – As Amended March 18, 2024

SUMMARY: Requires law enforcement agencies that contract for the destruction of firearms, to ensure that such contracts prohibit the sale of firearms or any part or attachment of firearms. Specifically, **this bill**:

1) Requires a law enforcement agency that contracts with a third party for the destruction of firearms or other weapons, to ensure that said contract explicitly prohibits the sale of any firearm or weapon, or any part or attachment of said firearm.

2) Provides that this is not intended to prohibit the recycling, or sale for the purpose of recycling, of any scrap metal or other material resulting from the destruction of a firearm or other weapon.

EXISTING FEDERAL LAW

1) Defines "firearm" as (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm. (18 U.S.C. § 921, subd. (a)(3).)

2) Requires licensed manufacturers and licensed importers of firearms to legibly identify each firearm they manufacturer or import with a unique serial number. (27 C.F.R. § 478.92, subd. (a).)

EXISTING LAW:

1) Defines "firearm" in part, as including the frame or receiver of the weapon, including a completed frame or receiver, or a firearm precursor part. (Pen. Code, § 16520, subd. (b).)

2) Defines a "firearm precursor part" as any forging, casting, extrusion, or similar article that has reached a stage where it can be readily assembled or completed to be used as the frame of a functional firearm, or that is marketed or sold to the public to become or be used as the frame or receiver of a functional firearm once completed, assembled, or converted. (Pen. Code, § 16531, subd. (a).)

3) Provides that when any firearm is in the possession of any officer of the state, or of a county, city, or city and county, or of any campus of the University of California or the California State University, and the firearm is an exhibit filed in any criminal action or proceeding which is no longer needed or is unclaimed or abandoned property, which has been in the

possession of the officer for at least 180 days, the firearm shall be sold, or destroyed, as specified. (Pen. Code § 34000, subd. (a).)

4) Provides that an officer to whom a weapon (including specified firearms) is surrendered, except upon receiving a certificate, as specified, stating that the retention of the weapon is necessary or proper to the ends of justice, shall destroy the weapon, and, if applicable, submit proof of its destruction to the court. (Pen. Code § 18005, subd. (a).)

5) Provides that no weapon shall be destroyed per the requirement above, unless reasonable notice is given to its lawful owner, if the lawful owner's identity and address can be reasonable ascertained. (Pen. Code § 18005, subd. (c).)

6) Provides that if any weapon has been stolen and is thereafter recovered, or is used in a manner as to constitute a nuisance without the prior knowledge of its lawful owner that it would be so used, it shall not be destroyed per the above but rather restored to the lawful owner, as soon as its use as evidence has been served, upon the lawful owner's identification of the weapon and proof of ownership, and after the law enforcement agency has complied with specified provisions of existing law governing the return or transfer of a firearm in the custody or control of a court or law enforcement agency. (Pen. Code § 18005, subd. (b).)

7) Provides that when a firearm is taken into custody by a law enforcement officer, the officer shall issue the person who possessed the firearm a receipt describing the firearm, as specified, and listing any serial number or other identification on the firearm. (Pen. Code, § 33800.)

8) Establishes a detailed process governing the return or transfer of a firearm in the custody of a court or law enforcement agency. ((Pen. Code, §§ 33850 – 33895.)

9) Provides that no law enforcement agency or court shall be required to retain any firearm or related device for more than 180 days after the owner has been notified that the property has been made available for return, and stipulates that an unclaimed firearm may be disposed of after the 180-day period. (Pen. Code, § 33875.)

10) Provides that any law enforcement agency that has custody of any firearms or any parts of firearms which are subject to destruction may, in lieu of destroying the weapons, retain and use any of them as may be useful in carrying out the official duties of the agency, including releasing weapons to another law enforcement agency for a similar use or turning over to the criminalistics laboratory of the Department of Justice (DOJ) or other local law enforcement entity, but must destroy the weapon when it is no longer needed by the agency for use in carrying out its official duties. (Pen. Code § 34005, subds. (b), (c).)

11) Authorizes a law enforcement agency that has custody of any firearms or any parts of firearms that are subject to destruction to instead obtain a court order directing the release of the firearm to the sheriff, who must record the firearm in the Automated Firearms System (AFS), and may in turn loan out the firearm to the basic training academy so that the firearms may be used for educational purposes. (Pen. Code § 34005, subd. (d).)

12) Provides that any weapon which is considered a nuisance under specified provisions of existing law shall be surrendered to the sheriff of a county, the chief of police or other head

of a municipal police department of any city or city and county, the chief of police of any campus of the University of California or the California State University, or the Commissioner of the Highway Patrol (CHP). (Pen. Code § 18000, subd. (a).)

13) Provides that for the purposes of the requirement above, the Commissioner of the CHP shall receive only weapons that were confiscated by a member of the CHP. (Pen. Code § 18000, subd. (b).)

14) Authorizes the Attorney General, a district attorney, or a city attorney to bring an action to enjoin the manufacture, importation of, keeping for sale of, offering or exposing for sale, giving, lending, or possession of specified weapons, including various types of firearms and firearm precursor parts, and provides that those weapons shall be subject to confiscation and summary destruction, as specified, whenever they are found within the state. (Pen. Code § 18010.)

15) Requires a law enforcement agency that is the registered owner of an institutional weapon, as defined, that subsequently destroys that weapon to enter such information into the AFS via the California Law Enforcement Telecommunications System (CLETS).

16) Provides that any firearms confiscated by law enforcement that do not bear an engraved serial number or other specified mark of identification, shall be destroyed as specified. (Pen. Code, § 29180, subd. (d)(3).)

17) States that firearms owned in violation of specified state laws, or that have been used in the commission of a crime, upon conviction of the defendant, are a nuisance and must be surrendered, as specified. (Pen. Code, § 29300.)

18) Authorizes law enforcement to sell a firearm relinquished to them by a person prohibited from owning a firearm due to a conviction. (Pen. Code, § 29810, subd. (a) & (i).)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "As a society, we must address the looming threat posed by the proliferation of ghost guns. These untraceable firearms represent a dangerous gap in our gun control laws, allowing individuals to bypass background checks and evade accountability. I was shocked to read the December 2023 New York Times article that highlighted an obvious gap in our system: law enforcement agencies are using 3rd party gun destruction companies to dispose of confiscated weapons, and the 3rd party companies are reselling leftover gun parts as "kits" to hobbyists. We have essentially created a legal pipeline for the creation of ghost guns.

   "Not only does the prevalence of ghost guns undermine public safety efforts, it is highly unethical to think that portions of a weapon that were used in murder are being reused. AB 2842 simply stops the 3rd party companies from being able to resell gun parts, closing the loophole that allows these deadly weapons to proliferate unchecked."

2) **Existing California Law Regarding Destruction of Firearms and Effect of This Bill:** Law enforcement agencies routinely acquire and retain possession of firearms in the course of their investigatory duties, and must follow a specific process for their disposal set forth in California law. Generally, law enforcement agencies are not required to retain possession of seized or recovered firearms, ammunition feeding devices, or ammunition for more than 180 days after the owner (if one can be identified) has been notified, and may dispose of the firearm, feeding device, or ammunition once the 180-day period has expired. (Pen. Code, § 33875.) (*See also Wright v. Beck* (9th Cir. 2020) 981 F.3d 719 (finding law enforcement may not destroy seized firearms without providing notice to the owner). Moreover, existing law requires that firearms in the possession of law enforcement for at least 180 days and that were exhibits in criminal actions but no longer needed, or were unclaimed or abandoned, must be destroyed. (Pen. Code § 34000, subd. (a).) Although exemptions exist for use of those weapons by law enforcement agencies for a limited time to carry out the duties of the agency, and for specified training purposes, the firearms must be destroyed when they are no longer needed. (Pen. Code § 34005, subds. (b), (c).) Additionally, existing law requires that specified prohibited firearms and crime guns (i.e. guns defined as a "nuisance") be surrendered to a law enforcement agency, which in turn must destroy the weapon unless a court certifies that retention of the weapon is "necessary or proper to the end of justice." (Pen. Code § 18005, subd. (a).)

3) **Resale of Firearms Required to be Destroyed:** Law enforcement agencies acquire firearms from the communities they serve for a host of reasons and in a variety of ways; they are seized in enforcement actions, relinquished or surrendered by individuals prohibited from possessing them, purchased in gun buyback programs, and sometimes found abandoned. Many jurisdictions, including California, have requirements that firearms acquired in these various ways be destroyed if or when they cannot be returned to a legal owner. ((Pen. Code §§ 18005, 33875, 34000, 34005.) However, a recent investigation from the New York Times revealed that in several of these jurisdictions, the guns are not in fact destroyed so as to render them completely inoperable, but rather sent to companies that crush or cut a single piece of the gun that constitutes the "firearm" under federal law and sells the remaining parts as a kit. The New York Times, *The Guns Were Said to Be Destroyed. Instead They were Reborn* (Dec. 10, 2023). Available at: <https://www.nytimes.com/2023/12/10/us/guns-disposal-recycling.html> [as of April 8, 2024].) These kits, which often include barrels, triggers, grips, slides, stocks and springs, can be purchased by individuals across the country and rebuilt into operable firearms. Thus, a firearm seized by a police officer in California and sent to one of these companies for disposal may end up providing parts to a future ghost gun.

