California State Assembly

PUBLIC SAFETY

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AGENDA

Tuesday, April 23, 2024
9 a.m. -- State Capitol, Room 126

PART II

AB 2456 (JONES-SAWYER) – AB 2824 (McCARTY)

Date of Hearing: April 23, 2024
Counsel: Andrew Ironside

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Kevin McCarty, Chair

AB 2456 (Jones-Sawyer) – As Amended April 1, 2024

SUMMARY: Extends civil compromise eligibility to non-violent and non-sex offense felonies. Specifically, **this bill**:

1) Expands the cases that may be resolved through civil compromise to include any felony offense that is not a violent felony or one that requires the defendant to register as a sex offender, except as specified.

2) Provides that a felony is not eligible for civil compromise where crime results in death.

3) Provides that it is the intent of the Legislature, that, if the defense counsel, or the defendant if they are unrepresented, communicates an offer to civilly compromise the case, the district attorney should, in a timely manner, convey to a victim the offer of civil compromise.

4) Authorizes the court, if each person injured with respect to a particular offense in the action acknowledges that they have received satisfaction for the injury at any time before the trial, to dismiss the charges in the interests of justice and give reasons on the record.

5) Provides that a civil compromise may be granted with respect to some or all of the eligible counts charged in a case in the discretion of the court, and that the order granted for any offense is a bar to another prosecution for the same offense.

6) Provides that satisfaction for the injury may be demonstrated by payment of a specific sum of money or by other means with the agreement of the injured person, including, but not limited to, nonmonetary resolutions, including but not limited to, community service or repairing or cleaning of property damage.

EXISTING LAW:

1) Provides that any misdemeanor resulting in injury for which there is a civil remedy may be compromised except when committed as follows:

   a) By or upon an officer of justice, while in the execution of the duties of his or her office;

   b) Riotously;

   c) With an intent to commit a felony;

   d) In violation of any court order, as specified;

e) By or upon any family or household member or other specified individuals; or,

f) Upon an elder or child, as specified. (Pen. Code, § 1377, subds. (a)-(g).)

2) Provides that, if the person injured appears before the court in which the action is pending at any time before trial, and acknowledges that he has received satisfaction for the injury, the court may, in its discretion, on payment of the costs incurred, order all proceedings to be stayed upon the prosecution, and the defendant to be discharged therefrom; but in such case the reasons for the order must be set forth therein, and entered on the minutes. The order is a bar to another prosecution for the same offense. (Pen. Code, § 1378.)

3) Provides that the purpose of sentencing is public safety achieved through punishment, rehabilitation, and restorative justice. (Pen. Code, § 1170, subd. (a)(1).)

4) Creates the Committee on Revision of the Penal Code within the California Law Revision Commission. (Gov. Code, § 8280, subd. (b).)

5) Requires the Committee on Revision of the Penal Code to study and make recommendations on revision of the Penal Code to establish alternatives to incarceration that will aid in the rehabilitation of offenders and improve the system of parole and probation. (Gov. Code, § 8290.5, subd. (a).)

6) Declares the Legislature's commitment to reducing recidivism among criminal offenders. (Pen. Code, § 3450, subd. (b)(1).)

7) Commits the state to reinvesting criminal justice resources to support community corrections programs and evidence-based practices that will achieve improved public safety returns on the state's substantial investment in its criminal justice system. (Pen. Code, § 3450, subd. (b)(4).)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "Civil compromise is an alternative resolution to criminal cases in which a judge can agree to dismiss charges if a victim acknowledges that they have received satisfaction, usually achieved through the defendant compensating the victim. This gives victims an active role in the resolution of their case and promotes accountability, empathy, and rehabilitation over punitive measures. Currently this option only exists for misdemeanors but, according the Committee on the Revision of the Penal Code, extending civil compromise to non-violent, non-sexual felonies would give victims a greater voice in a system which almost exclusively makes choices for them. AB 2456 will include non-sexual, non-violent felonies on the list of crimes which are eligible to be resolved through civil compromise, when chosen by a victim and approved by a judge. This bill will also clarify the definition of "satisfaction" to more clearly allow the use of non-monetary compensation in cases resolved through civil compromise."

2) **Committee on Revision of the Penal Code Recommends Expanding Civil Compromise:** The Committee on Revision of the Penal Code (CRPC) was established to study and

recommend statutory reforms to the Penal Code and associated criminal statutes. (Gov. Code, § 8290.5, subd. (a)(3).) According to the Committee:

> A concept closely related to restorative justice — civil compromise — has long existed in California's Penal Code. California's civil compromise statute dates back to 1872 and allows courts to dismiss most misdemeanor cases if a victim "acknowledges that they have received satisfaction." Civil compromises typically involve payment to the crime victim from the defendant for damage to property. When a victim agrees to a civil compromise, the judge must decide whether the case is appropriate for dismissal.
>
> Like restorative justice resolutions, civil compromises center a victim's needs by giving them agency to determine what must be done to repair the harm done. Civil compromises also preserve the historical role of crime victims in the prosecution of criminal offenses. In the early years of the United States' court system, victims of crime would hire private prosecutors to bring charges against accused persons, often seeking money damages, and move to dismiss when those claims were satisfied. While the private prosecution system had many flaws and was replaced by the state-led prosecution system we have today, courts have long recognized the public policy benefits of checking, rather than encouraging, criminal prosecutions when an offense is between private individuals, and civil compromises are one way to do so.
>
> Expanding the reach of California's civil compromise laws has the potential to produce some of the same benefits as a traditional restorative justice process by placing a victim in control of tailoring a resolution. The streamlined process allowed by civil compromise may be more attractive to some victims who do not have the resources or interest in engaging in the more involved restorative justice process.
>
> Currently, civil compromise resolutions are limited to misdemeanor offenses. But there are many nonviolent, non-sex offense felonies that could be resolved through civil compromise without damaging public safety including offenses such as vandalism, bicycle theft, car break-ins, and welfare fraud.
>
> Similar to restorative justice, in order for victims of crime to have access to this benefit, they should be informed of its availability early in the process. California should expand the applicability of its civil compromise laws, while leaving in place current law that the final decision on whether to dismiss a case is made by a judge.

(Committee on Revision of the Penal Code, 2022 Annual Report (Dec. 2022) p. 25-26 <http://www.clrc.ca.gov/CRPC/Pub/Reports/CRPC_AR2022.pdf> [last visited Apr. 13, 2024].) The Committee observed that misdemeanors most commonly resolved with civil compromise were hit-and-runs and vandalism. (*Id.* at p. 26.) The Committee recommended expanding the crimes eligible for civil compromise to include non-violent, non-sex offense felonies. (*Id.* at p. 25.) This bill would effectuate that recommendation.

3) **Argument in Support**: According to *Californians for Safety and Justice*, the bill's sponsor, "Currently, civil compromise allows courts to dismiss most misdemeanor cases if a victim 'acknowledges that they have received satisfaction.' If a victim agrees to a civil compromise, the judge must decide if the case is appropriate for dismissal. Then, satisfaction typically involves payment to the crime victim from the defendant for property damage. This option

has long existed in California's Penal Code - dating back to 1872.

"Like restorative justice resolutions, civil compromises center a victim's needs by giving them agency to determine what must be done to repair the harm done. It also allows the accused person to be accountable for their actions more meaningfully than the traditional criminal legal system. Civil compromise also offers victims a more active role in the resolution process than the traditional justice system and focuses on repairing harm through a cooperative process. This approach promotes accountability, empathy, and rehabilitation over punitive measures.

"Currently, this option only exists for misdemeanors, but extending civil compromise to nonviolent, nonsexual felonies would give victims a greater voice in a system that almost exclusively makes choices for them. Research has shown that victims and survivors feel a higher degree of satisfaction when opting for resolutions that allow them to have an active and meaningful role in the process of deciding what action would help to repair the harm they suffered. This bill will give victims and survivors greater power in the justice process by expanding the crimes eligible to be resolved through civil compromise and clarifying the definition of satisfaction."

4) **Argument in Opposition**: According to the *California Police Chiefs Association*, "AB 2456 allows for numerous crimes, including serious felonies pursuant to Penal Code section 1192.7(c), to be dismissed through "civil compromise." A small sample of Penal Code (P.C.) and Vehicle Code (V.C.) crimes include assault resulting in great bodily injury, assault with a deadly weapon, residential burglary, and crimes with gang enhancements. Further, the bill drastically changes Penal Code section 1378, no longer requiring the victim to appear before the court and acknowledge s/he has received satisfaction for the injury.

   "AB 2456 encourages criminality without consequence by injecting a "buy your way out of your crime through compromise" mentality to avoid responsibility. Because there is no prohibition on the representatives of the offending person from contacting victims, this is going to be an excellent opportunity for defense counsel, defendants, and defendants' family, friends, and fellow gang members to harass and intimidate victims to try to get them to agree. The more timid victims will be identified as the weak link and harassed – thereby silencing the person harmed."

5) **Related Legislation**: AB 2833 (McKinnor), would establish that an individual's participation in and communications related to restorative justice processes are inadmissible in civil and criminal proceedings. AB 2833 is currently pending hearing in the Assembly Judiciary Committee.

6) **Prior Legislation**:

   a) AB 60 (Bryan), Chapter 513, Statutes of 2023, established the statutory right of victims of crimes to be informed that community-based restorative justice programs are available to them.

   b) AB 2167 (Kalra), Chapter 775, Statutes of 2022, declared the intent of the Legislature that the disposition of any criminal case use the least restrictive means possible, and requires the court presiding over a criminal matter to consider alternatives to

incarceration, including, without limitation, collaborative justice court programs, diversion, restorative justice, and probation.

c) AB 2598 (Weber), Chapter 914, Statutes of 2022, requires the Department of Education to develop evidence-based practices for restorative justice practice implementation in schools.

d) AB 1670 (Bryan), of the 2021-2022 Legislative Session, would have created the Commission on Alternatives to Incarceration within the California Health and Human Services Agency to research, among other things, restorative justice practices and opportunities. AB 1670 was held on suspense in the Assembly Appropriations Committee.

e) AB 160 (Committee on Budget), Chapter 771, Statutes of 2022, requires CDCR, if the victim has submitted a request for notice that an offender is being released from CDCR custody, to provide information to the victim about opportunities for victims or their family members to engage in restorative justice programs.

f) SB 678 (Glazer), of the 2019-2020 Legislative Session, would have established the Restorative Justice Pilot Program which, upon appropriation by the Legislature, would have required the Board of State and Community Corrections (BSCC) to make 5-year grants to up to 3 counties to establish and operate the program. SB 678 was held in suspense in the Senate Appropriations Committee.

REGISTERED SUPPORT / OPPOSITION:

Support

California Attorneys for Criminal Justice
California Public Defenders Association
Californians for Safety and Justice
Californians United for A Responsible Budget
Children's Defense Fund - CA
Communities United for Restorative Youth Justice (CURYJ)
Ella Baker Center for Human Rights
Initiate Justice
Legal Services for Prisoners With Children
Rubicon Programs
Smart Justice California, a Project of Tides Advocacy
Young Women's Freedom Center

Opposition

California District Attorneys Association
California Police Chiefs Association
California State Sheriffs' Association

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

Date of Hearing: April 23, 2024
Chief Counsel: Gregory Pagan

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Kevin McCarty, Chair

AB 2470 (Joe Patterson) – As Amended March 18, 2024

SUMMARY: Adds the crime of felony domestic violence to the list of "Violent Felonies" that subject a defendant to additional penalties, including under California "Three Strikes" Law, and reduce the custody credits that a defendant may receive.

EXISTING LAW:

1) Defines a "violent felony" as any of the following (Pen. Code § 667.5(c).):

   a) Murder or voluntary manslaughter;

   b) Mayhem;

   c) Rape or spousal rape accomplished by means of force or threats of retaliation;

   d) Sodomy by force or fear of immediate bodily injury on the victim or another person;

   e) Oral copulation by force or fear of immediate bodily injury on the victim or another person;

   f) Lewd acts on a child under the age of 14 years, as defined;

   g) Any felony punishable by death or imprisonment in the state prison for life;

   h) Any felony in which the defendant inflicts great bodily injury on any person other than an accomplice, or any felony in which the defendant has used a firearm, as specified;

   i) Any robbery;

   j) Arson of a structure, forest land, or property that causes great bodily injury;

   k) Arson that causes an inhabited structure or property to burn;

   l) Sexual penetration accomplished against the victim's will by means of force, menace or fear of immediate bodily injury on the victim or another person;

   m) Attempted murder;

n) Explosion or attempted explosion of a destructive device with the intent to commit murder;

o) Explosion or ignition of any destructive device or any explosive which causes bodily injury to any person;

p) Explosion of a destructive device which causes death or great bodily injury;

q) Kidnapping;

r) Assault with intent to commit mayhem, rape, sodomy or oral copulation;

s) Continuous sexual abuse of a child;

t) Carjacking, as defined;

u) Rape or penetration of genital or anal openings by a foreign object;

v) Felony extortion;

w) Threats to victims or witnesses, as specified;

x) First degree burglary, as defined, where it is proved that another person other than an accomplice, was present in the residence during the burglary;

y) Use of a firearm during the commission of specified crimes; and,

z) Possession, development, production, and transfers of weapons of mass destruction.

2) Provides that when a defendant is convicted on a new felony offense and has a prior conviction for a specified violent felony, the defendant shall receive a consecutive three-year term for each prior separate prison term served by the defendant where the prior offense was one of the specified violent felonies specified, unless the defendant meets certain conditions. (Pen. Code § 667.5, subd. (a).)

3) States that a conviction of a violent felony counts as a prior conviction for sentencing under the two and three strike law. (Pen. Code § 667.)