These companies operate by taking advantage of a loophole in federal law related to the definition of a "firearm." Specifically, the federal definition of "firearm" includes the frame or receiver of a gun that provides housing or structure for the rest of the components, and under federal law, every legal frame or receiver must have a unique serial number. (18 U.S.C. § 921, subd. (a)(3); (27 C.F.R. § 478.92, subd. (a).) The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) provides guidance depicting acceptable methods for smelting, shredding or crushing the firearm receiver so as to render it legally "destroyed," and specifies that any method of destruction must render the firearm so that it is not restorable to firing condition and is otherwise reduced to scrap. (Bureau of Alcohol, Tobacco, Firearms and Explosives, *How to Properly Destroy Firearms*. Available at: <https://www.atf.gov/firearms/how-properly-destroy-firearms> [as of April 8, 2024].) In other words, by destroying the serialized frame or receiver of a firearm but salvaging the

remainder of the components, the companies investigated in the New York Times report are technically in compliance with the letter, if not the spirit, of federal law.

The Times investigation also reviewed a contract between a Nevada firearm destruction company called LSC Destruction and Riverside County, California, which stipulated that LSC may sell gun parts to distributors but not to the civilian population. (New York Times, *supra.*) But as the Times notes, distributors often sell to licensed dealers, who sell to the public. LSC's website also featured a testimonial from an unnamed police official – possibly not linked to Riverside County – saying that "gun buybacks used to be a big headache before contracting with LSC, but now the politicians are happy, and I'm happy too." (*Ibid.*)

3) **Effect of this Bill:** AB 2842 requires a law enforcement agency that contracts with a third party for the destruction of firearms or other weapons, to ensure that said contract explicitly prohibits the sale of any firearm or weapon, or any part or attachment of said firearm. This would not prohibit the recycling, or sale for the purpose of recycling, of any scrap metal or other material resulting from the destruction of a firearm or other weapon. Under existing law, guns deemed to be a "nuisance" must be destroyed, guns that were unclaimed, abandoned, or formerly in evidence but no longer needed may be destroyed if they have been in the possession of law enforcement for at least 180 days. However, existing law does not clearly define "destroy" for the purposes of the provisions referenced above. Thus, it is possible for California law enforcement agencies to dispose of firearms via the "destruction" companies cited in the New York Times investigation. This bill seeks to prevent this conduct by providing that any such law enforcement contract for the destruction of firearms must explicitly prohibits the sale of any firearm, or any firearm part or attachment. Given that firearm destruction companies are already utilizing the loophole in federal law to avoid fully destroying guns, and California law similarly defines a firearm to include the frame or receiver of the weapon, it may be prudent for the author to clarify that "any firearm part or attachment" includes every single part of a firearm, and not just the frame or receiver.

4) **Interaction with Related Legislation:** This bill is substantially similar to SB 1019 (Blakespear) which is pending in Senate Appropriations Committee. SB 1019 requires law enforcement agencies to destroy firearms subject to destruction under existing law in their entirety and to develop and make available on its website a written policy regarding the destruction of firearms. Specifically, SB 1019 adds a definition of "destroy" to the same Penal Code Section amended by this bill (defining "destroy" to mean to destroy a firearm or other weapon *in its entirety* by smelting, shredding, crushing, or cutting and shall include all parts including, without limitation, the frame or receiver, barrel, bolt, and grip of a firearm, as applicable, and any attachments including, but not limited to, a sight, scope, silencer, or suppressor, as applicable.") SB 1019 also would require law enforcement agencies that "either contract with, or operate under, a memorandum of understanding (MOU) with another agency for the storage or destruction of weapons or other firearms shall have a policy identifying the other agency and outlining the responsibilities of both agencies under the contract or MOU. AB 2842 may partially complement SB 1019 since it more broadly applies to contracts with *any third party* (as contrast to SB 1019 which addresses MOU's with other *agencies*) to explicitly prohibit the sale of any part or attachment. That being said, if SB 1019 is also enacted, AB 2842 may become redundant needed. This is because SB 1019 clarifies that "destroy" means the destroying of any firearm or other weapon *in its entirety*, which would make redundant any contractual provision with a third party requiring any part or attachment of a firearm to be destroyed, since this would already be required by SB 1019.

On the other hand, AB 2842 provides a notable exemption, clarifying that it would not prohibit the recycling, or sale for the purpose of recycling, of any scrap metal or other material resulting from the destruction of a firearm or other weapon.

4) **Argument in Support**: None.

5) **Argument in Opposition**: According to the Peace Officer's Research Association of California "Current law requires that a weapon acquired by a specified governmental entity under specified circumstances, including as part of a "gun-buyback" program, be destroyed. This bill would require a law enforcement agency that contracts with a third party for the destruction of firearms or weapons to ensure that the contract for those services prohibits the sale of any parts of, or attachments to, the firearm or other weapon.

   PORAC is opposed to AB 2842 because it does not provide an exemption for departments that donate historical or significant firearms obtained through confiscation or buyback programs to recognized museums, educational institutions, or other appropriate entities for public display or educational purposes. Because of this we ask that this amendment is included in the bill:

   'It is the intent of the Legislature to enact legislation prohibiting the resale of confiscated firearms and firearms obtained through buyback programs, in whole or in part, in California, except that public safety departments may donate historical or significant firearms obtained through confiscation or buyback programs to recognized museums, educational institutions, or other appropriate entities for public display or educational purposes, provided that such donations comply with all applicable laws and regulations regarding the transfer and possession of firearms.'"

6) **Related Legislation**:

   a) SB 1019 (Blakespear), of the 2023-2024 Legislative Session, requires law enforcement agencies to destroy firearms subject to destruction under existing law in their entirety and to develop and make available on its website a written policy regarding the destruction of firearms. SB 1019 is pending in Senate Appropriations Committee.

   b) AB 733 (Fong), of the 2023-2024 Legislative Session, would have prohibited, commencing January 1, 2025, governmental agencies within the state from selling firearms, ammunition, or body armor, except as specified. AB 733 was vetoed by the Governor.

   c) AB 2739 (Maienschein), of the 2023-2024 Legislative Session, would have required a firearm, as specified, that is used in the commission of a crime, to be surrendered to law enforcement even where the defendant is granted diversion, if the crime would require the firearm to be surrendered if the defendant had been convicted of the crime. AB 2739 is pending in Assembly Appropriations Committee.

7) **Prior Legislation**:

   a) AB 200 (Ting), Chapter 58, Statutes of 2022, required law enforcement agencies to destroy firearms that were surrendered to them.

b) SB 1061 (Monning), of the 2019-2020 Legislative Session, would have required a law enforcement agency to accept and dispose of any found, unwanted, or inherited firearm turned in and prescribe the disposition of these weapons by destruction, retention by the agency, or, in the case of a stolen weapon, the return of the weapon to the lawful owner. SB 1061 was held in Senate Public Safety Committee.

c) Proposition 63 of the November 2016 general election, stated, in part, that law enforcement agencies could sell firearms relinquished to them due to a felony or specified misdemeanor conviction prohibiting the owner from possessing firearms.

d) AB 232 (Ting), of the 2013-2014 Legislative Session, would have provided a tax credit, for a handgun, shotgun, rifle, or assault weapon in working condition that is either surrendered or sold to local law enforcement in a gun buyback program. AB 232 died in Assembly Public Safety committee.

e) AB 538 (Pan), Chapter 738, Statutes of 2013, requires a law enforcement agency that is the registered owner of an institutional weapon, as defined, that subsequently destroys that weapon to enter such information into the AFS via the CLETS.

REGISTERED SUPPORT / OPPOSITION:

Support

None

Oppose

Peace Officers Research Association of California (PORAC)

Analysis Prepared by: Ilan Zur / PUB. S. / (916) 319-3744

Date of Hearing: April 16, 2024
Counsel: Kimberly Horiuchi

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Kevin McCarty, Chair

AB 2959 (Ortega) – As Introduced February 16, 2024

SUMMARY: Requires the California Department of Corrections and Rehabilitation (CDCR) to price all vending machine food items in any CDCR prison the same market retail price as in the community in which the prison is located. Specifically, **this bill**:

1) Requires CDCR to take into consideration the research that exists on junk foods and snacks as a cause of obesity in children and families when providing food in the state prison.

2) Mandates CDCR encourage the provision of affordable, fresh, and nutritious food items in prison vending machines and the sourcing of food items from local farmers and producers.

EXISTING LAW:

1) Permits CDCR to maintain a canteen at any prison or institution under its jurisdiction to sell incarcerated person toilet articles, candy, notions, and other sundries. (Pen. Code, § 5005.)

2) Permits CDCR to provide the necessary facilities, equipment, personnel, and merchandise for the canteen. (Pen. Code, § 5005.)

3) Permits CDCR to undertake to insure against damage or loss of canteen and handicraft materials, supplies and equipment owned by the Inmate Welfare Fund (IWF). (Pen. Code, § 5005.)

4) Provides that the sale prices of the articles offered for sale in the canteen shall be fixed by CDCR at the amounts that will, as far as possible, render each canteen self-supporting. (Pen. Code, § 5005.)

5) Requires all net proceeds from the operation of canteens to be deposited in the IWF. The moneys in the fund shall constitute a trust held by the Secretary of CDCR for the benefit and welfare of all persons incarcerated at CDCR instructions. (Pen. Code, § 5006, subd. (b).)

6) Requires the Department of Finance (DOF) to conduct a biennial audit of canteen operations at any prison or institution and requires the audit to be available to incarcerated persons, as specified. (Pen. Code, § 5005.)

7) States all moneys now held for the benefit of inmates currently housed in CDCR facilities including those known as the Inmate Canteen Fund of the California Institution for Men; the IWF of the California Institution for Women; the Trust Contingent Fund of the California State Prison at Folsom; the S.P.L. Commissary, Canteen Account, Hobby Association, Camp Account, Library Fund, News Agency of the San Quentin Rehabilitation Center, the

Prisoners' Fund; and the Prisoners' Employment Fund, shall be deposited in the Inmate Welfare Fund of the CDCR, in the State Treasury, which is hereby created. (Pen. Code, § 5006, subd. (a)(1).)

8) Requires the money in the IWF be used solely for the benefit and welfare of inmates of prisons and institutions under the jurisdiction of CDCR, including the following:

   a) The establishment, maintenance, employment of personnel for, and purchase of items for sale to inmates at canteens maintained at the state institutions;

   b) The establishment, maintenance, employment of personnel, and necessary expenses in connection with the operation of the hobby shops at institutions under the jurisdiction of the CDCR;

   c) Educational programs, hobby and recreational programs, which may include physical education activities and hobby craft classes, inmate family visiting services, leisure-time activities, and assistance with obtaining photo identification from the Department of Motor Vehicles; and,

   d) Funding for innovative programming by not-for-profit organizations offering programs that have demonstrated success and focus on offender responsibility and restorative justice principles. All funding used for this purpose shall go directly to the not-for-profit organizations and shall not be used for department staff or administration of the programming. (Pen. Code, § 5006, subd. (a)(1)(A-D).)

9) States money in the IWF shall not be expended to pay charges for any or all of the following purposes:

   a) Overtime for staff coverage of special events;

   b) Television repair; or,

   c) Original complement of television sets and replacement of television equipment.

10) CDCR shall pay the above charges out of any money appropriated for these purposes. (Pen. Code, § 5006.1.)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "AB 2959 is crucial to reducing the financial burden on families visiting their loved ones in CDCR facilities. The lack of regulation on food prices in these facilities results in significant markups, causing families to pay significantly more than local store prices. Despite CDCR increasing the allowed amount of money visitors can bring, vendors have also raised their prices, exacerbating the financial strain. AB 2959 will mandate that food prices in prison vending machines align with average market retail prices in the community where the prison is located. Additionally, the bill encourages a diversification of food options and the inclusion of healthier choices, improving

quality and dignity for visiting families."

"Visitors to prison facilities are often present for hours at a time. They are not allowed to bring their own alimentation inside, and exiting and re-entering is often disallowed or impracticable. So if they require nourishment, they will have to obtain it on site. Additionally, for those visiting loved ones, the experience of communal meals may be an especially precious way of bonding. (You are who you eat with.) Being effectively a captive buyer, the visitor is in a weak bargaining position vis-a-vis the seller; the seller, moreover, has a monopoly and so needn't compete with other sellers as in a marketplace. (The minimum actors for any market mechanism whatsoever to operate is at least two buyers and at least two sellers for competition. See John R. Commons, "Institutional Economics" 21 Amer. Econ. Rev. 648 (1931).)

"The sellers get a local monopoly pursuant to a contract within the framework of a cooperation between the Department of Rehabilitation and the CA Department of Corrections and Rehabilitation. DOR's Business Enterprise Program facilitates licensed vending by blind vendors, which is a California-specific part of a broader federal policy framework dating back to the New Deal era. This preference structure, designed to enhance the economic opportunities of blind persons, is worthy, but it comes at a cost: the guaranteed profit for the vendor is paid for by higher-than-market prices for the consumers and, due to inadequate state oversight, lower quality goods. This is a consequence of the structure of the program. The remedy this bill proposes is price controls coupled with quality standards.

2) **Prison Canteens and Vending Machines**: Existing law permits, but does not require, CDCR to maintain a canteen at any prison or institution under its jurisdiction for the sale of toilet articles, candy, notions, and other sundries to incarcerated people. (Pen. Code, § 5005.) CDCR is statutorily authorized, but not required, to provide the necessary facilities, equipment, personnel, and merchandise for the canteen. (*Ibid.*) Title 15 regulations require each CDCR facility to establish a canteen enabling incarcerated prisons to make purchases of approved merchandise. (Cal. Code Regs., tit. 15 §§ 3090 – 3095.) Despite the permissive statutory language, canteens are currently operated in all correctional institutions.[1]

Under current law, the sale prices of the articles offered for sale in a canteen are fixed by the Secretary of CDCR at the amounts that will, as far as possible, "render each canteen self-supporting." (Pen. Code, § 5005.) Pursuant to regulations, facility staff are required to "consult with representatives of the inmate population when determining items to be stocked in the canteen for resale." (Cal. Code Regs., tit. § 3090, subd. (a).) Prison vending machines are accessible by visitors. Visiting family and friends may make purchases for incarcerated person or for themselves.

However, the Penal Code vests CDCR with broad discretion to set the price of items sold in the canteen. (See *In re Hamilton* (1996) 41 Cal.App.4th 926, 934-935.) In *In re Hamilton,* the

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[1] (DOF, Office of State Audits and Evaluations, *Report No. 22-5225-029* (Jan. 2023) at p. 9 <https://esd.dof.ca.gov/reports/reportPdf/98602576-41DE-ED11-A820-00224843A957/Department%20of%20Corrections%20and%20Rehabilitation%20Financial%20Combined%20Inmate%20Welfare%20Fund%20for%20the%20Fiscal%20Year%20Ended%20June%2030,%202021> [June 8, 2023].)

court of appeal held that the imposition by CDCR of a 10% surcharge on items bought or sold by incarcerated persons is within CDCR's discretion, including purchases at the prison canteen. (*In re Hamilton, supra,* 41 Cal.App.4th at pp. 934-935.) The court observed, "The Legislature has vested [CDCR] with considerable discretionary power by which to attain the goal of a self-supporting program. The subject surcharge clearly falls within the ambit of this power." (*Id.* at p. 933.) The court concluded that the surcharge was necessary to "defray costs." (*Id.* at pp. 934-935.) The court elaborated that Penal Code section 5005 requires only that the canteens "as far as possible" "attempt" to be self-supporting. Thus, prison canteens may price items to generate net proceeds, so long as those proceeds are used in the manner required by law. (*Ibid.*)

The DOF is required to conduct biennial audits of canteen operations. (Pen. Code, § 5005.) In its most recent audit for Fiscal Year 2021, the DOF reports that the net canteen sales across all CDCR institutions was $89,465,128. The cost of the goods sold totaled $54,938,660. The gross margin from canteen sales totaled $34,526,468 and canteen expenses totaled $25,180,743. As such, the total income from canteen sales across all CDCR institutions was $9,345,725. (DOF, Office of State Audits and Evaluations, *Report No. 22-5225-029, supra* at p.33.) $9.3 million in proceeds is likely more than adequate to render the canteens "self-supporting" and "defray costs." Of note, the income from canteen sales is raised directly from incarcerated persons. The combined pay for all incarcerated persons across all of CDCR's institutions for the fiscal year relating to canteen operations was $67,705—a mere fraction of a percent of the total income from canteen sales. (DOF, Office of State Audits and Evaluations, *Report No. 22-5225-029, supra* at p.33.) Though canteen prices continue to rise, the State has not raised pay for incarcerated persons,[2] including the pay of those that work the canteens.

The size of the prison commissary industry is difficult to estimate, but likely exceeds $1.6 billion in annual revenue. (Stephen Raher, *The Company Store and the Literally Captive Market: Consumer Law in Prisons and Jails*, 17 Hastings Race & Poverty L.J. 3 (2020).) "It is difficult to see prison-retail prices as anything other than premium rates charged for inexpensive, run-of-the mill goods or services." (*Id.* at p. 25.) Commentators have opined that the prison-retail industry is an exploitative "business model based on using the coercive power of the state to extract revenue from poor people in the form of exorbitant prices for phone calls or junk food." (*Ibid.*)

3) **CDCR Contracting for Goods and Services:** CDCR contracts with third party vendors for a variety of goods and services, including vending machines and the products being sold in the machines. These food items, particularly in visitor's room, are often the only food items visiting family and friends have access to when visiting a person in a CDCR facility. In many cases, where people visit loved ones incarcerated at CDCR, they must wait hours for the inmate to be brought to the visitor's room. Visitors are generally prohibited from bringing

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[2] Generally, the average pay for incarcerated people is $0.08 to $0.37 an hour before fees and deductions (Cal. Code Regs., tit. 15, § 3041.2.) Recent measures to increase prison pay have failed passage by the Legislature. (See, e.g., SB 1371 (Bradford), of the 2021-2022 Legislative Session [would have required CDCR to adopt a 5-year implementation plan to increase inmate wages; SB 1371 was vetoed]; ACA 3 (Kamlager), of the 2021-2022 Legislative Session [would have removed language in the state Constitution that allows involuntary servitude as punishment to a crime; ACA 3 was ordered to the Senate Inactive File].)

food in from the outside. Also, families often buy items for incarcerated people to enjoy while visiting.

Certainly, demanding market rate for these items does not seem unreasonable. However, CDCR's website points out that it does not install or stock the vending machines – they contract for that service.[3] Accordingly, CDCR may not have authority to tell the vending machine company what to charge for items; however, CDCR may demand market rate on items when negotiating agreements for vending machine services.