4) 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

5) Specifies that notwithstanding any other law, any person who is convicted of a felony that is contained in the "violent" felony list shall accrue no more than 15% of work-time credit. (Pen. Code § 2933.1, subd. (a).)

6) Defines a "serious felony" as any of the following: murder or manslaughter; mayhem; rape; sodomy; oral copulation; lewd acts on a child under the age of 14; any felony punishable by death or imprisonment for life; any felony in which the defendant inflicts great bodily injury;

attempted murder; assault with the intent to commit rape or robbery; assault with a deadly weapon or instrument on a peace officer; assault by a life prisoner on a non-inmate; assault with a deadly weapon by an inmate; arson; exploding a destructive devise with the intention to commit murder or great bodily injury; first-degree burglary; armed robbery or bank robbery; kidnapping; holding of a hostage by a person confined to a state prison; attempting to commit a felony punishable by death or life in prison; any felony where the defendant personally used a dangerous or deadly weapon; selling or otherwise providing heroin, PCP or any type of methamphetamine-related drug; forcible sexual penetration; grand theft involving a firearm; carjacking; assault with the intent to commit mayhem, rape, sodomy or forcible oral copulation; throwing acid or other flammable substance; assault with a deadly weapon on a peace officer; assault with a deadly weapon on a member of the transit authority; discharge of a firearm in an inhabited dwelling or car; rape or sexual penetration done in concert; continuous sexual abuse of a child; shooting from a vehicle; intimidating a victim or witness; any attempt to commit the above-listed crimes except assault or burglary; and using a firearm in the commission of a crime and possession of weapons of mass destruction. (Pen. Code § 1192.7(c).)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, ""By definition, domestic violence is violent; however, under current California law, in most instances, felony domestic violence convictions are considered "nonviolent offenses" and are eligible for automatic early release under Prop. 57 after serving only 50% of their sentence. This reality has resulted in the perpetuation of domestic abuse, and in some cases the loss of life. According to research compiled by USA Today, the Associated Press, and Northwestern University, more than 68% of mass shooters have a documented history of domestic violence or have killed a family member. Whether you're a Republican, Independent, or Democrat, you can't argue with the data. Statistics show that violent domestic abusers are the individuals most likely to commit mass shootings. If we hold them accountable and force them to serve the time in which they were sentenced, we will likely reduce mass shootings."

2) **Domestic Violence Penalties**: Domestic violence is currently an alternate felony/misdemeanor (wobbler) punishable by imprisonment in the state prison for two, three or four years, or by imprisonment in a county jail. A second offense within seven years of a prior conviction is punishable up to five years in prison. (Pen. Code, § 273.5.) An enhancement adding up to five more years could apply if great bodily injury is inflicted. (Pen. Code, § 12022.7, subd. (e).). The wide range of potential sentences is because the element of the crime of domestic violence requiring that a "traumatic condition" be inflicted in order to sustain a conviction need not be serious. In fact, it could be rather minor in nature. There are twenty three "violent felonies" listed in Penal Code § 273.5. All of them are serious in nature in that they may ONLY be charged as a "straight" felony. None of them has an alternative misdemeanor option. There are NO "wobblers' on the "violent felony list. It would be unprecedented to add felony domestic violence to the list of "violent felonies" because of, as mentioned above, the crime of domestic violence is a "wobbler" and would be inappropriate to add to the "violent felony" list.

3) **Credit Limitations for Violent Felonies with State Prison Sentences**: Under Penal Code section 2933.1, a defendant convicted of a violent felony as defined by Penal Code section 667.5, subdivision (c), has their presentence conduct credits limited to 15 percent of actual confinement time. (Cal. Code Regs., tit. 15, § 3043.1; *People v. Brown* (2012) 54 Cal.4th 314, 321.)

   A violent felony conviction also affects post-sentence credits. As previously discussed, Proposition 57 gave incarcerated persons in state prison the ability to earn additional, nonstatutory credits for sustained good behavior and for approved rehabilitative or educational achievements. The increased credit-earning opportunities incentivizes incarcerated people to take responsibility for their own rehabilitation. (https://www.cdcr.ca.gov/proposition57/, *supra.*) Under the California Department of Corrections and Rehabilitation (CDCR) regulations, a violent felony limits good conduct credits (GCC) to 33.3 percent of the total incarceration time, as opposed to 50 percent for a non-violent felony. (*Ibid*; 15 Cal. Code of Regs. § 3043.2.)

   Additionally, under CDCR regulations, persons convicted of nonviolent crimes earn 66.6 percent GCC while housed in camp or Minimum Support Facility (MSF) settings. People convicted of violent crimes, however, earn 50 percent GCC in fire camp settings and 33.3 percent in MSF settings. (See (https://www.cdcr.ca.gov/proposition57/, *supra.*)

   By adding this offense to the list of violent felonies in Penal Code section 667.5, subdivision (c), this offense would be subject to the violent felony credit limitations.

4) **Increased Penalties and Lack of Deterrent Effect:** The National Institute of Justice (NIJ) has looked into the concept of improving public safety through increased penalties. (https://nij.ojp.gov/about-nij.) As early as 2016, the NIJ has been publishing its findings that increasing punishment for given offenses does little to deter criminals from engaging in that behavior. ("Five Things About Deterrence," NIJ, May 2016, available at: https://www.ojp.gov/pdffiles1/nij/247350.pdf].) The NIJ has found that increasing penalties are generally ineffective and may exacerbate recidivism and actually reduce public safety. (*Ibid.*) These findings are consistent with other research from national institutions of renown. (See Travis, *The Growth of Incarceration in the United States: Exploring Causes and Consequences*, National Research Council of the National Academies of Sciences, Engineering, and Medicine, April 2014, at pp. 130 -150 available at: https://academicworks.cuny.edu/cgi/viewcontent.cgi?article=1026&context=jj_pubs, [as of Feb. 25, 2022].) Rather than penalty increases, the NIJ, advocates for polices that "increase the perception that criminals will be caught and punished" because such perception is a vastly more powerful deterrent than increasing the punishment. ("Five Things About Deterrence," *supra.*)

5) **Three Strikes Implications**: In general, violent felonies as specified in Penal Code section 667.5 are considered "strikes" for purposes of California's Three Strikes law. However, Proposition 36, which was passed by California voters on November 6, 2012, specifies that only the crimes that were included in the "violent felonies" list as of November 7, 2012, shall be treated as strikes for purposes of the Three Strikes law.

   Notwithstanding subdivision (h) of Section 667, for all offenses committed on or after November 7, 2012, all references to existing statutes in subdivisions (c) to

(g), inclusive, of Section 667 (Three Strikes Law), are to those statutes as they existed on November 7, 2012.

(Pen. Code, § 667.1; see also Pen. Code, § 1170.125 ["Notwithstanding Section 2 of Proposition 184, as adopted at the November 8, 1994, General Election, for all offenses committed on or after November 7, 2012, all references to existing statutes in Sections 1170.12 and 1170.126 are to those sections as they existed on November 7, 2012].)

This bill would make this offense a strike under California law because this bill would amend the date which defines the list of strikes to include the provisions of this bill.

6) **Argument in Support**: According to the *California State Sheriffs' Association*, "Assembly Bill 2470, which would classify felony domestic violence as a violent felony.

"Under existing law, domestic violence is generally not considered a violent felony. The sole exception is if, in commission of an offense, great bodily injury is inflicted. The current statutory configuration ignores the violence inherent in most domestic violence offenses.

"Domestic violence continues to create countless victims across our state. By adding this offense to the state's list of violent felonies, domestic abusers will face increased penalties that appropriately reflect the severity of their crimes and lifelong harm they inflict upon their victims. Lawmakers should take the long-overdue step of changing California's Penal Code to classify felony domestic violence as a violent felony."

7) **Argument in Opposition**: According to the *California Attorneys for Criminal Justice,* "There are several reasons why CACJ opposes this bill.

"First, a violation of PC 273.5 is a "wobbler" under California law, meaning it can be either a misdemeanor or a felony depending on the facts of the case and the accused's prior criminal history. Currently, PC 667.5(c) does not include any offense that is a "wobbler" under California law. There is no justifiable reason to make a domestic violence crime that is a possible misdemeanor a "violent felony" on a par with murder, rape, child molestation, kidnapping, and other offenses punishable by death or life imprisonment. The "Three Strikes" law has been part of California criminal law for approximately 40 years without having a "wobbler" made part of this very draconian punishment scheme. No good reason exists to change this long history now for this offense.

"Second, adding PC 273.5 to the list of "violent felonies" would make it the 24th such crime on this list. Constantly adding new offenses to the list of what are considered the most heinous of crimes under California law, diminishes the severity of these long-standing crimes and reflects more of a temporary political viewpoint rather than a considered, thoughtful reflection of making the punishment truly reflect the seriousness of the crime.

"Third, PC 273.5 is frequently overcharged initially as a felony offense and often reduced to a misdemeanor as part of plea negotiations as more evidence is gained by both the prosecution and the defense. The overcharging of this offense as a felony has significant immigration consequences and often results in non-citizen defendants taking pleas to a misdemeanor PC 273.5 when they may have a realistic chance of acquittal at trial but cannot risk the potential for deportation or exclusion if they are found guilty of a felony. Threatening an

accused with a felony conviction under the "Three Strikes" law for a violation of PC 273.5 as a felony will without question cause more accused individuals to plead guilty to a lesser charge to avoid the immediate and long term consequences of a conviction under the "Three Strikes" law. It very likely will have the effect of also causing more defendants to go forward with a trial because they do not want to plead to a felony that makes them a 'Three Strikes' defendant forever."

8) **Related Legislation**: AB 3231 (Villapudua), adds felony hate crimes, or any felony in which a hate crimes enhancement is imposed, to the list of violent felonies subject to additional penalties. AB 3231 is scheduled for hearing today

9) **Prior Legislation**: AB 229 (Joe Patterson) of the 2023 Legislative Session added several felonies too the "Violent Felony" list, including felony domestic violence. AB 229 failed passage in Assembly Public Safety Committee.

REGISTERED SUPPORT / OPPOSITION:

Support

Arcadia Police Officers' Association
Burbank Police Officers' Association
California Baptist for Biblical Values
California Narcotic Officers' Association
California Police Chiefs Association
California Reserve Peace Officers Association
California State Sheriffs' Association
Claremont Police Officers Association
Corona Police Officers Association
Culver City Police Officers' Association
Deputy Sheriffs' Association of Monterey County
Fullerton Police Officers' Association
Legal Services for Prisoners With Children
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

Oppose

ACLU California Action
All of Us or None Riverside
California Alliance for Youth and Community Justice

California Attorneys for Criminal Justice
California Coalition for Women Prisoners
California Public Defenders Association
Californians United for A Responsible Budget
Ella Baker Center for Human Rights
Fair Chance Project
Felony Murder Elimination Project
Immigrant Legal Resource Center
Initiate Justice
Initiate Justice Action
LA Defensa
Pacific Juvenile Defender Center
San Francisco Public Defender
Silicon Valley De-bug
Sister Warriors Freedom Coalition
Smart Justice California, a Project of Tides Advocacy
Survived and Punished
Team Justice
Uncommon Law
Vera Institute of Justice
Young Women's Freedom Center

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

Date of Hearing: April 23, 2024
Counsel: Kimberly Horiuchi

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Kevin McCarty, Chair

AB 2518 (Davies) – As Introduced February 13, 2024

SUMMARY: Prohibits any juvenile adjudicated a ward of the court, as specified, for the crimes of murder, attempted murder, or voluntary manslaughter from owning, possessing, or having custody of a firearm. Specifically, **this bill**:

1) States that any person, who on or after January 1, 2014, is adjudicated a ward of the court because the person committed murder, attempted murder, or voluntary manslaughter, shall not own, possess, or have custody or control of a firearm.

2) Prohibits the destruction of juvenile records that contain a sustained petition for murder, attempted murder, or voluntary manslaughter, making a person ineligible to possess, own, or have custody or control of a firearm.

EXISTING LAW:

1) States any person who has been convicted of a felony under the laws of the United States, the State of California, or any other state, government, or country, or of an offense enumerated in existing law pertaining to violent use of a firearm, or who is addicted to the use of any narcotic drug, and who owns, purchases, receives, or has in possession or under custody or control any firearm is guilty of a felony. (Pen. Code, § 29800, subd. (a)(1).)

2) Provides any person who has two or more convictions for violating existing law pertaining to brandishing a firearm and who owns, purchases, receives, or has in possession or under custody or control any firearm is guilty of a felony. (Pen. Code, § 29800, subd. (a)(2).)

3) States any person who has an outstanding warrant for any offense listed in this subdivision and who has knowledge of the outstanding warrant, and who owns, purchases, receives, or has in possession or under custody or control any firearm is guilty of a felony. (Pen. Code, § 29800, subd. (a)(3).)

4) States any person is guilty of carrying a loaded firearm when the person carries a loaded firearm on the person or in a vehicle while in any public place or on any public street in an incorporated city, city and county, or in any public place or on any public street in a prohibited area of an unincorporated area of a county or city and county. (Pen. Code, § 25850, subd. (a).)

5) States any weapon, used in the commission of a crime, whether a misdemeanor or felony, shall be surrendered to one of the following:

a) The sheriff of a county.

b) The chief of police or other head of a municipal police department of any city or city and county.

c) The chief of police of any campus of the University of California or the California State University.

d) The Commissioner of the California Highway Patrol. (Pen. Code, § 18000, subd. (a).)

6) Clarifies that a finding that the defendant was guilty of the offense but was insane at the time the offense was committed is a conviction for the purposes of surrendering a firearm to law enforcement. (Pen. Code, § 18000, subd. (c).)