The availability of reasonable, low cost food items may encourage more visitors. It is settled policy that family and community visits are crucial to an incarcerated person's success both while in custody and after coming home.

> Using multiple measures of visitation (any visit, total number of visits, visits per month, timing of visits, and number of individual visitors) and recidivism (new offense conviction and technical violation revocation), the study found that visitation significantly decreased the risk of recidivism, a result that was robust across all of the Cox regression models that were estimated. The results also showed that visits from siblings, in-laws, fathers, and clergy were the most beneficial in reducing the risk of recidivism, whereas visits from ex-spouses significantly increased the risk. The findings suggest that revising prison visitation policies to make them more "visitor friendly" could yield public safety benefits by helping offenders establish a continuum of social support from prison to the community. It is anticipated, however, that revising existing policies would not likely increase visitation to a significant extent among unvisited inmates, who comprised nearly 40 percent of the sample. Accordingly, it is suggested that correctional systems consider allocating greater resources to increase visitation among inmates with little or no social support. (Minnesota Department of Corrections (2011) "The Effects of Prison Visitation on Offender Recidivism," p. iii.)[4]

While CDCR cannot control what third party vendors charge or what those vendors put in the machines, it can prioritize its efforts to contract with third party vendors that have reasonable pricing and healthy food options. Additionally, inmate councils across the state have complained to CDCR and the Legislature that inmates actually struggle just to meet daily caloric intake due to lack of inmate resources to purchase food and not enough food from CDCR.

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[3] Located at https://www.cdcr.ca.gov/obs/services-goods-types/ [last visited April 10, 2024.]
[4] Located at https://nicic.gov/resources/nic-library/all-library-items/effects-prison-visitation-offender-recidivism [last visited April 10, 2024].

4) **Arguments in Support:** According to the *California Alliance for Youth & Community Justice:* In 2023, through SB 474, the state legislature found and declared: It is essential that incarcerated Californians and their loved ones are protected from price gouging and excessive cost pressures related to incarceration that negatively impact their financial stability. Research shows that economic stability is critical to preventing recidivism and supporting positive reentry outcomes.

In 2020, a report by Impact Justice found that 60 percent of formerly incarcerated people surveyed said that they could not afford canteen purchases while incarcerated, while 75 percent of those surveyed reported that their access to adequate food was restricted by their personal or family finances. A research study from the Ella Baker Center for Human Rights has shown that nearly two in three families with an incarcerated family member are unable to meet their families' basic needs due to the costs of incarceration, and that nearly one-half of families are unable to afford conviction-related costs.

The financial burdens associated with incarceration tend to fall most heavily on women of color from low-income communities. The current practice of vending machine pricing contradicts these findings and creates an unfair burden on families who are visiting their incarcerated loved ones. Since 2007, the California Department of Corrections and Rehabilitation (CDCR), deemed it necessary to increase the amount of money families are allowed to bring to visit to compensate for increased vending prices.

In 2019, CDCR was still concerned with the increase in vending prices and were seeking to prevent price gouging. Families were allowed to bring more money to visits, once again, to compensate for the increased vending machine prices. Nevertheless, during and since COVID, families have been placed under an unfair burden of further increased prices. The mark ups tend to be 4-6 times what the retail price. Visits are an integral part of maintaining family contact and are a rehabilitative mechanism that is recognized to reduce recidivism. Part of visiting is eating a meal together. Research has demonstrated the importance of eating a meal together.

Sharing a meal with a family and/or friend deepens those bonds and they can shape healthy eating habits. They also have prosocial benefits for the incarcerated individual. The prosocial aspect of visiting is undermined by the price gouging that occurs with the vending machines at prison visiting rooms.

The prices limit the number of times a family or friend will visit their incarcerated loved ones. There are many challenges and costs to maintaining relationships and family ties while a loved one is incarcerated. From phone calls to canteen to a source of income has left the household.

Visits are often an expense families have to save up with cost for gas, cost for a hotel, cost for flights for some. The exorbitant pricing for food in vending machines does not align with the mission of rehabilitation since it discourages the use of this proven component to reduce recidivism. …

This bill would be another step for California's legislature in combating poverty, racial inequity, and mass incarceration, following on the heels of recent, bold reforms in our state to repeal administrative fees in the criminal system (AB 1869), eliminate fees for prison phone

calls (SB 1008), and reduce markups on canteen prices (SB 474). Investing in financial stability for justice-involved families is a critical and evidence-based strategy for improving reentry outcomes, and is an investment in public safety for all Californians."

5) **Arguments in Opposition:** According to the *California Council of the Blind:* "AB2959 would require the CDCR to require all food items sold in the facility vending machines to be priced at the same average market retail price as in the community in which the facility is located. Many state prisons are operated by blind vendors working under the state's Business Enterprise Program.

   The problem with this provision is that many prisons are surrounded by big box stores and other chain stores that can dramatically undercut any price point that can be met by a blind vendor. If the proponents of this bill desire to solve the problem of overpricing without harming the ability of blind vendors to make a living wage, a more realistic solution would be to determine an average price point based upon the amount for items charged by convenience stores and gas stations in the community.

   The bill would also require those facilities to take into consideration research that exists on junk foods and snacks as a cause of obesity in children and families when providing food in the state prison, and to encourage the provision of affordable, fresh, and nutritious food items in prison vending machines and the sourcing of food items from local farmers and producers. Blind vendors are more than willing to bring in healthy food choices and work with the department in this endeavor. However, it is often the department itself who discourages vendors from taking those steps that will allow such choices to be provided. If this provision is to be adopted, blind vendors would need assurances from the department that it would be implemented in a manner that would help all concerned, both those buying products and blind vendors.

6) **Prior Legislation:**

   a) AB 1782 (Jones-Sawyer), of the 2021-2022 Legislative Session, would have renamed the IWF the Incarcerated Peoples' Welfare fund and would have required money in the fund to be expended solely for the benefit, education, and welfare of incarcerated people. AB 1782 was vetoed.

   b) SB 555 (Mitchell), of the 2019-2020 Legislative Session, would have required, in part, that IWF funds be expended solely for the benefit, education, and welfare of the individuals incarcerated in the jail. SB 555 was vetoed.

REGISTERED SUPPORT / OPPOSITION:

Support

A New Way of Life Reentry Project
ACLU California Action
Alliance for Boys and Men of Color
California Alliance for Youth and Community Justice
California Hospital Association

California Public Defenders Association
Californians United for A Responsible Budget
Center on Juvenile and Criminal Justice
Communities United for Restorative Youth Justice (CURYJ)
Empowering Women Impacted by Incarceration
Felony Murder Elimination Project
Freedom 4 Youth
Initiate Justice
Initiate Justice Action
LA Defensa
Lawyers' Committee for Civil Rights of The San Francisco Bay Area
Legal Services for Prisoners With Children
Rubicon Programs
San Francisco Financial Justice Project
Young Women's Freedom Center

Oppose

California Council of The Blind
Capitol Advocacy, LLC

Analysis Prepared by: Kimberly Horiuchi / PUB. S. / (916) 319-3744

Date of Hearing: April 16, 2024
Counsel: Kimberly Horiuchi

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Kevin McCarty, Chair

AB 3083 (Lackey) – As Amended April 3, 2024

SUMMARY: Requires a court to conduct a search of available databases to determine whether a person subject to a proposed domestic violence restraining order (DVRO) owns a firearm. Specifically, **this bill**:

1) Clarifies that, before a hearing on the issuance or denial of a DVRO, a court must determine, among other things, whether the proposed restrained person owns or possesses a firearm as reflected in the California Department of Justice's (DOJ) Automated Firearms System (AFS).

2) States when the court is determining whether a proposed restrained person owns or possesses a firearm, it must conduct a search of all records and databases readily available and reasonably accessible by the court, including the DOJ AFS.

3) Repeals uncodified language from Family Code section 6306, as amended in Chapter 765 of the Statutes of 2012 that states "This act shall be implemented in those courts identified by the Judicial Council as having resources currently available for these purposes. This act shall be implemented in other courts to the extent that funds are appropriated for purposes of the act in the annual Budget Act."

4) Requires that a county sheriff access the California Law Enforcement Telecommunications System (CLETS) in order to search the DOJ AFS for the purpose of determining whether the subject of the DVRO owns or possesses any a firearm, if a court does not have electronic or other access to the DOJ AFS and if there is no preexisting agreement between the court and a law enforcement agency.

5) States the intent of the Legislature that, except with regard to a search of whether the subject of a proposed order owns or possesses a firearm, this provision of law shall be implemented in those courts identified by the Judicial Council as having resources currently available for these purposes. This act shall be implemented in other courts to the extent that funds are appropriated for purposes of the act in the annual Budget Act.