7) Provides that any officer to whom a weapon is surrendered, except upon the certificate of a judge of a court of record, or of the district attorney of the county, that the retention thereof is necessary or proper to the ends of justice, shall destroy that weapon and, if applicable, submit proof of its destruction to the court. (Pen. Code, § 18005, subd. (a).)

8) Makes concealed carry of an explosive substance other than fixed ammunition, a nuisance subject to surrender of a firearm. (Pen. Code, § 19190.)

9) Makes the unlawful carrying of a concealed dirk or dagger a nuisance, subject to surrender to law enforcement. (Pen. Code, § 21390.)

10) States any firearm owned or possessed by a felon, as specified, or used in the commission of any misdemeanor, any felony, or an attempt to commit any misdemeanor or any felony, is a nuisance and must be surrendered to law enforcement. (Pen. Code, § 29800, subd. (a)(1).)

11) States a judge in the superior court in which a misdemeanor is being prosecuted may, at the judge's discretion, and over the objection of a prosecuting attorney, offer diversion to a defendant. (Pen. Code, § 1001.95, subd. (a).)

12) States if the defendant has complied with the imposed terms and conditions, at the end of the period of diversion, the judge shall dismiss the action against the defendant. (Pen. Code, § 1001.95, subd. (b).)

13) States any person who is convicted, on or after January 1, 2019, of a misdemeanor domestic violence, and who subsequently owns, purchases, receives, or has in possession or under custody or control, any firearm is guilty of a public offense, punishable by imprisonment in a county jail not exceeding one year or in the state prison, by a fine not exceeding one $1,000, or by both that imprisonment and fine. (Pen. Code, 29805, subd. (b).)

14) Prohibits a juvenile adjudicated for a Welfare and Institutions Code section 707, subdivision (b) pertaining to serious or violent offenses from possessing or owning a firearm unit the person is 30 years of age. (Pen. Code, § 29820, subd. (a).)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement:** According to the author: "Gun Violence is an epidemic that has caused turmoil for both communities and law enforcement agencies for far too long. California has some of the toughest firearm laws on the books in the nation, but common-sense reforms are still needed. We need to ensure the rights of law-abiding firearm owners are protected while going after the convicted criminals or individuals who use a gun in a commission of a crime.

   "AB 2518 is a common-sense measure that will accomplish this goal by closing a loophole in current law that allows individuals convicted of the worst crimes, such as murder, from ever owning a firearm again, regardless of what age they were convicted. If these crimes result in the loss of a firearm if someone is convicted over the age of 18, there is no reason it should not apply to someone who commits the same crime, even as a minor."

2) **Surrender of a Firearm:** Penal Code section 18000 requires the surrender of all firearms deemed to be a nuisance, and section 29300, subdivision (a), states that any weapon possessed, owned or controlled by a convicted felon constitutes a nuisance. Under prior law, persons convicted of a felony were automatically required to surrender all weapons to law enforcement following their conviction.

   Section 29810 provides that in a felony case, a defendant must be advised at the time judgment is rendered of the prohibition against owning a firearm, and must be given a form to facilitate transfer of any firearms they own or possesses. In other words, when a defendant is convicted of a felony and is, going forward, prohibited from owning firearms, they must be given the opportunity to avoid violating section 29300, subdivision (a), by transferring the firearms to a third person, including law enforcement, at the time judgment is rendered. That person, as an agent for the defendant, may then transfer title to the firearms or facilitate their sale.

   Former Penal Code section 12021, subdivision (e) prohibited any individual who has committed certain violent and or serious crimes while a juvenile and who is subsequently determined to be a ward of the state as a result of a violent and or serious crime from possessing a firearm until they are 30 years old. This bill would prohibit possession forever. That provision was recast by SB 1080 in 2010 as Penal Code section 29820, subdivision (a)(1)(A).

3) **Second Amendment:** This provision was expressly authorized as constitutional by *People v. Villa* wherein the court held a juvenile's Second Amendment rights were not infringed by a firearm prohibition:

   > That the state has the power, notwithstanding the Second Amendment, to limit the right of certain juveniles to possess firearms based on conduct that would be a crime for an adult does not transform such a person's juvenile adjudication into a criminal conviction. Rather, we merely recognize that the logic for recognizing an exception to the Second Amendment for certain adult criminals extends to certain juvenile offenders as well. (*People v. Villa* (2009) 178 Cal.App.4th 443, 449.)

However, existing law states a juvenile adjudicated for 707(b) offense is only prohibited from possessing a firearm until 30 years of age. This bill appears to prohibit a juvenile from possessing a firearm forever if convicted of murder, presumably[1] pursuant to Penal Code section 187, attempted murder likely pursuant to Penal Code sections 664 and 187, and voluntary manslaughter, pursuant to Penal Code section 192, subdivision (a).

In *People v. Villa*, the court ruled on whether *District of Columbia v. Heller* (2008) 554 U.S. 570, 595 prohibited firearms prohibition following a conviction for specified serious or violent felonies. The *Villa* court found the restriction consistent with the *Heller* decision:

In *Heller*, the high court addressed the constitutionality of a District of Columbia law prohibiting the possession of all firearms in the district. (*District of Columbia v. Heller, supra,* 554 U.S. at p. 647].) The court analyzed the district's law in light of the Second Amendment and found that an individual has the right to keep and bear firearms. (Internal citation omitted.) ***However, the court recognized this right is not limitless and provided a brief non-exhaustive list of exceptions to the rule of Heller, including the state's ability to prohibit felons from possessing firearms.*** (Emphasis added) (171 L.Ed.2d at pp. 659–660, 678.) Further, the court did not address whether this right is applicable to states or if it applied only to the federal government and left this as an open question. (Emphasis added.) (*People v. Villa* (2009) 178 Cal.App.4th 443, 447.)

More recently, however, the Court in *New York State Rifle & Pistol Ass'n v. Bruen* (2022) 597 U.S. 1 refined its Second Amendment analysis holding that only restrictions that would have been in place at the time the Second Amendment was drafted in 1791 or when the 14th Amendment[2] applied the Second Amendment to the states in 1868. Otherwise, if the restrictions were not contemplated in 1791 or 1868, they are likely invalid.

> "After holding the Second Amendment protected an individual right to armed self-defense, we also relied on the historical understanding of the Amendment to demark the limits on the exercise of that right. We noted that, '[l]ike most rights, the right secured by the Second Amendment is not unlimited." *Heller, supra*, at 626, 128 S. Ct. 2783, 171 L. Ed. 2d 637. 'From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.' *Ibid.* For example, we found it 'fairly supported by the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons' that the Second Amendment protects the possession and use of weapons that are 'in common use at the time.' *Id.*, at 627, 128 S. Ct. 2783, 171 L. Ed. 2d 637…That said, we cautioned that we were not 'undertak[ing] an exhaustive historical analysis today of

[1] This bill does not specifically cross-reference specific code sections.

[2] The Court ruled individuals are constitutionally entitled to bear arms – not just "well regulated militias." (N.*Y. State Rifle & Pistol Ass'n v. Bruen* (2022) 597 U.S. 1, 17 ["In *Heller* and *McDonald*, we held that the Second and Fourteenth Amendments protect an individual right to keep and bear arms for self-defense."].)

> the full scope of the Second Amendment" and moved on to considering the constitutionality of the District of Columbia's handgun ban. *(N.Y. State Rifle & Pistol Ass'n v. Bruen* (2022) 597 U.S. 1, 21.)

The United States Supreme Court is now reviewing the case of *Rahimi v. United States* related to the constitutionality of civil prohibitions on firearms ownership. (certiorari granted *United States v. Rahimi* (2023) 143 S.Ct. 2688.) This is the first case taken up by the Supreme Court after its decision in *Bruen*. The Solicitor General argues that the Second Amendment allows Congress to disarm persons who are not law-abiding, responsible citizens. Rahimi's counsel counters that there is no historical tradition of any similar restriction, and so the prohibition is unconstitutional. On November 7, 2023, the Court heard oral arguments in the case. The justices' questioning seemed to suggest that they would uphold the law. (See Amy Howe, *Justices appear wary of striking down domestic-violence gun restriction*, SCOTUSblog (Nov. 7, 2023, 5:47 PM).[3]

Although the *Rahimi* case deals with domestic violence restraining orders, the inquiry principally revolved around prohibiting firearm possession based on a civil proceedings. It is unclear as to whether this restriction is the type contemplated by the framers of the Constitution, but given the standard expressed by *Bruen* – which largely abandoned the existing legal standards for other Bill of Rights violations – is so strange in the application, litigation seems inevitable.

4) **Arguments in Support**: According to *California District Attorneys Association*: "Your bill creates a lifetime prohibition of owning or possessing a firearm if a juvenile becomes a ward of the court for the commission of a murder, attempted murder, or voluntary manslaughter. AB 2518 would also amend Welfare and Institution Code section 786 to prohibit the sealing of juvenile records for youth who have sustained petitions for crimes listed in subdivision (a)(1) of 786. AB 2518 will improve public safety by keeping firearms out of the hands of youth who have committed very serious and violent crimes."
5)
6) **Arguments in Opposition:** According to the *ACLU California Action*: We recognize the terrible tragedies that result from gun violence. Still, AB 2518 does nothing to address those issues. Over the last decade, California has realized that youthful indiscretions and mistakes should not have eternal consequences. Youth who are adjudicated in juvenile court must have an opportunity to move past their juvenile records rather than face lifelong collateral consequences.

"Among many other laws, we have increased the ability to seal juvenile records, elevated the opportunity for courts to dismiss strike allegations for offenses committed as youth, and provided special youthful offender parole processes for the serious offenses that are prosecuted in adult court. These and other laws recognize that youthful mistakes do not and should not forever define or limit a young person's life. A ban on possession or use of a firearm until the age of 30 is certainly a sufficient collateral consequence. Any illegal use or

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[3] https://www.scotusblog.com/2023/11/justices-appear-wary-of-striking-down-domestic-violence-gun-restriction

possession of a firearm after age 30 is still punishable as a crime, but the punishment should not be made harsher because of youthful mistakes.

7) **Related Legislation:**

a) AB 2629 (Haney) prohibits any person who is determined to be incompetent to stand trial on a misdemeanor offense from possessing or owning a firearm. AB 2629 is pending hearing in this committee today.

b) AB 2739 (Maienschein) Requires 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 on the Assembly floor.

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 court's obligations in making determinations as to sown peace officers carrying a firearm either on or off duty. AB 2759 is pending on the Assembly floor.

8) **Prior Legislation:**

a) AB 178 (Ting), Chapter 45, Statutes of 2022, allocates $40 million to the Judicial Council to support a court-based firearm relinquishment program to ensure the consistent and safe removal of firearms from individuals who become prohibited from owning or possessing firearms and ammunition pursuant to court order.

b) AB 1594 (Ting), Chapter 98, Statutes of 2022, authorizes DOJ, local governments and survivors of gun violence to file a civil action in a California court for damages against a gun manufacturer, importer or dealer that violates firearm industry standards of conduct, as specified.

c) SB 129 (Skinner), Chapter 69, Statutes of 2021, allocates funds to DOJ to disburse to local sheriffs' departments for APPS enforcement operations, and outlined reporting requirements for participating sheriffs' departments.

d) SB 94 (Committee on Public Safety), Chapter 25, Statutes of 2019, requires DOJ to send an annual report to the Legislature detailing information related to APPS including the number of individuals in the database, firearms removed, number of staff enforcing APPS, and information regarding collaborative task forces with local law enforcement agencies.

e) AB 809 (Feuer), Chapter 745, Statutes of 2011, requires the DOJ to collect and retain firearm transaction information for all types of firearms, including long guns.

REGISTERED SUPPORT / OPPOSITION:

Support

California District Attorneys Association
California Police Chiefs Association
California State Sheriffs' Association
Peace Officers Research Association of California (PORAC)

Opposition

ACLU California Action
California Attorneys for Criminal Justice
California Public Defenders Association

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

Date of Hearing: April 23, 2024
Counsel: Andrew Ironside

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Kevin McCarty, Chair

AB 2519 (Maienschein) – As Introduced February 13, 2024

SUMMARY: Provides that a defendant who is diverted for a charged serious or violent misdemeanor, for which there would be a 10-year prohibition on possessing a firearm if convicted, shall be prohibited from possessing a firearm until they successfully complete diversion.

EXISTING FEDERAL LAW:

1) States that the right of the people to keep and bear arms shall not be infringed. (U.S. Const., 2nd Amend.)

2) Provides that no state shall deprive any person of life, liberty, or property, without due process of law. (U.S. Const., 14th Amend.)

EXISTING LAW:

1) States that a person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws. (Cal. Const. art. I, § 7.)

2) Authorizes a judge in the superior court in which a misdemeanor is being prosecuted, at the judge's discretion, and over the objection of a prosecuting attorney, offer diversion to a defendant. (Pen. Code, § 1001.95, subd. (a).)

3) Authorizes a judge to continue a diverted case for a period not to exceed 24 months and to order the defendant to comply with terms, conditions, or programs that the judge deems appropriate based on the defendant's specific situation. (Pen. Code, § 1001.95, subd. (b).)

4) Requires the judge, if the defendant has complied with the imposed terms and conditions, to dismiss the action against the defendant at the end of the period of diversion. (Pen. Code, § 1001.95, subd. (c).)

5) Requires the court, if it appears to the court that the defendant is not complying with the terms and conditions of diversion, after notice to the defendant, to hold a hearing to determine whether the criminal proceedings should be reinstituted. (Pen. Code, § 1001.95, subd. (c).)

6) Authorizes the court, if the court finds that the defendant has not complied with the terms and conditions of diversion, to end the diversion and order resumption of the criminal proceedings. (Pen. Code, § 1001.95, subd. (d).)

7) Provides that a defendant may not be offered diversion for any of the following current charged offenses:

   a) Any offense for which a person, if convicted, would be required to register as s sex offender;

   b) Any offense involving domestic violence, as specified; and,

   c) Stalking. (Pen. Code, § 1001.95, subd. (e)(1)-(3).)

8) Provides that persons convicted of specified serious or violent misdemeanors are prohibited from possession of firearms for a period of 10 years and that a violation of that prohibition is punishable as a misdemeanor with imprisonment up to one year or as a state prison felony. (Pen. Code, § 29805, subd. (a).)

9) Provides that persons with the knowledge that they have an outstanding warrant for any of the specified serious or violent misdemeanors that result in a 10 year prohibition are guilty of a crime if they possess a firearm while the warrant is outstanding. A violation is punishable as a misdemeanor, with imprisonment up to one year, or as a state prison felony. (Pen. Code, §§ 29805, subd. (a), 29851.)

10) Includes within the list of misdemeanors triggering a 10 year firearm prohibition the crimes of stalking, sexual battery, assault with a deadly weapon, battery with serious bodily injury, brandishing a firearm of deadly weapon, assault with force likely to produce great bodily injury, battery on a peace officer, and threats of bodily injury or death. The list includes a number of other misdemeanor crimes as well. (Penal Code, § 29805, subd. (a).)

11) Provides that a defendant who is diverted pursuant to this chapter shall be required to complete all of the following in order to have their action dismissed:

   a) Complete all conditions ordered by the court.

   b) Make full restitution.

   c) Comply with a court-ordered protective order, stay-away order, or order prohibiting firearm possession, if applicable. (Penal Code, § 1001.96, subds. (a)-(c).)

12) Provides that, upon successful completion of the terms, conditions, or programs ordered by the court, the arrest upon which diversion was imposed shall be deemed to have never occurred. (Penal Code, § 1001.97, subds. (a).)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "Under current law, there are numerous misdemeanor criminal offenses that prohibit a defendant, if convicted, from possessing a firearm for up to 10 years. These crimes include threatening or intimidating public officials, assault, stalking, child endangerment and elder abuse. However, a defendant who is charged

with one of these offenses but granted misdemeanor diversion is not subject to any firearm prohibitions even though the offenses they are charged with would warrant a prohibition if convicted. AB 2519 prohibits defendants granted misdemeanor diversion from possessing a firearm until they have successfully completed diversion. This would apply if the defendant is being diverted for a crime that would otherwise require a 10-year ban on possessing a firearm if convicted."

2) **Individuals Prohibited from Possessing Firearms in California:** California has several laws that prohibit certain persons from purchasing firearms. All felony convictions lead to a lifetime prohibition, while a conviction of specified misdemeanors result in a 10 year prohibition. A person also may be prohibited from possessing a firearm due to a protective order or as a condition of probation. If a person communicates to his or her psychotherapist a serious threat of physical violence against a reasonably-identifiable victim or victims, the person is prohibited from owning or purchasing a firearm for five years, starting from the date the psychotherapist reports to local law enforcement the identity of the person making the threat. (Welf. & Inst. Code, § 8100, subd. (b)(1).) If a person is admitted into a facility because that person is a danger to himself, herself, or to others, the person is prohibited from owning or purchasing a firearm for five years. (Welf. & Inst. Code, § 8103, subd. (f).)

   Misdemeanors that result in a 10 year firearm prohibition include the crimes of stalking, sexual battery, assault with a deadly weapon, battery with serious bodily injury, brandishing a firearm or deadly weapon, assault with force likely to produce great bodily injury, battery on a peace officer, and threats of bodily injury or death. (Penal Code, § 29805, subd. (a).) This bill would prohibit a person who is diverted for one of those misdemeanors from possessing a firearm until they successfully complete diversion.

3) **Existing Law Permits Law Enforcement to Seek GVROs**: The process to obtain an emergency GVRO is designed to address situations where a person presents a current danger to themselves or others by virtue of owning or possessing a firearm. An application for an emergency GVRO can be made orally and processed immediately. (Pen. Code, § 18170.) Current law allows an immediate family member of a person or a law enforcement officer to request a court, after notice and a hearing, to issue a GVRO enjoining the subject of the petition from having in his or her custody or control, owning, purchasing, possessing, or receiving a firearm or ammunition for a period of time from one to five years. (*Ibid.*) AB 3014 (Irwin) would authorizes a district attorney to petition for an ex parte gun violence restraining order (GVRO), a GVRO after notice and a hearing, and a renewal of a GVRO. Although a person currently diverted for a misdemeanor for which there is a 10-year prohibition on possessing a firearm, an immediate family member or law enforcement officer may request a GVRO if the person is current danger to themselves or others.

4) **Argument in Support**: According to the *City of San Diego*, "Diversion programs are intended to provide an alternative to criminal prosecution and aim at preventing the creation of repeated offenders by keeping specified offenders out of jail by giving individuals a second chance and a clean slate. However, the recent diversion law created a loophole which fails to apply laws prohibiting possession of firearms to individuals while in diversion. A defendant who is convicted of a specificized [sic] misdemeanor offense is prohibited from possessing a firearm for a period of 10 years. However, defendants who are charged with a violation of a misdemeanor offense listed in the Penal Code and are granted diversion do not currently have to comply with any firearm prohibitions. AB 2519 would close that loophole

and prevent gun possession until diversion is complete.

"A recently published report provides a sobering profile of gun violence in the San Diego region. Although San Diego ranked lower in gun related deaths per capita than the state and national averages, the report, conducted by Health Assessment and Research for Communities, noted that from 2017 through 2022, there have been 1,310 deaths by firearms in San Diego County, often either due to homicide or suicide. San Diego has taken a leadership role, statewide and nationally in reducing gun violence through programs like the Gun Violence Prevention Unit, organized by our City Attorney and supported by the San Diego Police Department. Additionally, San Diego enacted one of the first "ghost gun" bans in the nation and continues to sponsor and support legislation that reduces the likelihood of gun violence."

5) **Argument in Opposition**: According to *California Attorneys for Criminal Justice*, "Penal Code section 1001.95 allows judges, over the objection of the prosecution, to grant diversion to a defendant in most misdemeanor cases and impose various terms, conditions, and programs as the court deems appropriate. In such cases, a defendant does not enter a plea of guilty or nolo contendere ('no contest'). Upon successful completion of diversion, the pending criminal case is dismissed, and the arrest upon which diversion was imposed shall be deemed to have never occurred. (Pen. Code § 1001.97).

"This bill prohibits a person from owning a firearm if they enter judicial diversion if the underlying offense would be prohibiting upon conviction. This bill does not specify what the penalty would be, but Penal Code statutory construction suggests that it would be punishable as a misdemeanor. In essence, this bill prohibits someone from owning a gun for an offense they have never been convicted of or admitted to and for which they could face up to six months in jail.

"Remember that section 1001.95 does not require or involve a plea of guilty or no contest. Due to the favorable terms of judicial diversion, many defendants accept it even in cases where the evidence against them is tenuous and defendable. Prohibiting defendants in diversion from possessing firearms and subjecting them to criminal liability is anathema to the goal and purpose of judicial diversion.

"In addition to the foregoing, the mandate of this bill to prohibit defendants enrolled in 1001.95 diversion from owning or possessing firearms usurps the role of the judiciary and abrogates their discretion. Under current law, a judge has the discretion to prohibit a defendant from possessing firearms as a condition of judicial diversion. A judge is well positioned, upon considering the criminal complaint and various factors offered by the People and the defense, to determine whether, and in which cases, a firearm prohibition may be appropriate for a defendant in judicial diversion.

"A final consideration is the broad range of misdemeanor offenses enumerated in section 29805 which are prohibiting, many of which have nothing to do with firearms. To prohibit a defendant who enters judicial diversion from owning firearms in all cases wherein they are charged with an enumerated offense is unwarranted and serves no function to protect the public. Moreover, a court may, on its own motion or at the request of the prosecution, impose a firearm prohibition as a condition of continued release on bond when appropriate before

judicial diversion even commences."

6) **Related Legislation**:

a) AB 667 (Mainschein), would increase the renewal period to a maximum of 10 years, instead of 5, for GVROs if the subject of the petition poses a significant danger of self-harm or harm to another in the near future by having a firearm. AB 667 is pending hearing in this Committee. AB 667 is pending referral in the Senate Rules Committee.

b) AB 2917 (Zbur), would require the court to consider recent or past threats of violence to another group or location when determining if there are grounds to issue a GVRO. AB 2917 will be heard today in this committee.

c) AB 3014 (Irwin), would authorizes a district attorney to petition for a GVRO, a GVRO after notice and a hearing, and a renewal of a GVRO. AB 3014 is pending vote by the Assembly.

7) **Prior Legislation**:

a) AB 455 (Quirk Silva), Chapter 236, Statutes of 2023, authorized the prosecution to request an order from the court prohibiting a defendant from owning or possessing a firearm because they are a danger to themselves or others until they successfully complete diversion.

b) AB 2239 (Maienschein), Chapter 143, Statutes of 2022, created a 10 year firearm prohibition for individuals convicted of child abuse and elder and dependent adult abuse involving violence.

c) AB 2551 (McCarty), Chapter 100, Statutes 2022, required the DOJ, upon notification that a specified prohibited person attempted to purchase a firearm, to notify local authorities in the jurisdiction where the prohibited person resides of such attempt. AB 2551 is currently pending in the Assembly Appropriations Committee.

d) SB 723 (Jones), Chapter 306, Statutes of 2020, clarified that an individual must have knowledge of an outstanding warrant in order to be charged with unlawful possession of a firearm.

e) SB 701 (Jones), of the 2019-2020 Legislative Session, would have lowered the penalty to make it a misdemeanor for a person with an outstanding arrest warrant, as specified, to own or possess a firearm. SB 701 was vetoed by the Governor.

f) AB 3129 (Rubio), Chapter 883, Statutes of 2018, added oustanding warrants and petty theft of a firearm on to the list of misdemeanors that result in a ban on the right to possess a firearm for 10 years.

g) AB 785 (Jones-Sawyer), Chapter 784, Statutes of 2017, added two hate crimes to the list of misdemeanors that result in a ban on the right to possess a firearm for 10 years.

h) AB 1084 (Melendez), of the 2013-2014 Legislative Session would have increased the penalties to two, three, or four years in the state prison when an individual possesses a gun, who has been prohibited from gun possession because the person has been held for specified mental health findings. AB 1084 failed passage in the Assembly Public Safety Committee.

i) SB 580 (Jackson), of the 2013-2014 Legislative Session, would have would appropriated the sum of $5,000,000 from the FSESF to the DOJ to contract with local law enforcement agencies to reduce the backlog of individuals who are identified by APPS as illegally possessing firearms. SB 580 died in the Assembly Committee on Appropriations.

j) SB 140 (Leno), Chapter 2, Statutes of 2013, appropriated $24 million from the DROS Special Account to the DOJ for costs associated with regulatory and enforcement of illegal possession of firearms by prohibited persons.

REGISTERED SUPPORT / OPPOSITION:

Support

California District Attorneys Association
California Police Chiefs Association
City of San Diego
Los Angeles Unified School District
Peace Officers Research Association of California (PORAC)

Opposition

California Attorneys for Criminal Justice

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

Date of Hearing: April 23, 2024
Counsel: Andrew Ironside

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Kevin McCarty, Chair

AB 2521 (Waldron) – As Introduced February 13, 2024

SUMMARY: Clarifies that a court may grant any prosecuting agency representing the state on appeal in a capital case access to the application and contents of the application for specified funds by an indigent defendant when relevant to an issue raised by the defendant. Specifically, **this bill**:

1) Clarifies that the prosecuting agency representing the state, not just the Attorney General, may access documents relating to the application and contents of the application for specified funds by an indigent defendant in a capital case when the defendant raises an issue on appeal or collateral review and the recorded portion of the record relating to the application for funds also relates to the issue raised.

2) Provides that the prosecuting agency representing the state, not just the Attorney General, shall be provided with funding records at their request when the defendant raises an issue related to the application for funds on appeal or in a collateral review where an order to show cause has issued.

3) Clarifies that, if a court grants a motion for DNA testing in a felony case where the person is serving a term of imprisonment, the laboratory conducting the test must be mutually agreed upon by the person filing the motion and the Attorney General or district attorney, regardless of whether the case is capital or noncapital.

EXISTING LAW:

1) Authorizes an indigent defendant, in the trial of a capital case or a case under subdivision (a) of Section 190.05, the indigent defendant, to request through defense counsel that funds for the specific payment of investigators, experts, and others for the preparation or presentation of the defense. (Pen. Code, § 987, subd. (a).)

2) Provides that the fact that an application has been made shall be confidential and the contents of the application shall be confidential. (Pen. Code, § 987, subd. (a).)

3) Provides that the confidentiality provided in this section shall not preclude any court from providing the Attorney General with access to documents relating to an indigent defendant's application for funds when the defendant raises an issue on appeal or collateral review where the recorded portion of the record on the application for funds relates to the issue raised. (Pen. Code, § 987, subd. (b).)

4) When the defendant raises that issue, the funding records, or relevant portions thereof, shall be provided to the Attorney General at the Attorney General's request, in which case the

documents shall remain under seal and their use shall be limited solely to the pending proceeding. (Pen. Code, § 987, subd. (b).)

5) Authorizes a person convicted of a felony and currently serving a term of imprisonment to make a written motion, as specified, before the trial court that entered the judgment of conviction in their case, for DNA testing. (Pen. Code, § 1405, subd. (a).)

6) Requires the request to include the person's statement that they were not the perpetrator of the crime and to explain how the DNA testing is relevant to their assertion of innocence. (Pen. Code, § 1405, subd. (b)(1).)