6) States findings and declarations as follows:

   a) It is the intent of the Legislature that judges issuing domestic violence restraining orders determine if the subject of the order is known to own or possess firearms in all cases. Although Chapter 765 of the Statutes of 2012 required this, the requirement was made conditional on the issuance of a specified study by the Judicial Council and a specific appropriation of funds for this purpose, which never occurred. It is vital that firearms be kept out of the hands of known domestic abusers.

b) Individuals who are prohibited due to issuance of restraining orders represented 16 percent of the backlog in the DOJ's Armed and Prohibited Persons System (APPS) in 2022.

c) Failure to remove firearms from domestic abusers can have tragic results. According to Attorney General Bonta, "The data is clear: Domestic violence abusers should not have firearms. When an abuser has access to a firearm, it endangers the safety and lives of those around them. Violence is not an accident. It is also not inevitable, and it can be prevented. Removing dangerous weapons from people who pose a danger to others is key to that goal."

d) According to a November 2023 report by the California Department of Justice's Office of Gun Violence Prevention, "In the decade from 2013 to 2022, law enforcement agencies in California reported 1,254 gun homicides in which one or more suspected offenders were identified as a current or former intimate partner or family member of the victim."

e) Therefore, it is the intent of the Legislature that, in all circumstances, judges who issue domestic violence restraining orders verify whether the subject of the order is known to own or possess one or more firearms and, if the subject of the order does, to demonstrate proof of surrender of the firearm or firearms in accordance with legal requirements.

EXISTING LAW:

1) Authorizes a court, under the Domestic Violence Protection Act (DVPA), to issue and enforce domestic violence restraining orders, including emergency protective orders (EPOs), temporary (or ex parte) restraining orders (TROs), and longer-term or permanent restraining orders. (Fam. Code, § 6300, et seq.)

2) Requires, before a hearing on a protective order, that the court ensures a search of specified records and databases is conducted to determine if the subject of the proposed order has a registered firearm. (Fam. Code, § 6306, subd. (a).)

3) Mandates the court search all records and databases readily available and reasonably accessible to the court, including, but not limited to the following:

   a) The California Sex and Arson Registry (CSAR);

   b) The Supervised Release File;

   c) State summary criminal history information maintained by the DOJ, as specified;

   d) The Federal Bureau of Investigation's nationwide database; and

   e) Locally maintained criminal history records or databases.

   However, a record or database need not be searched if the information available in that record or database can be obtained as a result of a search conducted in another record or database. (Fam. Code, § 6306, subd. (a)(1-5).)

4) States prior to deciding whether to issue a protective or restraining order or when determining appropriate temporary custody and visitation orders, the court shall consider the following information obtained pursuant to a search of records, as specified:

   a) A conviction for a serious or violent felony, as defined;

   b) A misdemeanor conviction involving domestic violence, weapons, or other violence;

   c) An outstanding warrant;

   d) Parole or probation status;

   e) A prior restraining order; and

   f) A violation of a prior restraining order. (Fam. Code, § 6306, subd. (b)(1).)

5) Provides that information obtained as a result of the search that does not involve a conviction, as specified, shall not be considered by the court in making a determination regarding the issuance of a DVRO. That information shall be destroyed and shall not become part of the public file in this or any other civil proceeding. (Fam. Code, § 6306, subd. (b)(1).)

6) Requires the Judicial Council to provide notice on all protective orders issued within the state that the respondent is prohibited from owning, possessing, purchasing, receiving, or attempting to purchase or receive a firearm while the protective order is in effect. (Pen. Code, § 1524, subd. (d).)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "Existing law relies too heavily on the 'honor system' for domestic violence offenders to surrender their firearms. Failure to remove guns from the hands of the abuser can have tragic results regardless of the restraining orders. Domestic violence offenders should not have access to firearms. Existing law relies too heavily on the 'honor system' for these abusers to surrender their guns. Family court judges are supposed to be part of the process of ensuring that offenders surrender their weapons, but without the budget allocation, this has not widely occurred.

   "According to Attorney General Bonta, 'The data is clear: Domestic violence abusers should not have firearms. When an abuser has access to a gun, it endangers the safety and lives of those around them. Every time firearm possession is overlooked when issuing a restraining order, there is a high risk of preventable domestic violence and gun-related death. To add to the high risk, as indicated by the AG Bonta, domestic abusers are associated with two-thirds of mass shootings.' Therefore, California must protect the safety of others with this common-sense gun control measure. Existing law requires a court to check if a person subject to a restraining or protective order owns a weapon and, consequently, will be prohibited from owning or possessing a firearm upon the order. However, after the passage of that bill, the mandate was not fully enacted. Due to the contingency language within its origin language in SB 1433 (Alquist) of 2012, some counties did not comply since the proposal was only a

mandate if a budget allocation was to be made, as many counties are not well enough funded to enforce these background checks. However, the 2022-23 budget did allocate money for APPS-related activities, but this was not broad enough to trigger the mandate. This being said, the policy within SB 1433 should be carried out whether the budget allocation has been made or not. Guns in the hands of domestic abusers can lead to tragedies. The state must ensure that all reasonable steps are taken to ensure that firearms in the hands of abusers are identified and removed as soon as possible."

2) **Protective and Restraining Orders Based on Incidents of Domestic Violence:** Protective orders and restraining orders are, in the outcome, very similar – both are orders issued or approved by a court that prevents a person from contacting another person under specific circumstances and may also restrict other conduct to prevent harassment, threats, or violence. (See generally, Fam. Code, § 6218, subd. (a)-(c).)

However, there are a couple of differences, at least in a practical sense. According to the California Courts, Self Help Guide, the ***police*** may ask for an emergency (which includes instances of domestic violence) protective order (EPO) to protect the victim of a crime, usually when the victim calls the police or 911 for help. If the defendant (the person accused of committing the crime) is arrested and charged, a judge can issue a criminal protective order (CPO) to protect victims and witnesses, particularly during the pendency of the case. EPOs and CPOs are protective orders.

Protective orders and "temporary restraining orders or TROs" are often used interchangeably. A victim may also be able to file their own moving papers to request a protective or restraining order. A restraining order can include some of the same orders as an EPO or CPO, like ordering the defendant to stay away from the victim. But in restraining order cases ***filed by a victim*** (instead of law enforcement), additional protections may be available. A victim can have a restraining order and an EPO or CPO at the same time as one is issued on an emergency basis and one is issued for a longer period of time. (See Fam. Code, § 6320, subd. (a); Judicial Branch of California, California Courts Self-Help Guide, Guide to Protective Orders, p. 1-2.)[1]

An EPO can include orders that the defendant: (a) not contact people protected by the order; (b) not harass, stalk, threaten or hurt people protected by the order; (c) stay a certain distance away from people protected by the order or places they live or go regularly; (d) move out from a home that is shared with the protected person; or (e) not have guns, firearms, or ammunition. An EPO only lasts a short time, usually 5-7 days. If the person protected by the EPO needs protection that lasts longer or wants to ask for other orders, they can apply for a restraining order. Speed is by necessity an issue in obtaining the TRO, so processes that make it quicker and easier to file for, and receive, the TRO are important. Because a restrained party may not have had the opportunity to defend their interests, TROs are of necessity short in duration. If a noticed hearing is not held within 21 days (or 25 days if the court finds good cause), the TRO is no longer enforceable, unless a court grants a continuance. (Fam. Code, §242, subd. (b).) After a duly noticed hearing, however, the court is authorized to extend the original TRO into a "permanent" protective order (also known as

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[1] Located at https://selfhelp.courts.ca.gov/protective-orders, last visited March 21, 2024.

orders after hearing or, for purposes of this analysis, a DVRO) that may last up to five years. (Fam. Code, §§ 6345, 6302.)

The purpose of the DVPA "is to prevent acts of domestic violence, abuse, and sexual abuse and to provide for a separation of the persons involved in the domestic violence for a period sufficient to enable these persons to seek a resolution of the causes of the violence." Family Code sections 6218, among others, allow a party to seek a "protective order," to protect a petitioner who presents "reasonable proof of a past act or acts of abuse." (Fam. Code, §§ 6300, 6218.) A petitioner who needs immediate protection may seek a temporary restraining order or TRO, which becomes effective upon receiving a judge's signature and being served on the respondent. TROs may be issued on an ex parte basis that is, without formal notice to, or the presence of, the respondent. (Fam. Code, § 241.)

3) **Firearms Prohibition**: Existing law prohibits a person from owning, possessing, purchasing, or receiving a firearm or ammunition while the DVRO order is in effect, and makes the violation of such an order a crime. (Fam. Code, § 6389, subd. (a).) Possessing or attempting to possess a firearm during the pendency of a DVRO is punishable as an alterate misdemeanor-felony (a misdemeanor for owning or possessing a firearm when prohibited from doing so by a restraining order; a wobbler for purchasing or receiving or attempting to purchase or receive a firearm when prohibited from doing so by a restraining order). (*Ibid.*; See also Pen. Code, § 29825.)

Existing law requires, before a hearing on a protective order, that the court ensure a search of specified records and databases is conducted to determine if the subject of the proposed order, among other things, owns a firearm. (Fam. Code, § 6306, subd. (a).) While this requirement has been in place since 1993, it is not always implemented as envisioned by the Legislature.

For example, a court is not required to request firearms ownership information from the DOJ and is only required to search all records and databases "readily available and reasonably accessible to the court," including several state, federal, and local databases, but not databases of firearms ownership. (Fam. Code, § 6306, subd. (a).) Furthermore, existing uncodified statutory language provides that the requirement "shall be implemented in those courts identified by the Judicial Council as having resources currently available for these purposes. This act shall be implemented in other courts to the extent that funds are appropriated for purposes of the act in the annual Budget Act." (See § 7 of Chapter 572 of the Statutes of 2001.)

In 2021, SB 320 (Eggman), Chapter 685, Statutes of 2021, codified Rule of Court 5.495 in the Family Code and made compliance mandatory so that standards and procedures for ensuring the relinquishment of a firearm and ammunition following the issuance of a civil restraining order would consistently apply throughout the state. It also required, in order to fill the gaps in court communication with justice partners identified by the 2008 Judicial Council report, the court to notify law enforcement officials and the county prosecutor's office when there has been a violation of a firearm relinquishment order related to a DVRO.

This bill enacts uncodified statutory language expressing the Legislature's intent for restrictions on the possession and ownership of firearms by persons who are subject to DVROs; repeals uncodified intent language, stating the requirement for a court to search

databases to determine whether the subject of a DVRO owns firearms is only required to be implemented in courts that have resources or receive funds for that purpose; and clarifies a court must determine whether the subject of the proposed DVRO, as reflected in the AFS, owns or possess a firearm.

4) **Arguments in Support:** According to the *Burbank Police Officers Association*: Existing law mandates a court check if an individual subject to a restraining or protective order owns a weapon, with the intention of prohibiting firearm possession upon issuance of such an order. However, the effectiveness of this mandate has been hindered due to contingent language within the original legislation (SB 1433 - Alquist) of 2012. This contingency, tied to budget allocations, has resulted in inconsistent enforcement across counties, exacerbating the risks faced by victims of domestic violence. The reliance on an "honor system" for domestic violence offenders to surrender firearms has proven inadequate. Failure to remove guns from the hands of abusers poses significant risks to the safety and lives of victims, as evidenced by the alarming association between domestic abusers and firearm-related violence, including mass shootings. AB 3083 seeks to rectify these shortcomings by repealing contingent language and ensuring the safety of victims. It requires family court judges, upon issuing restraining orders, to ascertain whether the subject possesses firearms. This proactive measure empowers judges to demand proof of surrender or storage of firearms with licensed dealers, aligning with existing laws prohibiting firearm possession by individuals subject to domestic violence restraining orders. By eliminating ambiguity and strengthening enforcement mechanisms, AB 3083 aims to reduce the incidence of gun violence and murders associated with domestic violence. It prioritizes the safety and well-being of victims by ensuring that abusers are deprived of access to lethal weapons, thus mitigating the risk of further harm.

5) **Arguments in Opposition:** None on file.

6) **Related Legislation**:

   a) AB 2024 (Pacheco) seeks to eliminate delays in getting DVPO protection forms to the judicial officer due to relatively minor errors or omissions. AB 2024 is pending referral in the Senate.

   b) AB 2621 (Gabriel) requires the Commission on Peace Officer Standards and Training (POST) instruction to include identifying when a gun violence restraining order is appropriate to prevent a hate crime and the procedure for seeking a gun violence restraining order and require instruction on responses to hate crime waves against specified groups, including the LGBTQ and Jewish communities. AB 2621 is pending in the Assembly Appropriations Committee.

   c) AB 2759 (Petrie-Norris) revises the exemption in existing law pertaining to the issuance of a protective order or restraining order and the relinquishment of a firearm to clarify and expand the standard considered by the court in making determinations as to sworn peace officers carrying a firearm either on or off duty, as a condition of employment. AB 2759 is pending on the Assembly Floor.

6) **Prior Legislation**:

a) AB 1143 (Berman) Chapter 156, Statutes of 2021 provides that in lieu of personal service of a petition for a civil harassment restraining order, if a respondent's address is unknown, the court may authorize another method of service that is reasonably calculated to give actual notice to the respondent, if the court determines that a petitioner made a diligent effort to accomplish service, and may prescribe the manner in which proof of service must be made.

b) SB 538 (Rubio), Chapter 686, Statutes of 2021 facilitates the filing of a DVRO and gun violence restraining order (GVRO) by allowing petitions to be submitted electronically and hearings to be held remotely.

REGISTERED SUPPORT / OPPOSITION:

Support

Arcadia Police Officers' Association
Burbank Police Officers' Association
California Association of Highway Patrolmen
California District Attorneys Association
California Partnership to End Domestic Violence
California Police Chiefs 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
Fullerton 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' Assocation
Pomona Police Officers' Association
Riverside Police Officers Association
Riverside Sheriffs' Association
Santa Ana Police Officers Association
Upland Police Officers Association

Opposition

None

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Date of Hearing: April 16, 2024
Counsel: Andrew Ironside

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Kevin McCarty, Chair

AB 3171 (Soria) – As Introduced February 16, 2024

As Proposed to be Amended in Committee

SUMMARY: Increases the penalties for selling, distributing, or transporting fentanyl, an analog of fentanyl, or a substance containing fentanyl or an analog of fentanyl, if the amount of fentanyl weighs more than 28.35 grams. Specifically, **this bill**:

1) Increases the punishment for a person who possess or purchases for purposes of sale more than 28.35 grams of fentanyl or analog of fentanyl, or a substance containing more than 28.35 grams of fentanyl or an analog of fentanyl, from two, three, or four years imprisonment in county jail to four, five, or six years.

2) Increases the punishment for a person who transports, imports into this state, sells, furnishes, administers, or gives away, or who offers or attempts to transport, import into this state, sell, furnish, administer or give away, more than 28.35 grams of fentanyl or analog of fentanyl, or substance containing more than 28.35 grams of fentanyl or an analog of fentanyl from three, six, or nine years imprisonment in county jail to seven, eight, or nine years.

3) Increases the punishment for a person who transports more than 28.35 grams of fentanyl or an analog of fentanyl, or a substance containing more than 28.35 grams of fentanyl or an analog of fentanyl, within this state from one county to another noncontiguous county from 3, 6, or 9 years imprisonment in county jail to 7, 10, or 13 years.

4) States the penalty increases imposed by this bill apply only when the person has knowledge that the specific controlled substances possessed is fentanyl.

EXISTING LAW:

1) Provides the following penalties for trafficking of cocaine, cocaine base, heroin and specified opiates, including fentanyl:

   a) Possession for sale is punishable by imprisonment for two, three, or four years in the county jail (Health & Saf. Code, § 11351);

   b) Sale is punishable by imprisonment for three, four, or five years in county jail. Sale includes any transfer or distribution (Health & Saf. Code, § 11352.); and,

   c) Transportation of fentanyl, to a noncontiguous county, for purposes of sale is punishable by imprisonment for three, six, or nine years in the county jail (Health & Saf. Code, § 11352.).

2) Provides that, except as specified, the term "controlled substance analog" means either of the following:

   a) A substance the chemical structure of which is substantially similar to the chemical structure of specified controlled substances; or,

   b) A substance which has, is represented as having, or is intended to have a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to, or greater than, the stimulant, depressant, or hallucinogenic effect on the central nervous system of specified controlled substances. (Health & Saf. Code, § 11401, subd. (b)(1) & (2).)

3) Specifies that the term "controlled substance analog" does not mean "any substance for which there is an approved new drug application as specified under the federal Food, Drug, and Cosmetic Act or which is generally recognized as safe and effective as specified by the federal Food, Drug, and Cosmetic Act." (Health & Saf. Code, § 11401, subd. (c)(1).)

4) Provides the following additional sentencing enhancements based on the weight of a substance containing heroin, cocaine base, cocaine, or fentanyl possessed for sale or sold.

   a) 1 kilogram = 3 years

   b) 4 kilograms = 5 years

   c) 10 kilograms = 10 years

   d) 20 kilograms = 15 years

   e) 40 kilograms = 20 years

   f) 80 kilograms = 25 years. (Health and Saf. Code, § 11370.4, subd. (a).)

5) States that in addition to the term of imprisonment provided by law for persons convicted of violating specified drug trafficking crimes, the trial court may impose a fine not exceeding $20,000 for each offense. (Health & Saf. Code, § 11372, subd. (a).)

6) Specifies that a person receiving an additional prison term for trafficking more than a kilogram of a substance containing heroin, cocaine base, cocaine, or fentanyl may, in addition, be fined by an amount not exceeding $1,000,000 for each offense. (Health & Saf. Code, § 11372, subd. (b).)

7) Provides that a person receiving an additional prison term for trafficking more than four kilograms of a substance containing heroin, cocaine base, cocaine fentanyl may, in addition, be fined by an amount not to exceed $4,000,000 for each offense. (Health & Saf. Code, § 11372, subd. (c).)

8) Provides that a person receiving an additional prison term for trafficking more than 10 kilograms of a substance containing heroin, cocaine base, cocaine fentanyl may, in addition,

be fined by an amount not to exceed $4,000,000 for each offense. (Health & Saf. Code, § 11372, subd. (c).)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "Fentanyl poisoning is the #1 killer for individuals ages 18-45.

"Nationwide, over 150 people die every day from fentanyl overdoses and poisonings.

"In the three counties I represent, Fresno, Madera and Merced, there have been over 130 deaths linked to fentanyl in 2021 alone.

"Assembly Bill (AB) 3171 cracks down on drug trafficking of fentanyl by holding drug dealers accountable for fentanyl overdoses, poisonings and for harming our communities.

"The increased penalties reflect Governor Newsom's call to hold the "poison peddlers accountable" for the spike in fentanyl overdoses, poisonings and deaths.

"Under the bill, fentanyl drug dealers face increased jail sentences ranging from 4 to 13 years."

2) **AB 2782 (Jim Patterson), of the 2023-2024 Legislative Session**: Under existing law, a person convicted of possession for sale of a substance containing fentanyl may be incarcerated for up to four years. (Health & Saf. Code, § 11351.) AB 2782 (Jim Patterson) would lower the amount of a substance containing fentanyl required for weight enhancements that increase the penalty and fine for trafficking fentanyl, beginning at 28.35 grams. This bill would increase the penalties for possessing for sale 28.35 grams or more of a substance containing to incarceration of up to six years.