7) Upon request of the convicted person or convicted person's counsel, the court may order the prosecutor to make all reasonable efforts to obtain, and police agencies and law enforcement laboratories to make all reasonable efforts to provide, if the documents exist, among other documents, copies of DNA lab reports and copies of evidence logs. (Pen. Code, § 1405, subd. (c)(1) & (2).)

8) Requires the court, if the court finds evidence was subjected to DNA or other forensic testing previously by either the prosecution or defense, to order the party at whose request the testing was conducted to provide all parties and the court with access to the laboratory reports, underlying data, and laboratory notes prepared in connection with the DNA or other biological evidence testing. (Pen. Code, § 1405, subd. (e).)

9) Requires the court to grant the motion for DNA testing if it determines all of the following have been established:

   a) The evidence to be tested is available and in a condition that would permit the DNA testing requested in the motion;

   b) The evidence to be tested has been subject to a chain of custody sufficient to establish it has not been substituted, tampered with, replaced, or altered in any material aspect;

   c) The identity of the perpetrator of the crime was, or should have been, a significant issue in the case;

   d) The convicted person has made a prima facie showing that the evidence sought to be tested is material to the issue of the convicted person's identity as the perpetrator of, or accomplice to, the crime, special circumstance, or enhancement allegation that resulted in the conviction or sentence;

   e) The requested DNA testing results would raise a reasonable probability that, in light of all the evidence, the convicted person's verdict or sentence would have been more favorable if the results of DNA testing had been available at the time of conviction;

   f) The evidence sought was not tested previously of, the evidence was previously tested, the requested DNA test would provide results that are reasonably more discriminating and probative of the identity of the perpetrator or accomplice or have a reasonable probability of contradicting prior test results;

g) The testing requested employs a method generally accepted within the relevant scientific community; and,

h) The motion is not made solely for the purpose of delay. (Pen. Code, § 1405, subd. (g)(1)-(8).)

10) Requires the court order granting the motion to identify the specific evidence to be tested and the DNA technology to be used. (Pen. Code, § 1405, subd. (h)(1).)

11) Requires the testing to be conducted by a laboratory that meets the FBI Director's Quality Assurance Standards and that is mutually agreed upon by the district attorney in a noncapital case, or the Attorney General in a capital case, and the person filing the motion. (Pen. Code, § 1405, subd. (h)(2).)

12) Requires the court, if the parties cannot agree on a laboratory, to designate a laboratory that meets the FBI Director's Quality Assurance Standards. (Pen. Code, § 1405, subd. (h)(2).)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "AB 2521 recognizes recent policy changes by tasking District Attorneys with managing vital legal challenges following appeals in death penalty cases. By delegating the oversight of capital habeas corpus petitions to District Attorneys, we grant them authority over DNA testing requests and access to funding records in capital cases, roles previously exclusive to the Attorney General. This shift is crucial for District Attorneys, providing them with equal responsibilities in post-trial capital litigation, and reducing delays."

2) **Need for the Bill**: Approved by California voters in November 2016, Death Penalty Reform and Savings Act of 2016 was "intended to facilitate the enforcement of judgments and achieve cost savings in capital cases." (*Briggs v. Brown* (2017) 3 Cal.5th 808, 822.)

> Proposition 66 includes a series of findings and declarations to the effect that California's death penalty system is inefficient, wasteful, and subject to protracted delay, denying murder victims and their families justice and due process. (Voter Information Guide, Gen. Elec. (Nov. 8, 2016) § 2, p. 212 (Voter Guide).) The measure enacts a series of statutory reforms, which may be grouped into three general categories: (1) provisions to expedite review in capital appeals and habeas corpus proceedings; (2) provisions governing the confinement of prisoners sentenced to death and the administration of the death penalty; and (3) provisions pertaining to California's Habeas Corpus Resource Center.

(*Id.* at p. 823.)

As part of the effort to expedite review of capital cases, Proposition 66 shifted responsibility for habeas proceedings from the California Supreme Court to county courts:

> The measure requires that habeas corpus petitions first be heard in trial courts instead of the California Supreme Court. (Direct appeals would continue to be heard in the California Supreme Court.) Specifically, these habeas corpus petitions would be heard by the judge who handled the original murder trial unless good cause is shown for another judge or court to hear the petition. The measure requires trial courts to explain in writing their decision on each petition, which could be appealed to the Courts of Appeal. The decisions made by the Courts of Appeal could then be appealed to the California Supreme Court. The measure allows the California Supreme Court to transfer any habeas corpus petitions currently pending before it to the trial courts.

(https://repository.uclawsf.edu/cgi/viewcontent.cgi?article=2358&context=ca_ballot_props)

Existing law provides that the "Attorney General has direct supervision over the district attorneys of the several counties of the state." (Cal. Const., art. 5, § 13; Gov. Code, § 12550.) Under this authority, the Attorney General has delegated some responsibility for post-conviction litigation to district attorneys.

According to the Riverside County District Attorney's Office, "This bill facilitates the long-established practice where large local prosecutor's offices with expertise in writs and appeals handle post-conviction work at the Superior Court level (and sometimes the Court of Appeal) at the behest of the Attorney General. This practice has been long recognized by Penal Code section 4750 which provides a reimbursement mechanism for some cases and was further extended by Proposition 66 shifting capital habeas work to the Superior Court level. AB 2521 eliminates a barrier to this long-established practice in cases in which the records of trial counsel requests for investigative resources are under scrutiny after conviction."

This bill would clarify that a court may grant any prosecuting agency representing the state on appeal in a capital case access to the application and contents of the application for specified funds by an indigent defendant when relevant to an issue raised by the defendant. Existing law limits access to only the Attorney General.

This bill also provides that, if a court grants a motion for DNA testing in a felony case where the person is serving a term of imprisonment, the laboratory conducting the test must be mutually agreed upon by the Attorney General or district attorney, regardless of whether the case is capital or noncapital, and the person filing the motion. Existing law provides that the Attorney General may approve of the laboratory testing in capital cases, and that the district attorney's authority extends only to noncapital ones.

3) **Argument in Support**: According to the *San Diego County District Attorney's Office*, the bill's sponsor, "AB 2521 will fix two procedural gaps in the Penal Code, which derive from the now-outdated premise that the California Attorney General will handle all petitions for writ of habeas corpus in capital cases. Based on a policy change, these matters are increasingly delegated to District Attorneys. Thus, it is important to update the Penal Code in two areas to reflect these policy changes and provide the District Attorney the same authority to access documents and to agree to additional DNA testing in order to litigate habeas petitions pending in the Superior Court.

"On November 8, 2016, California voters approved Proposition 66, which sought to fix the death penalty in California by increasing its efficiency. One of Prop. 66's changes shifted

capital petitions for writ of habeas corpus from the California Supreme Court (where the Attorney General predominantly practices) to the county Superior Courts (where District Attorneys routinely practice). Due to this shift, the Attorney General has delegated much of the work of responding to capital habeas petitions to District Attorneys. However, the Penal Code has not yet been amended to reflect that change. Thus, there are two Penal Code sections requiring amendment: 987.9 and 1405.

"Confidential Defense Funding Applications

"Penal Code section 987.9 outlines the regulations controlling funds used in preparation of the defense of indigent defendants in a capital case, including that the funding applications are made confidential. However, under subdivision (d), 'The confidentiality provided in this section shall not preclude any court from providing *the Attorney General* with access to documents protected by this section when the defendant raises an issue on appeal or collateral review where the recorded portion of the record, created pursuant to this section, relates to the issue raised.' (Pen. Code, § 987.9, subd. (d).)

"This bill would, instead, provide that this confidentiality does not preclude any court from providing *the prosecuting agency representing the state* in the proceeding with that access. In some cases, the prosecuting agency will be the Attorney General; in others, it will be the District Attorney.

"DNA Testing Laboratory Selection

"Penal Code section 1405 controls the motion and parameters of an inmate's request for DNA testing in relation to their case. It states in relevant part, '[t]he testing shall be conducted by a laboratory that meets the FBI Director's Quality Assurance Standards and that is mutually agreed upon by the district attorney in a noncapital case, *or the Attorney General in a capital case*, and the person filing the motion.' (Pen. Code, § 1405, subd. (h)(2), italics added.)

"This bill would instead require that DNA testing to be conducted by a laboratory that is mutually agreed upon by the district attorney *or* Attorney General and the person filing the motion, regardless of the type of case.

"AB 2521 provides a needed legislative fix to complement the Attorney General's policy changes that require local district attorneys to handle more capital case habeas litigation in the Superior Court that were not contemplated when Penal Code sections 987.9 and 1405 were drafted."

4) **Prior Legislation**:

a) SB 243 (Wiener), of the 2021-2022 Legislative Session, would have expanded the definition of "false evidence" for the purpose of habeas corpus relief and required the court to make specified determinations when considering the admission of expert testimony in criminal proceedings. SB 243 was held on the Senate Appropriations suspense file.

b) SB 1134 (Leno) Chapter 785, Statutes of 2016, codified a standard for habeas corpus petitions filed on the basis of new evidence.

c) SB 694 (Leno), of the 2015-2016 Legislative Session, would have codified a standard for habeas corpus petitions filed on the basis of new evidence. SB 694 was held in Assembly Appropriations Committee.

d) SB 1058 (Leno), Chapter 623, Statutes of 2014, allowed a writ of habeas corpus to be prosecuted when evidence given at trial has subsequently been repudiated by the expert that testified or undermined by later scientific research or technological advances.

e) SB 618 (Leno), Chapter 800, Statutes of 2013, streamlined the process for compensating persons who have been exonerated after being wrongfully convicted and imprisoned.

f) AB 1593 (Ma), Chapter 809, Statutes of 2012, allows a writ of habeas corpus to be prosecuted if expert testimony relating to intimate partner battering and its effects was received into evidence but was limited at the trial court proceedings relating to a prisoner's incarceration for the commission of a violent felony committed prior to August 29, 1996, and there is a reasonable probability, sufficient to undermine confidence in the judgment of conviction, that if the testimony had not been limited, the result of the proceedings would have been different.

REGISTERED SUPPORT / OPPOSITION:

Support

San Diego County District Attorney's Office (Sponsor)
California District Attorneys Association
Riverside County District Attorney

Opposition

None

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

Date of Hearing: April 23, 2024
Counsel: Ilan Zur

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Kevin McCarty, Chair

AB 2544 (Low) – As Amended March 11, 2024

SUMMARY: Allows a licensee of a community care facility to approve an individual to care for children prior to completing a review of other state's child abuse and neglect registry. Specifically, **this bill**, authorizes a licensee of a community care facility to approve an individual to care for children prior to the completion of the check of other state's child abuse and neglect registry, as long as the following conditions are met:

1) The facility has submitted a request for the out-of-state abuse and neglect registry check to the Care Provider Management Bureau.

2) The applicant has been cleared for all other aspects of the background check, including the Department of Justice (DOJ), the Federal Bureau of Investigation, and the Child Abuse Central Index.

3) The applicant shall not have unsupervised contact with residents or clients until the completion of the abuse and neglect registry check, and the licensee shall take reasonable steps to ensure the safety and well-being of residents during this period. The applicant may be employed to work in the facility under supervision until a complete caregiver background check is obtained.

4) If the out-of-state abuse and neglect registry check reveals information that would disqualify the applicant from approval, the licensee shall remove the applicant from the community care facility immediately upon receipt of the information and notify the State Department of Social Services (DSS) of the removal within three business days.

EXISTING LAW:

1) Establishes the California Community Care Facilities Act, which provides regulatory structure for a coordinated and comprehensive statewide system of care for individuals with mental illnesses, individuals with disabilities, and children and adults who require care or services provided by licensed community care facilities. (Health & Saf. Code, § 1500 et seq.)

2) Defines "community care facility" as any facility, place, or building that is maintained and operated to provide nonmedical residential care, day treatment, adult day care, or foster family agency services for children, adults, or children and adults, and includes: residential facilities, adult day programs, foster family agencies, group homes, and children's crisis residential programs, among others. (Health & Saf. Code, §1502 et seq.)

3) Provides it is the policy of the state to facilitate the proper placement of every child in residential care facilities where the placement is in the best interests of the child. (Health & Saf. Code, § 1501.1, subd. (a).)

4) Requires CDSS to obtain a full criminal record, if any, for certain individuals, including adults responsible for administration or direct supervision of staff; any person, other than a client, residing in the facility; any person who provides client assistance in dressing, grooming or bathing; and any staff person, volunteer, or employee who has contact with the clients, among others, for purposes of criminal record clearance. (Health & Saf. Code, § 1569.17 (b).)

5) Authorizes counties to require placement or licensing agencies to actively seek out-of-home care facilities capable of meeting the varied needs of the child, and in placing children in out-of-home care, particular attention should be given to the individual child's needs, the ability of the facility to meet those needs, the needs of other children in the facility, the licensing requirements of the facility as determined by the licensing agency, and the impact of the placement on the family reunification plan. (Health & Saf. Code, § 1501.1, subd. (a).)

6) Requires DSS, prior to granting a license to or approving, any individual to care for or reside with children, to check the Child Abuse Central Index (CACI). (Health & Saf. Code, § 1522.1, subd. (a).)

7) Requires the DOJ to maintain and update an index of reports of child abuse by providers and to inform DSS of subsequent reports received from the CACI and the criminal history, and to investigate any reports received from the CACI. Such an above investigation must include the review of the investigation report and file prepared by the child protective agency which investigated the child abuse report. (*Ibid.*) (*See also* Pen. Code, § 11170.)

8) Provides that licensure or approval shall not be denied based upon a report from the CACI unless child abuse or severe neglect is substantiated. (Health & Saf. Code, § 1522.1, subd. (a); Pen. Code, § 11170).

9) Provides that for any application, if a prospective foster parent, adoptive parent, or any person 18 years or older residing in their household, has lived in another state in the preceding five years, the licensing agency or licensed adoption agency shall check that state's child abuse and neglect registry, in addition to checking the CACI. (Health & Saf. Code, § 1522.1, subd. (b).)

10) Requires DSS, in consultation with the County Welfare Directors Association of California, to develop and promulgate the process and criteria to be used to review and consider other states' findings of child abuse or neglect. (*Ibid.*)

11) Provides if any person in the household is 18 years of age or older and has lived in another state in the preceding five years, the department or its designated representative shall check the other state's child abuse and neglect registry to the same extent required for federal funding, in addition to checking the CACI, prior to granting a license to, or otherwise approving, any foster family home, certified family home, resource family, or person for whom an adoption home study is conducted or who has filed to adopt. (Health & Saf. Code, § 1522.1, subd. (c).)

12) Provides that if any licensee of a community care facility that is eligible to accept placement of a dependent child or any associated individual, has lived in another state in the preceding five years, DSS shall check that state's child abuse and neglect registry, in addition to the CACI, and develop and promulgate the process and criteria to be used to review and consider other states' findings of child abuse or neglect. (Health & Saf. Code, § 1522.1, subd. (d).)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "California is facing a crisis for foster youth finding appropriate placements that provide the therapeutic supports needed and the programs that serve these foster youth are limited in who they can recruit for their programs due to, while well intentioned, significant bureaucratic barriers for any prospective employee that has lived out of state in the last five years. This applies to all staff, including clinical staff that may have gone out of state for their masters' program. The out of state checks required may need to be mailed to other states, with wet signatures and checks and can take upwards of 6-9 months to come back, all while the person has to wait to work with children.

   "AB 2544 addresses workforce issues by allows for out-of-state prospective employees to begin employment, training on the job, and continues to protect children safety by not allowing any unsupervised contact with children while the out-of-state child abuse check is pending and that the clearances from the Department of Justice, Federal Bureau of Investigation, and Child Abuse Central Index through the Department of Social Services' Guardian system must still be completed prior to hire. This bill balances protections for children while allowing prospective employees moving from out of state to start working and provide life-saving care."

2) **Community Care Facilities:** CDSS's Community Care Licensing Division (CCLD) licenses and oversees community care facilities—including child care facilities, foster family homes, and residential care facilities for the elderly—throughout California. These facilities typically provide non-medical care and supervision for children and adults in need, including individuals with disabilities, older adults in residential care, children in foster care, and children in child day care facilities. As of June 2021, there are 67,622 licensed community care facilities in the state with total capacity to serve approximately 1.4 million Californians. All facilities licensed by CDSS must meet minimum licensing standards, as specified in California's Health and Safety Code and Title 22 regulations. CDSS conducts pre- and post-licensing inspections for new facilities and unannounced visits to licensed facilities under a statutorily required timeframe.

3) **Out of State Child Abuse Checks**. CDDS is required to check the DOJ, FBI, and CACI through Guardian, the state's background check system, prior to granting a license or otherwise approving any individual to care or reside with Children. In addition, DSS is required to conduct out of state background checks for prospective foster parents and adoptive parents, any persons 18 years or older living in their household, as well as licensees of community care facilities eligible to accept placement of a dependent child, if such persons have lived in another state in the preceding five years. Background checks are important to ensure vulnerable populations are kept safe and not put into unnecessary danger.

However, in recent years, advocates have reported long wait times (many checks are sent by physical mail and require wet signatures) resulting in staffing delays, which can also impact care to individuals. Specifically, data provided from DSS to the author's office indicated that as of January 2024 there were 625 pending out of state CACI checks. Data from a survey of residential therapeutic programs from the California Alliance of Children and Family Services indicates that it takes on average 71.5 days to clear a prospective out of state employee. Such significant delays may deter prospective employees, undermine staffing levels in community care facilities, and hinder the quality of services provided to youth.

4) **Effect of this bill:** AB 2544 is attempting to address long wait times for out-of-state background checks after other elements of clearance are completed by allowing someone to continue working while waiting for out-of-state clearance. Specifically, it authorizes licensees of community care facilities to approve an individual to care for children *prior to the completion of the out of state check of other state's child abuse and neglect registries*, as long as: 1) the facility has submitted a request for the out-of-state abuse and neglect registry check; 2) the applicant has been cleared for all other aspects of the background check, including the Department of Justice (DOJ), the Federal Bureau of Investigation, and the Child Abuse Central Index. The applicant would not be able to have unsupervised contact with residents or clients until the completion of the abuse and neglect registry check. This can be expected to support staffing levels and reduce the delay associated with an out of state background check from deterring potential candidates, while also containing protections for children by still requiring state child abuse checks and mandating supervision, until the out of state check is completed.

5) **Argument in Support**: According to California Alliance of Child and Family Services "California law requires that prospective employees who have lived out of state at any point in the last 5 years must have completed an OCSA prior to hire to work in a CCL licensed children's residential program. However, federal law under the Family First Prevention Services Act of 2019 acknowledged delays that exist between states and only requires that the check must be requested prior to hire, not completed. Each state maintains their own database and there is no national system. Requests must be sent to each state, sometimes by physical mail, with checks and 'wet' signatures. Each state's timeframe varies, and it can take upwards of 9 months, while data collected by the California Alliance of Child and Family Services from 15 short term residential therapeutic programs showed that the average is 71.5 days. This serves as a barrier to starting employment and serving children, while every day, foster youth languish in hotels, motels and child welfare offices without supportive environments."

6) **Argument in Opposition**: None

7) **Related Legislation**: None

8) **Prior Legislation**:

   a) AB 1720 (Holden) Chapter 581, Statutes of 2022, would have authorized the California Department of Social Services (CDSS) to grant a simplified criminal record exemption to an applicant seeking a license or position within various community care facilities, as specified, and removes the requirement for those applicants to sign a declaration under

penalty of perjury before the receipt of live scan results regarding prior criminal convictions.

b) AB 819 (Stone) Chapter 777, Statutes of 2019 (adopts changes to further facilitate implementation of Continuum of Care Reform (CCR) specifically as it relates to flexibility for resource families, exclusions from resource family homes, financial resources available to tribally approved homes, the provision of intensive services foster care (ISFC), and the ability of group home staff to administer emergency injections, among others.

c) AB 404 (Stone) Chapter 732, Statutes of 2017, adopts changes to further facilitate implementation of Continuum of Care Reform (CCR) recommendations to better serve children and youth in California's child welfare services system.

d) AB 2651 (Aghazarian) Chapter 701, Statutes of 2008, conforms state child welfare laws to federal law to ensure the continuation of federal compliance and funding.

e) SB 703 (Ducheny) Chapter 583, Statutes of 2007, requires, among other things, that within 60 days after receiving a request from another state to conduct a home study for the purposes of assessing the safety and suitability of placing a child, the child welfare agency shall complete the home study and return a report to the requesting state.

REGISTERED SUPPORT / OPPOSITION:

Support

A Greater Hope
Aspiranet
Bill Wilson Center
California Alliance of Child and Family Services
Casa De Amparo
Children's Bureau of Southern California
Haven of Hope
Haynes Family of Programs, INC.
Helen E Cowell Children's Center
Koinonia Family Services
Newport Healthcare
Progress Ranch Treatment Services
Rancho San Antonio Boys Home, INC.
Redwood Community Services
St Anne's Family Services
Sycamores
Tlc Child and Family Services
Walden Family Services

Opposition

None

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

Date of Hearing: April 23, 2024
Counsel: Andrew Ironside

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Kevin McCarty, Chair

AB 2576 (Stephanie Nguyen) – As Introduced February 14, 2024

SUMMARY: Adds attempted murder to the list of crimes for which a defendant may not be placed in mental health diversion.

EXISTING LAW:

1) Provides that murder is the unlawful killing of a human being with malice aforethought. (Pen Code, § 187, subd. (a).)

2) Provides that malice may be either express or implied. (Pen Code, § 188, subd. (a).)

3) Provides that malice is express when there is manifested a deliberate intention to unlawfully take away the life of a fellow creature. (Pen Code, § 188, subd. (a)(1).)

4) Provides that malice is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart. (Pen Code, § 187, subd. (a)(2).)

5) Provides that all murder that is perpetrated by means of a destructive device or explosive, a weapon of mass destruction, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or that is committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or specified sex offenses, or murder that is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death, is murder of the first degree. (Pen Code, § 189, subd. (a).)

6) Provides that all other kinds of murders are of the second degree. (Pen Code, § 189, subd. (b).)

7) Provides that the attempt to commit a crime occurs when a person attempts, but fails, or is prevented or intercepted in its perpetration. (Pen Code, § 664.)

8) Provides that, if the crime attempted is willful, deliberate, and premeditated murder, the person guilty of that attempt shall be punished by imprisonment in the state prison for life with the possibility of parole. (Pen Code, § 664, subd. (a).)

9) Provides that all persons concerned in the commission of a crime, whether it be a felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission,

and all persons counseling, advising, or encouraging children under the age of fourteen years, or persons who are mentally incapacitated, to commit any crime, or who, by fraud, contrivance, or force, occasion the drunkenness of another for the purpose of causing him to commit any crime, or who, by threats, menaces, command, or coercion, compel another to commit any crime, are principals in any crime so committed. (Pen Code, § 31.)

10) Provides that the purpose of mental health diversion is all of the following:

    a) Increased diversion of individuals with mental disorders to mitigate the individuals' entry and reentry into the criminal justice system while protecting public safety;

    b) Allowing local discretion and flexibility for counties in the development and implementation of diversion for individuals with mental disorders across a continuum of care settings;

    c) Providing diversion that meets the unique mental health treatment and support needs of individuals with mental disorders. (Pen Code, § 1001.35, subd. (a)-(c).)

11) Gives the court the discretion, after considering the positions of the defense and prosecution, to grant pretrial diversion to a defendant if the defendant satisfies the eligibility requirements for pretrial diversion and the court determines that the defendant is suitable for that diversion, unless the defendant has committed a prescribed crime. (Pen Code, § 1001.36, subd. (a)-(c).)

12) A defendant is eligible for pretrial diversion if both of the following criteria are met:

    a) The defendant has been diagnosed with a mental disorder as identified in the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders, including, but not limited to, bipolar disorder, schizophrenia, schizoaffective disorder, or post-traumatic stress disorder, but excluding antisocial personality disorder and pedophilia; and,

    b) The defendant's mental disorder was a significant factor in the commission of the charged offense. (Pen. Code, § 1001.36, subd. (b)(1) & (2).)

13) Requires the defense to provide evidence of the defendant's mental disorder including a diagnosis or treatment for a diagnosed mental disorder within the last five years by a qualified mental health expert. In opining that a defendant suffers from a qualifying disorder, the qualified mental health expert may rely on an examination of the defendant, the defendant's medical records, arrest reports, or any other relevant evidence. (Pen. Code, § 1001.36, subd. (b)(1).)

14) Requires the court, if the defendant has been diagnosed with a mental disorder, to find that the defendant's mental disorder was a significant factor in the commission of the offense unless there is clear and convincing evidence that it was not a motivating factor, causal factor, or contributing factor to the defendant's involvement in the alleged offense. (Pen. Code, § 1001.36, subd. (b)(2).)

15) Authorizes a court, when determining whether the defendant's mental disorder was a significant factor in the commission of the offense, to consider any relevant and credible evidence, including, but not limited to, police reports, preliminary hearing transcripts,

witness statements, statements by the defendant's mental health treatment provider, medical records, records or reports by qualified medical experts, or evidence that the defendant displayed symptoms consistent with the relevant mental disorder at or near the time of the offense. (Pen. Code, § 1001.36, subd. (b)(2).)

16) Requires the court, for any defendant who satisfies the eligibility requirements, to consider whether the defendant is suitable for pretrial diversion. (Pen. Code, § 1001.36, subd. (c).)

17) Provides that a defendant is suitable for pretrial diversion if all of the following criteria are met:

    a) In the opinion of a qualified mental health expert, the defendant's symptoms of the mental disorder causing, contributing to, or motivating the criminal behavior would respond to mental health treatment.

    b) The defendant consents to diversion and waives the defendant's right to a speedy trial, unless a defendant has been found to be an appropriate candidate for diversion in lieu of commitment and, as a result of the defendant's mental incompetence, cannot consent to diversion or give a knowing and intelligent waiver of the defendant's right to a speedy trial.

    c) The defendant agrees to comply with treatment as a condition of diversion, unless the defendant has been found to be an appropriate candidate for diversion in lieu of commitment for restoration of competency treatment and, as a result of the defendant's mental incompetence, cannot agree to comply with treatment.

    d) The defendant will not pose an unreasonable risk of danger to public safety if treated in the community. The court may consider the opinions of the district attorney, the defense, or a qualified mental health expert, and may consider the defendant's treatment plan, the defendant's violence and criminal history, the current charged offense, and any other factors that the court deems appropriate. (Pen. Code, § 1001.36, subd. (c)(1)-(4).)

18) Prohibits the placement of a defendant into a mental health diversion program for the following current charged offenses:

    a) Murder or voluntary manslaughter;

    b) An offense for which a person, if convicted, would be required to register as a sex offender, except as specified;

    c) Rape;

    d) Lewd or lascivious act on a child under 14 years of age;

    e) Assault with intent to commit rape, sodomy, or oral copulation;

    f) Commission of rape or sexual penetration in concert with another person;

g) Continuous sexual abuse of a child;

h) A person who uses a weapon of mass destruction, as specified. (Pen. Code, § 1001.36, subd. (d).)