As such, if both this bill and the enhancements under AB 2782 were to become law, the term of incarceration for possessing for sale 28.35 grams or more of a substance containing fentanyl would increase from up to four years to up to nine years. Similarly, a conviction for transporting, importing, or giving away 28.35 grams or more of a substance containing fentanyl would increase from up to 5 years to as many as 12 years; and a conviction for transportation to a noncontiguous county for purposes of sale would increase from up to nine years to 16 years.

Further, the enhancement proposed by AB 2782 would increase as the amount possessed increases. For example, if both this bill and the enhancements under AB 2872 were to become law, the term of incarceration for possessing for sale 100 grams or more of a substance containing fentanyl would increase from up to four years to up to 11 years; a conviction for transporting, importing, or giving away 100 grams or more of a substance containing fentanyl would increase from up to 5 years to as many as 14 years; and a conviction for transportation to a noncontiguous county for purposes of sale would increase from up to nine years to 18 years.

The annual cost to incarcerate a person in state prison is roughly $140,000. As noted above, this bill and AB 2782 together would considerably increase penalties for possessing and/or transporting 28.35 grams or more fentanyl. If 1,000 defendants are sentenced to the increases proposed by these bills, the additional CDCR costs will quickly increase by hundreds of millions, if not several billion, dollars.

3) **Harsher Sentences for Drug Trafficking Unlikely to Reduce Drug Use or Deter Criminal Conduct:** 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].)

This bill attempts to reduce the number of people dying of overdoses involving fentanyl by deterring people who traffic fentanyl with a sentencing enhancement ranging from three to 13 years based on the amount. However, ample research on the impact of increasing penalties for drug offenses on criminal behavior has called into question the effectiveness of such measures. In a report examining the relationship between prison terms and drug misuse, PEW Charitable Trusts found "[n]o relationship between drug imprisonment rates and states' drug problems," finding that "high rates of drug imprisonment did not translate into lower rates of drug use, arrests, or overdose deaths." (PEW, *More Imprisonment Does Not Reduce State Drug Problems* (Mar. 2018) p. 5 <https://www.pewtrusts.org/-/media/assets/2018/03/pspp_more_imprisonment_does_not_reduce_state_drug_problems.pdf> [last viewed Feb. 6, 2023]; see generally, Przybylski, *Correctional and Sentencing Reform for Drug Offenders* (Sept. 2009) < http://www.ccjrc.org/wp-content/uploads/2016/02/Correctional_and_Sentencing_Reform_for_Drug_Offenders.pdf> [last visited Mar. 20, 2023].) Put differently, imprisoning more people for longer periods of time for drug trafficking offenses is unlikely to reduce the risk of illicit drugs in our communities.

Unduly long sentences are counterproductive for public safety and contribute to the dynamic of diminishing returns as the incarcerated population expands. (*Long-Term Sentences: Time to Reconsider the Scale of Punishment*, 87 UMKC L.Rev. 1 (Nov. 5, 2018).) According to the U.S. Department of Justice, "Laws and policies designed to deter crime by focusing mainly on increasing the severity of punishment are ineffective partly because criminals know little about the sanctions for specific crimes. More severe punishments do not 'chasten' individuals convicted of crimes, and prisons may exacerbate recidivism." (National Institute of Justice, U.S. Department of Justice, Five Things About Deterrence (June 5, 2016) <https://nij.ojp.gov/topics/articles/five-things-about-deterrence> [last visited Feb. 2, 2023.]) Increasingly punitive sentences add little to the deterrent effect of the criminal justice system; and mass incarceration diverts resources from program and policy

initiatives that hold the potential for greater impact on public safety. (*Long-Term Sentence, supra.*)

The Council on Criminal Justice reviewed the evidence on the effect of harsher punishments on criminal behavior and came to the same conclusion. It reported:

> The empirical evidence on selective incapacitation suggests that long sentences may produce short- and long-term public safety benefits for individuals engaged in violent offending, but may produce *the opposite effect* for those engaged in drug-related offending…where an incarcerated individual is quickly replaced by a new recruit. This "replacement effect" occurs—and undermines the overall crime-reducing effects of incapacitation—when there is "demand" for a particular criminal activity. The illicit drug business offers the most obvious example: when someone who plays a role in a drug trafficking organization is incarcerated, someone else must take his or her place…
>
> Additional analyses further indicate that incarcerating people for drug trafficking may result in increased crimes rates in general and increased rates of violent crime, specifically, because of organizational destabilization and the need for new recruits to prove themselves.
>
> (Long Sentences Task Force, Council on Criminal Justice, *The Impact of Long Sentences on Public Safety: A Complex Relationship* (Nov. 2022) p. 8 https://councilonci.org/wp-content/uploads/2022/11/Impact-of-Long-Sentences-on-Public-Safety.pdf [last visited Apr. 24, 2023] [internal citations omitted] [emphasis added].)
>
> Additionally, as the Council on Criminal Justice's report notes, the harsher punishments for drug offenses may actually do harm. For example, they may push persons selling and using drugs to engage in riskier behaviors. (See Friedman et al., *Relationships of deterrence and law enforcement to drug-related harms among drug injectors in US metropolitan areas* (2006) AIDS Vol 20 No 1.)
>
> According to PEW, "[A] large body of prior research…cast[s] doubt on the theory that stiffer prison terms deter drug misuse, distribution, and other drug-law violations." (PEW, *supra.*) PEW concludes:
>
> Putting more drug-law violators behind bars for longer periods of time has generated enormous costs for taxpayers, but it has not yielded a convincing public safety return on those investments. Instead, more imprisonment for drug offenders has meant limited funds are siphoned away from programs, practices, and policies that have been proved to reduce drug use and crime. (*Ibid.*)

Based on this research, one might reasonably question whether increasing the penalties for drug trafficking fentanyl would meaningfully impact the drug's availability or the number of deaths resulting from its illicit fentanyl use.

4) **People Who Deal Drugs Are Often People Who Use Drugs:** Persons who participate in the drug trade often are themselves people who use drugs. According to the National Research Council: "Facing limited opportunities in legal labor markets and already in contact with drug-selling networks, users provide a ready low-wage labor pool for illegal markets."

(https://nap.nationalacademies.org/read/12976/chapter/4 - 24). According to a Bureau of Justice Statistics report, 70% of persons serving time in state prison for drug trafficking offenses used drugs in the month before the offense, and 42.3% of those persons had been using drugs at the time of their offense. (Bureau of Justice Statistics, *Special Report: Drug Use and Dependence, State and Federal Prisoners*, 2004 (Oct. 2006) a p. 5 <https://bjs.ojp.gov/content/pub/pdf/dudsfp04.pdf> [last visited Mar. 20, 2023].) According to one study, "[Street-involved youth implicated in the drug trade] appear to be motivated by drug dependence," finding: "Among participants who reported drug dealing, 263 (85.6%) individuals stated that the main reason that they sold drugs was to pay for their personal drug use." (Werb et al., *Risks surrounding drug trade involvement among street-involved youth*, Am. J. Drug Alcohol Abuse (2008) < https://pubmed.ncbi.nlm.nih.gov/19016187/> [last visited Feb. 2, 2023].) Still another found that "White youths who misused prescription drugs were three times more likely to sell drugs, compared to White youths who did not misuse prescription drugs." (Floyd et al., *Adolescent Drug Dealing and Race/Ethnicity: A Population-Based study of the Differential Impact on Substance Use on Involvement in Drug Trade*, Amer. J. of Drug & Alcohol Abuse, Vol. 36, No. 2 (Mar. 2010) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2871399/ - R7> [last visited Mar. 17, 2022].)

Will the threat of a longer term of incarceration deter people already at a relatively high risk of death from illicit drug use?

5) **Argument in Support**: According to the *League of California Cities*, "A study by the Centers for Disease Control and Protection names fentanyl the deadliest drug in the United States. Fentanyl is often disguised as other synthetic opioids or drugs, then sold to users who are unaware that fentanyl is a key ingredient. Users who unknowingly ingest these substances believing they are taking a less powerful drug are much more susceptible to overdose or even death. In fact, the Drug Enforcement Administration (DEA) recently released a warning on the sharp increase in fake prescription drugs containing fentanyl.

"Under current law, fentanyl is listed as a controlled substance under California's Uniform Controlled Substances Act which has five schedules. Schedule 1 substances are considered to have a high potential for abuse and no accepted medical use, while Schedules 2 through 5 have potential for abuse but are recognized for their medical benefits. Fentanyl is currently listed as a Schedule II controlled substance. Under current law, possession of controlled substances for sale is punishable by imprisonment for 2, 3, and 4 years, while transportation and sale of those substances results in incarceration term of 3, 4, or 5 years.

"This bill would increase sentences for those convicted of possession with intent to sell of more than 28.35 grams of fentanyl or fentanyl analog to 4, 5, or 6 years of state prison. Further, this bill would further target those who traffic fentanyl by increasing sentences for transporting both into the state or within the state with the intent to sell or facilitate a sale of more than 28.35 grams of fentanyl or fentanyl analog to 7, 10, or 13 years of incarceration.

"One of Cal Cities top priorities in 2024 is to address the fentanyl crisis which includes additional penalties, diversion and other treatment needs."