19) Defines "unreasonable risk of danger to public safety" as an unreasonable risk that the petitioner will commit a new violent felony, as specified. (Pen. Code, §§ 1170.18, subd. (c) & 667, subd. (e)(2)(C)(iv).)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "Attempted murder is a serious and violent offense that poses a significant threat to public safety. Currently, a loophole in state law allows individuals who attempt, but fail to kill someone, to be granted diversion for mental health treatment. This can result in their release into the community with minimal court supervision, and expungement of their criminal record upon completion of the program.

"AB 2576 addresses this issue by including attempted murder on the list of crimes ineligible for mental health diversion. This prioritizes public safety and ensures that individuals who try to take another person's life are held accountable for their actions. AB 2576 aims to prevent anyone from escaping the consequences of attempted murder and to uphold paramount safety of our community."

2) **Mental Health Diversion:** Existing law permits pretrial diversion programs. (Pen. Code, §1001.) Pre-trial diversion suspends the criminal proceedings without requiring the defendant to enter a plea. (Pen. Code, §§ 1001.1, 1001.3.) The defendant must successfully complete a program or other conditions imposed by the court. If a defendant does not successfully complete the diversion program, criminal proceedings resume but the defendant, having not entered a plea, may still proceed to trial or enter a plea. If diversion is successfully completed, the criminal charges are dismissed and the defendant may, with certain exceptions, legally answer that they have never been arrested or charged for the diverted offense. (Pen. Code, §§ 1001.7, 1001.9.)

A defendant must be both eligible and suitable for mental health diversion. A defendant is eligible for pretrial mental health diversion if they have been diagnosed with a mental disorder identified in the most recent edition of the DSM, including but not limited to bipolar disorder, schizophrenia, schizoaffective disorder, or PTSD, but excluding antisocial personality disorder and pedophilia. (Pen. Code, § 1001.36, subd. (b)(1).) The defendant's mental disorder must also have been a significant factor in the commission of the charged offense; and the court must find that the defendant's mental disorder was a significant factor in the commission of the offense unless there is clear and convincing evidence that it was not a motivating factor, causal factor, or contributing factor to the defendant's involvement in the alleged offense. (Pen. Code, § 1001.36, subd. (b)(2).)

If eligible, the court must then consider whether the defendant is suitable for diversion. The defendant is suitable for diversion if, in the opinion of a qualified mental health expert, the defendant's symptoms of the mental disorder causing, contributing to, or motivating criminal

behavior would respond to treatment; the defendant consents to diversion, the defendant agrees to comply with treatment, and the defendant will not pose an unreasonable risk of danger to public safety if treated in the community. (Pen. Code, § 1001.36, subd. (c).) "[T]he risk of danger is narrowly confined to the likelihood the defendant will commit a limited subset of violent felonies," specifically super strike offenses. (*People v. Moine* (2021) 62 Cal.App.5th 440, 450; see Pen. Code, § 667, subd. (e)(2)(C)(iv).) When evaluating whether a defendant poses an unreasonable risk of danger to public safety, the court may consider the opinion of the prosecutor, defense, the treatment plan, the defendant's violence and criminal history, the opinions of qualified mental health professionals, and *any other factors that the court deems appropriate*. (Pen. Code, § 1001.36, subd. (c).) (emphasis added)

Importantly, even if eligible and suitable, the court may still in its discretion deny the defendant mental health diversion. (Pen. Code, § 1001.36, subd. (a); *People v. Gerson* (2022) 80 Cal.App.5th 1067, 1079, *People v. Qualkinbush* (2022) 79 Cal.App.5th 879, 888.) According to a recent decision,

> Finally, even where defendants make a prima facie showing that they meet all the express statutory requirements, the court may still exercise its discretion to deny division. But this "residual" discretion must be exercised "'consistent with the principles and purpose of the governing law.'" That purpose includes a strong legislative preference for treatment of mental health disorders because of the benefits of such treatment to both the offending individual and the community. Where the court chooses to exercise this residual discretion to deny diversion, its statement of reasons should reflect consideration of the underlying purpose of the statute and explain why diversion would not meet those goals.

(*Sarmiento v. Superior Court* (2024) 98 Cal.App.5th 882, 892-893.)

A defendant may not be granted mental health diversion if charged with murder, rape, other specified sex crimes, or any offenses requiring sex offender registration. (Pen. Code, § 1001.36, subd. (d).)

In addition, the mental health diversion statute provides:

- The court must be satisfied that the recommended mental health treatment will meet the needs of the specialized defendant. (Pen. Code, § 1001.36, subd. (f).)
- The provider of the mental health treatment must provide regular reports to the court. (Pen. Code, § 1001.36, subd. (f).)
- The court can reinstate criminal proceedings if the defendant is engaged in criminal conduct during diversion. (Pen. Code, § 1001.36, subd. (g).)
- The court can reinstate criminal proceedings if the defendant is performing unsatisfactorily during diversion. (Pen. Code, § 1001.36, subd. (g).)

The mental health diversion statute comports with other state efforts to keep persons with serious mental illnesses, even those who have attempted acts of violence against others, out of carceral settings and in treatment. For example, in 2002, the Legislature passed Laura's Law, which sought to authorize assisted outpatient treatment to persons with severe mental

illness, even ones who had made threats or attempts of serious violence. (See Pen Code, §§ 422 [criminal threats] and 664 [attempt to commit a crime].) Indeed, the statute expressly provides that a person is eligible for services if, among other things, "the person's mental illness has resulted in one or more acts of serious and violent behavior toward…another, or threats, or attempts to cause serious physical harm…to another within the last 48 hours." (Welf. & Inst. Code, § 5346, subd. (a)(4)(B).) Also similar to mental health diversion, a person must have had a "clinical determination that, in view of the person's treatment history and current behavior...[t]he person is in need of assisted outpatient treatment in order to prevent a relapse or deterioration that would be likely to result in grave disability or serious harm…to others." (Welf. & Inst. Code, § 5346, subd. (a)(3)(B).)

3) **Attempted Murder**: Murder is the unlawful killing of a human being with malice aforethought. (Pen Code, § 187, subd. (a).) Malice may be either express or implied. (Pen Code, § 188, subd. (a).) Malice is express when there is manifested a deliberate intention to unlawfully take away the life of another. (Pen Code, § 188, subd. (a)(1).) Malice is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart. (Pen Code, § 187, subd. (a)(2).)

   An attempted murder is where a person attempts to kill another person with malice, but fails, or is prevented or intercepted in its perpetration from carrying out the killing. (Pen Code, § 664.)

   > For an attempt, the overt act must go beyond mere preparation and show that the killer is putting his or her plan into action; it need not be the last proximate or ultimate step toward commission of the crime or crimes nor need it satisfy any element of the crime. However, as we have explained, "[b]etween preparation for the attempt and the attempt itself, there is a wide difference. The preparation consists in devising or arranging the means or measures necessary for the commission of the offense; the attempt is the direct movement toward the commission after the preparations are made." "'[I]t is sufficient if it is the first or some subsequent act directed towards that end after the preparations are made.' "…
   >
   > Although a definitive test has proved elusive, we have long recognized that "[w]henever the design of a person to commit crime is clearly shown, slight acts in furtherance of the design will constitute an attempt."

   (*People v. Superior Court (Decker)* (2007) 41 Cal.4th 1, 8 [internal citations omitted] [discussing slight-acts rule]; see e.g., *People v. Morales* (1992) 5 Cal.App.4th 917, 926 [attempted murder conviction affirmed where defendant threatened to kill somebody, loaded a gun, and was found outside their house with the gun].)) For example, attempting to hire somebody to kill another person is sufficient to sustain both a solicitation of murder charge and an attempted murder charge. (*People v. Superior Court (Decker)* (2007) 41 Cal.4th 1, 58.)

   A person may be charged with attempted murder even if they are not the person made the actual attempt. Existing law provides that a person who aids and abets an attempted murder, or, not being present, has advised and encouraged its commission, is guilty of attempted murder. (Pen Code, § 31.) The California Supreme Court has observed:

> Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing… [T]o be guilty of attempted murder as an aider and abettor, a person must give aid or encouragement [by words or gestures] with knowledge of the direct perpetrator's intent to kill and with the purpose of facilitating the direct perpetrator's accomplishment of the intended killing—which means that the person guilty of attempted murder as an aider and abettor must intend to kill.

(*People v. Lee* (2003) 31 Cal.4th 613, 623-624 [internal citations omitted])

The question raised by this bill is whether courts should retain the discretion to grant mental health diversion to persons **charged** with attempted murder in limited circumstances. One might also wonder whether adding a new crime to the list of crimes for which a person is prohibited from receiving mental health diversion is a first step towards drastic limitations on the availability of mental health diversion.

3) **Prevalence of Mentally Ill Offenders in Jails:** According to the Los Angeles Sheriff's Department (LASD), the overall jail population decreased in 2015, while the mentally ill population was on the rise. Between 2009 and 2016, LASD reports seeing a 60% increase in its mentally ill population. In early September 2016, a quarter of L.A. County's inmates received some form of mental health treatment. Because many of the mentally ill inmates need to be housed alone, it creates a bed shortage in the general population. (http://www.cnn.com/2016/09/22/us/lisa-ling-this-is-life-la-county-jail-by-the-numbers/index.html)

More recent statewide data suggests the problem is growing:

> On the last day of any given month in 2009 there were roughly 80,000 people in jail custody throughout California and 15,500 people with an active mental health case. On the last day of any month in 2019 there were approximately 72,000 people in jail custody and 22,000 people with an open mental health case. This represents a 42 percent increase in the number of active mental health cases. In addition, the proportion of incarcerated people in California jails with an active mental health case rose by approximately 63 percent, rising from 19 percent in 2009 to 31 percent in 2019

(The Prevalence of Mental Illness in California Jails is Rising: An Analysis of Mental Health Cases & Psychotropic Medication Prescriptions, 2009-2019, California Health Policy Strategists (Feb. 2020) p. 1 < https://www.cdcr.ca.gov/ccjbh/wp-content/uploads/sites/172/2020/02/Jail_MentalHealth_JPSReport_02-03-2020.pdf> [last visited Apr. 16, 2024].)

The situation has not improved. According to the PPIC: "[T]he percentage of inmates with mental health needs has continued to climb, from around 20% in January 2010 to a staggering 53% in June 2023." (Lofstrom, et al., *County Jails House Fewer Inmates, but Over Half Face Mental Health Issues*, PPIC (Oct. 25, 2023) < County Jails House Fewer Inmates, but Over Half Face Mental Health Issues - Public Policy Institute of California (ppic.org)> [last viewed Apr. 16, 2024].)

Housing mentally ill inmates in a custodial setting creates other difficulties, in addition to bed shortages. Jails are often not set up to provide effective mental health treatment and are

not the best treatment option for the inmate. Mentally ill inmates are expensive to house. Mentally ill inmates cost more than other prisoners for a variety of reasons, including increased staffing needs. For example, "In Los Angeles, it costs approximately $180 per day to provide community-based housing and clinical care for people with serious mental health needs—versus $445-650 per day to hold them in the city's jails." (Bryant, *The United States Criminalizes People Who Need Health Care and Housing*, Vera Institute of Justice https://www.vera.org/news/the-united-states-criminalizes-people-who-need-health-care-and-housing [last visited Apr. 16, 2024].)

4) **Recommendations from Judicial Council Related to Diversion for Mentally Ill Defendants:** The Judicial Council convened a task force to examine the issues related to mentally ill defendants within the court system. The task force published their final report in December of 2015. The report recommended the development of diversion programs for mentally ill defendants. The report stated that resources must be dedicated to identify individuals with mental illness who are involved or who are likely to become involved with the criminal justice system. The report went on to say that interventions and diversion possibilities must be developed and utilized at the earliest possible opportunity. (*Mental Health Issues Implementation Task Force: Final Report*, Judicial Council (Dec. 2015) p. 5 <https://www.courts.ca.gov/documents/MHIITF-Final-Report.pdf> [last visited Apr. 16, 2024].)

5) **Argument in Support**: According to the *Association for Los Angeles Deputy Sheriffs*, "Existing law authorizes a court to grant pretrial diversion to a defendant suffering from a mental disorder, on an accusatory pleading alleging the commission of a misdemeanor or felony offense, in order to allow the defendant to undergo mental health treatment. Existing law prohibits defendants charged with specified offenses, including murder, from being placed in this diversion program.

"AB 2576 would add ***attempted murder*** to the list of charged offenses that prohibit a defendant from being placed in this diversion program. ALADS agrees that individuals who ***attempt*** to commit murder should be evaluated for diversion programs through the same lens as those who commit murder."

6) **Argument in Opposition**: According to *Motivating Individual Leadership for Public Advancement* (MILPA), "The mental health diversion law allows a court to grant pretrial diversion if a defendant has been diagnosed with a mental disorder and the defendant's mental disorder was a significant factor in the commission of the charged offense. The law does not mandate that a court grant diversion, it merely provides the court the ability to exercise its discretion, when appropriate, to divert a defendant for mental health treatment. In making their evaluation, courts consider the opinions of qualified mental health experts to determine if the defendant's symptoms of the mental disorder causing the criminal behavior would respond to mental health treatment. Mental health diversion is never appropriate if the defendant will pose a risk of danger to the public safety.

"This bill would categorically exclude the offense of attempted murder from consideration for the mental health diversion program. That change would constitute an error from the standpoint of good policy. It is *unlikely* that a defendant charged with attempted murder would make an appropriate candidate for mental health diversion. However, the fact that is unlikely does not mean that there will not be some cases that present circumstances for which

mental health diversion will be an appropriate and preferable option to proceeding to a criminal conviction. Under current law, courts would only exercise their discretion to grant mental health diversion to a defendant that meets all the qualifying factors, would benefit from the provided mental health treatment, and does not present a risk to public safety.