6) **Argument in Opposition**: According to *Ella Baker Center for Human Rights*, "Specifically, AB 3171 would amend Health & Safety Codes 11351 and 11352 to increase the number of

years a person would be incarcerated should they be convicted of possession for sale of fentanyl (HSC 11351) or sale, transportation, furnishing, administering, or giving away fentanyl, if the weight was more than 28.35 grams (HSC 11352). The upper penalty for violation of HSC 11351 would be six years, and the upper penalty for HSC 11352 would be 13 years if fentanyl were transported from one county to another noncontiguous county.

We are in the midst of a tragic increase in drug overdose deaths. Thousands of lives are lost in California every year – each one leaving an irreparable rift in the hearts and lives of their families and friends. To prevent future deaths and suffering, California should implement evidence-based solutions to prevent avoidable deaths. California needs to invest more in substance use disorder treatment and harm reduction rather than pursuing expensive and unproductive incarceration policies.

"What health benefit do the people of California get from punishing people with many more years of incarceration? Research has established that persons leaving prisons are far, are more likely to die of a drug overdose than the general population.2 And there is no research that we are aware of that shows that long sentences reduce the availability of drugs or reduce drug harm. On the contrary, available research finds that long sentences have negligible public safety benefits 3, and measurable negative effects on families and communities.4

"Furthermore, our state and local budgets are not unlimited – we should not lock them up in failed policies. The approximate per capita cost of a year in a California state prison is now over $132,860, a sum greater than the tuition at California's most expensive university.5 The approximate cost of a year of methadone treatment for an opioid-dependent person is $6,552. The approximate cost of buprenorphine treatment is less than $6,000.6 It would be healthier, safer, and better for public safety to send an additional 20 people to methadone treatment or 22 people to buprenorphine treatment than to incarcerate one person for even a year, much less 10, 15, or 20 years. In terms of saving lives, widely expanding the availability of low-barrier medically assisted drug treatment and harm reduction programs would be a much more intelligent investment of public dollars.

"The war on drugs failed us, failed families, and failed communities. While incarcerating millions of Americans, drugs became more widely available, stronger, and cheaper than ever before. It seems completely irrational to expand on that failed policy."

7) **Related Legislation**:

a) AB 2782 (Jim Patterson), would impose an additional enhancement when a person is convicted of specified drug offenses involving fentanyl, including sale, possession for sale, and transportation, when the substance containing fentanyl exceeds a specified weight. AB 2782 will be heard today in this committee.

b) AB 1848 (Davies), would expand an existing one year sentencing enhancement for any person over the age of 18 who induces a minor to transport, carry, sell, give away, prepare for sale, or sell heroin, cocaine, or cocaine base on any church, synagogue, youth center, day care, or public swimming pool grounds to include the transport, carry, sell, give away, prepare for sale, or sell heroin, cocaine, cocaine base, and fentanyl either on the grounds of, or within 1000 feet from a church, synagogue, youth center, day care, or public swimming pool. The hearing on AB 1848 was canceled at the request of the

author.

c) AB 2045 (Hoover), would add fentanyl to the list of controlled substance for which a defendant may be sentenced to an additional period of incarceration for using, inducing, or employing a minor to transport or possess specified controlled substances. AB 2045 is pending hearing in the Assembly Appropriations Committee.

8) **Prior Legislation**:

a) AB 701 (Villapudua), Chapter 540, Statutes of 2023, applied the existing weight enhancements that increase the penalty and fine for trafficking controlled substances containing heroin, cocaine base, and cocaine to fentanyl.

b) AB 955 (Petrie-Norris), of the 2023-2024 Legislative Session, would provide that a person who sells fentanyl on a social media platform in California shall be punished by imprisonment for a period of three, six, or nine years in county jail. This committee retained AB 955 of interim study.

c) AB 1058 (Jim Patterson), of the 2023-2024 Legislative Session, was identical to this bill. AB 1058 failed passage in this committee.

d) SB 62 (Nguyen), of the 2023-2024 Legislative Session, was substantially similar to AB 701 above. SB 62 failed passage in the Senate Public Safety Committee.

e) SB 237 (Grove), of the 2023-2024 Legislative Session, was identical to this bill. SB 237 failed passage in the Senate Public Safety Committee.

f) AB 1955 (Nguyen), of the 2021-2022 Legislative Session, was substantially similar to AB 701 above. AB 1955 failed passage in this committee.

g) AB 1351 (Petrie-Norris), of the 2021-2022 Legislative Session, was substantially similar to AB 701 above. The hearing on AB 1351 was canceled at the request of the author.

h) AB 2975 (Petrie-Norris), of the 2019-2020 Legislative Session, was substantially similar to AB 701 above. AB 2975 was not heard in this committee.

i) AB 2467 (Jim Patterson), of the 2017-2018 Legislative Session, was identical to this bill. SB 2467 failed passage in this committee.

j) SB 1103 (Bates), of the 2017-2018 Legislative Session, was substantially similar to AB 701 above. SB 1103 failed passage in the Senate Public Safety Committee.

k) SB 1323 (Bates), of the 2015-2016 Legislative Session, was substantially similar to AB 701 above. SB 1323 was held on the Assembly Appropriations Committee Suspense File.

REGISTERED SUPPORT / OPPOSITION:

Support

California Association of Highway Patrolmen
California State Sheriffs' Association
City of Santa Clarita
City of Vista
League of California Cities
Peace Officers Research Association of California (PORAC)
Santa Clarita; City of

Opposition

ACLU California Action
California Public Defenders Association
Californians for Safety and Justice
Ella Baker Center for Human Rights
Felony Murder Elimination Project
Friends Committee on Legislation of California
Initiate Justice
Initiate Justice Action
Legal Services for Prisoner With Children
San Francisco Public Defender
Smart Justice California, a Project of Tides Advocacy
Uncommon Law
Underground Scholars Initiative UC Berkeley
Vera Institute of Justice

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

Amended Mock-up for 2023-2024 AB-3171 (Soria (A))

Mock-up based on Version Number 99 - Introduced 2/16/24
Submitted by: Staff Name, Office Name

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

SECTION 1. Section 11351 of the Health and Safety Code is amended to read:

11351. (a) Except as provided in subdivision (b) and as otherwise provided in this division, a person who possesses for sale or purchases for purposes of sale (1) any controlled substance specified in subdivision (b), (c), or (e) of Section 11054, specified in paragraph (14), (15), or (20) of subdivision (d) of Section 11054, or specified in subdivision (b) or (c) of Section 11055, or specified in subdivision (h) of Section 11056, or (2) any controlled substance classified in Schedule III, IV, or V which is a narcotic drug, shall be punished by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code for two, three, or four years.

(b) **(1)** Notwithstanding subdivision (a), a person who possesses for sale or purchases for purposes of sale more than 28.35 grams of fentanyl, more than 28.35 grams of an analog of fentanyl, a substance containing more than 28.35 grams of fentanyl, or a substance containing more than 28.35 grams of an analog of fentanyl shall be punished by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code for four, five, or six years.

(2) For the purpose of this subdivision, the person must have knowledge that the specific controlled substance possessed is fentanyl.

SEC. 2. Section 11352 of the Health and Safety Code is amended to read:

11352. (a) Except as provided in subdivision (c) and as otherwise provided in this division, a person who transports, imports into this state, sells, furnishes, administers, or gives away, or offers to transport, import into this state, sell, furnish, administer, or give away, or attempts to import into this state or transport (1) any controlled substance specified in subdivision (b), (c), or (e), or paragraph (1) of subdivision (f) of Section 11054, specified in paragraph (14), (15), or (20) of subdivision (d) of Section 11054, or specified in subdivision (b) or (c) of Section 11055, or specified in subdivision (h) of Section 11056, or (2) any controlled substance classified in Schedule III, IV, or V which is a narcotic drug, unless upon the written prescription of a physician, dentist, podiatrist, or veterinarian licensed to practice in this state, shall be punished by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code for three, four, or five years.

(b) Notwithstanding the penalty provisions of subdivision (a) and except as provided in paragraph (2) of subdivision (c), a person who transports any controlled substances specified in subdivision (a) within this state from one county to another noncontiguous county shall be punished by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code for three, six, or nine years.

(c) (1) Notwithstanding subdivision (a), a person who transports, imports into this state, sells, furnishes, administers, or gives away, or offers to transport, import into this state, sell, furnish, administer, or give away, or attempts to import into this state or transport more than 28.35 grams of fentanyl, more than 28.35 grams of an analog of fentanyl, a substance containing more than 28.35 grams of fentanyl, or a substance containing more than 28.35 grams of an analog of fentanyl shall be punished by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code for seven, eight, or nine years.

(2) Notwithstanding subdivision (b), a person who transports more than 28.35 grams of fentanyl, more than 28.35 grams of an analog of fentanyl, a substance containing more than 28.35 grams of fentanyl, or a substance containing more than 28.35 grams of an analog of fentanyl within this state from one county to another noncontiguous county shall be punished by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code for 7, 10, or 13 years.

(3) For the purposes of this subdivision, the person must have knowledge that the specific controlled substance possessed is fentanyl.

(d) For purposes of this section, "transports" means to transport for sale.

(e) This section does not preclude or limit the prosecution of an individual for aiding and abetting the commission of, or conspiring to commit, or acting as an accessory to, any act prohibited by this section.

SEC. 3. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.