"It is also not appropriate to add attempted murder to the list of offenses which currently exclude a defendant from consideration for mental health diversion, because the nature of an attempted murder charge reflects circumstances that are much easier to charge than other charges on the list which involve completed crimes. This bill creates the danger (and incentive) for a district attorney to add a charge of attempted murder to an assault case to preclude a court from considering the defendant for mental health diversion."

7) **Prior Legislation**:

a) AB 455 (Quirk-Silva), would have prohibited individuals in pretrial mental health diversion for a felony or specified misdemeanor charge from owning a firearm until they successfully complete diversion. AB 455 is pending in Assembly Appropriations Committee.

b) AB 1412 (Hart), Chapter 687, Statutes of 2023, would remove borderline personality disorder (BPD) from the mental disorders excluding a defendant from eligibility for pretrial mental health diversion.

c) SB 1223 (Becker), Chapter 735, Statutes of 2022, made changes to mental health diversion eligibility and suitability provisions.

d) AB 1810 (Budget Committee) Chapter 34, Statutes of 2018, created mental health diversion.

e) SB 142 (Beall), would have established the State Community Mental Health Performance Incentives Fund, which would provide monetary incentives for counties to avoid sending mentally ill offenders to prison. SB 142 was held in suspense in the Assembly Appropriations Committee.

f) SB 215 (Beall), Chapter 1005, Statutes of 2018, made certain offenses ineligible for mental health diversion.

REGISTERED SUPPORT / OPPOSITION:

Support

Association for Los Angeles Deputy Sheriffs
California Association of Highway Patrolmen
California Police Chiefs Association
Crime Victims United of California
Los Angeles County Professional Peace Officers Association

Opposition

ACLU California Action
California Alliance for Youth and Community Justice
California Coalition for Women Prisoners
California for Safety and Justice
California Public Defenders Association
Californians United for A Responsible Budget
Children's Defense Fund - CA
Communities United for Restorative Youth Justice (CURYJ)
Felony Murder Elimination Project
Friends Committee on Legislation of California
Initiate Justice
LA Defensa
Milpa Collective
San Francisco Public Defender
Silicon Valley De-bug
Smart Justice California, a Project of Tides Advocacy
Team Justice
Uncommon Law
Vera Institute of Justice
Young Women's Freedom Center

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

Date of Hearing: April 23, 2024
Counsel: Andrew Ironside

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Kevin McCarty, Chair

AB 2603 (Low) – As Introduced February 14, 2024

SUMMARY: Expands the grounds upon which a search warrant may be issued to include when the property or things to be seized consist of evidence that tend to show that certain misdemeanor hate crimes have occurred or are occurring.

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

EXISTING LAW:

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

2) Provides that the right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches may not be violated; and a warrant may not issue except on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized. (Cal. Const., art. I, § 13.)

3) Provides that a search warrant is an order in writing, in the name of the people, signed by a magistrate, directed to a peace officer, commanding him or her to search for a person or persons, a thing or things, or personal property, and, in the case of a thing or things or personal property, bring the same before the magistrate. (Pen. Code, § 1523.)

4) Provides that a search warrant cannot be issued but upon probable cause, supported by affidavit, naming or describing the person to be searched or searched for, and particularly describing the property, thing, or things and the place to be searched. (Pen. Code, § 1525.)

5) Provides that a search warrant may be issued when, among other reasons, the property or things to be seized consist of evidence that tends to show that sexual exploitation of a child, or possession of matter depicting sexual conduct of a person under 18 years of age, as specified. (Pen. Code, § 1524, subd. (a)(5).)

6) Defines "hate crime" as a criminal act committed, in part or in whole, because of actual or perceived characteristics of the victim, including: disability, gender, nationality, race or ethnicity, religion, sexual orientation, or association with a person or group with one or more of the previously listed actual or perceived characteristics. (Pen. Code, § 422.55, subd. (a).)

7) Specifies that "hate crime" includes a violation of statutes prohibiting interference with a person's exercise of civil rights because of the actual or perceived characteristics, as listed above. (Pen. Code, § 422.55, subd. (b).)

8) Provides that no person shall by threat of force, willfully injury, intimate, interfere with, oppress or threaten any other person in the free exercise or enjoyment of any right or privilege secured by the Constitution or laws of this state or the United States because of the actual or perceived characteristics of the victim; but that no person may be convicted of violating subdivision (a) based upon speech alone, except upon a showing that the speech itself threatened violence against a specific person or group of persons and that the defendant had the apparent ability to carry out the threat. (Pen. Code, § 422.6, subd. (a) & (c).)

9) Provides that no person, whether or not acting under color of law, shall knowingly deface, damage, or destroy the real or personal property of any other person for the purpose of intimidating or interfering with the free exercise or enjoyment of any right or privilege secured by the secured by the Constitution or laws of this state or the United States because of the actual or perceived characteristics of the victim. A violation is a misdemeanor (Pen. Code, § 422.6, subd. (b).)

10) Provides that a violation of either provision of Section 422.6 above is a misdemeanor punishable by imprisonment in county jail for up to one year, by a fine of up to $5,000, or by both; and requires the court shall to the defendant to perform up to 400 hours of community service to be performed over a period not to exceed 350 days. (Pen. Code, § 422.6, subd. (c).).

11) Provides that all state and local agencies shall use the definition of "hate crime" stated above except as other explicit provisions of state or federal law may require otherwise. (Pen. Code, § 422.9.)

12) Specifies "hate crimes" include, but are not limited to violating or interfering with the exercise of civil rights, or knowingly defacing, destroying, or damaging property because of actual or perceived characteristics of the victim that fit the "hate crime definition." (Pen. Code, §§ 422.55, subd. (b). & 422.6., subd. (a) and (b).)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "The rise in Hate crimes towards Asian Americans, the elderly, and other groups has been cynical. California must adopt more robust laws to provide the best possible tools for law enforcement to protect communities against criminals that would target people based on race, gender, disability, age, or other characteristics. No criminal who targets Californians with hate should walk freely and escape prosecution and consequences as a result of inadequately written laws that currently protect criminals over the victims of hate crimes"

2) **Fourth Amendment and Search Warrant Requirements**: Both the United States Constitution and the California Constitution guarantee the right of all persons to be secure from unreasonable searches and seizures. (U.S. Const., amend. IV; Cal. Const., art. 1, sec.

13.) This protection applies to all unreasonable government intrusions into legitimate expectations of privacy. (*United States v. Chadwick* (1977) 433 U.S. 1, 7, overruled on other grounds by *California v. Acevedo* (1991) 500 U.S. 565.) In general, a search is not valid unless it is conducted pursuant to a warrant. A search warrant may not be issued without probable cause. "Reasonable and probable cause exists if a man of ordinary care and prudence would be led to conscientiously entertain an honest and strong suspicion that the accused is guilty." (*People v. Alvarado* (1967) 250 Cal.App.2d 584, 591.) The mere reasonableness of a search, assessed in light of the surrounding circumstances, is not a substitute for the warrant required by the Constitution. (*Arkansas v. Sanders* (1979) 442 U.S. 753, 758, overruled on other grounds by *California v. Acevedo*, supra.) There are exceptions to the warrant requirement, but the burden of establishing an exception is on the party seeking one. (*Arkansas v. Sanders* (1979) 442 U.S. 753, 760, overruled on other grounds by *California v. Acevedo*, supra.)

In California, Penal Code section 1524 provides the statutory grounds for the issuance of warrants. Under these provisions, a search warrant may be issued "[w]hen property or things were used as the means to commit a felony." (Pen. Code, § 1524, subd. (a)(2).) There are other enumerated circumstances that authorize a search warrant regardless of whether the crime was a felony or misdemeanor, such as "[w]hen the property subject to search was stolen or embezzled." (Pen. Code, § 1524, subd. (a)(1).) Additionally, Penal Code section 1524 provides that a search warrant may be issued "[w]hen the property or things are in the possession of any person with the intent to use them as a means of committing a public offense. . .." (Pen. Code, § 1524, subd. (a)(3).) A "public offense" is defined as crimes which include felonies, misdemeanors, and infractions. (Pen. Code, § 16.)

This bill would expand that statutory authority for search warrants by allowing law enforcement to obtain a search warrant on the grounds that the property or things to be seized consists of evidence that tends to show that a violation of Penal Code Section 422.6 (interference with the civil rights of an individual because of their status in a protected class) has occurred or is occurring.

3) **Hate Crimes and Reporting**: The DOJ is required to report hate crime statistics on their website by July 1st of each year. The DOJ sources the report with data from local law enforcement agencies, which the DOJ receives on a monthly basis. Monthly reporting is required to comply with federal standards imposed by the Federal Bureau of Investigation (FBI).

Although hate crimes make a small percentage of total reported crimes, the number of reported hate crimes in California has increased. In 2020, the DOJ reported hate crime events increased 31.0 percent from 1,015 in 2019 to 1,330 in 2020. The report also found hate crime offenses increased 23.9 percent from 1,261 in 2019 to 1,563 in 2020. (DOJ, Hate Crime in California 2020 <https://data-openjustice.doj.ca.gov/sites/default/files/2021-06/Hate%20Crime%20In%20CA%202020.pdf> [as of Feb. 28, 2022].) According to DOJ's 2021 report on hate crimes, "hate crime events" reported to law enforcement "increased 32.6 percent from 1,330 in 2020 to 1,763 in 2021," and "hate crime offense increased 42.1 percent from 1,563 in 2020 to 2,221 in 2021." (DOJ, Hate Crime in California 2021 <https://oag.ca.gov/system/files/attachments/press-docs/Hate Crime In CA 2021 FINAL.pdf> [last visited Mar. 7, 2023].) Specifically, the DOJ found that "[v]iolent [hate]

crime offenses increased 47.4 percent from 1,088 in 2020 to 1,604 in 2021." (*Ibid.*)

A 2018 report by the California State Auditor found that law enforcement had not taken sufficient action to identify, report, and respond to hate crimes. According to the report, "Officers at…law enforcement agencies might have been better equipped to identify hate crimes if their agencies had implement better methods for doing so and provided periodic training." (California State Auditor, *Hate Crimes in California* (May 2018) at p. 2 <https://www.auditor.ca.gov/pdfs/reports/2017-131.pdf> [last visited Mar. 15, 2022]) It added, "At local law enforcement agencies we reviewed, a lack of hate crime training and protocols, in addition to little proactive guidance and oversight from DOJ, have contributed to the underreporting of hate crimes." (*Id.* at 26.)

4) **The Toll of Hate Crimes on Victims:** Hate crimes severely impact victims. The emotional effect can be significant, with victims experiencing "more psychological distress than victims of other violent crimes." (*Id.* at p. 11.) Experts have observed that "[e]xperiences of hate are associated with poor emotional well-being such as feelings of anger, shame, and fear. Moreover, victims tend to experience poor mental health, including depression, anxiety, posttraumatic stress, and suicidal behavior." (Cramer et al., *Hate-Motivated Behavior: Impacts, Risk Factors, and Interventions*, Health Affairs (Nov. 9, 2020) <https://www.healthaffairs.org/do/10.1377/hpb20200929.601434/> [last visited Mar. 8, 2023].) The physical health of victims also suffers. The "impacts include poor overall physical health, physical injury, stress, and difficulty accessing medical care." (Cramer et al., *supra.*)

   Hate crimes also impact the victim's community. According to the California State Auditor, "[T]hese crimes likely had a significant impact on the groups to which victims belonged… [by] communicat[ing] to members of the victims' groups that they are unwelcome and unsafe in their communities." (California State Auditor, *supra*, at p. 11; see e.g., Brown et al., *How hate crime affects a whole community*, BBC (Jan. 12, 2018) <https://www.bbc.com/news/uk-42622767> [last visited Mar. 8, 2023].) Indeed, "Entire communities can feel the impacts of victimization. Members of the targeted community may experience vicarious trauma symptoms resulting from witnessing others being victimized. In addition, a review of structural discrimination shows that for a targeted vulnerable group, long-standing, systemic inequalities can be seen in economic, housing, and educational disparities." (Cramer et al., *supra.*)

5) **Argument in Support**: According to *California District Attorneys Association*, "There has been a shocking rise in hate crimes over the past several years in the past year. This is sadly no aberration but part of an on-going trend. Hate crimes are singularly damaging to our society as they target more than the immediate victim - they target an entire community. Sometimes, the greatest harm of the hate crime is its symbolic blow to the community which creates a climate of fear that effectively imprisons entire segments of our society as they fear walking at night or attending a campus or public event.

   "An essential element when investigating any hate crime is determining the motive of the perpetrator. If the perpetrator was motivated by bias, then he is potentially guilty of a hate crime, but if the perpetrator was not motivated by bias, he may be guilty of assault but not a hate crime. It makes an extraordinary difference to the community, to the victim, and to the accused that the underlying motive is properly identified. For this reason, it is vital for us to

be able to accurately determine if a crime was motivated by bias, which can often only be done using a search warrant to examine a defendant's social medial feeds and computer files.

"While the most important tool for determining motive is often a search warrant, state law currently does not allow for the issuance of a search warrant in misdemeanor hate crimes. Without this tool, those guilty of hate crimes evade responsibility and those wrongfully accused cannot clear their names. Allowing judges to issue search warrants when there has been a demonstration of probable cause will allow us to reach the truth, to respond appropriately to hate crimes, and ensure fewer misdemeanor hate crimes will go unprosecuted due to lack of definitive evidence that racial bias was the motivation. In this way, AB 2603 will increase public safety and justice.

"For example, recently in Santa Clara County there was an incident where a man of apparent Mideastern origin was attacked when he did not respond to a panhandler calling him a "terrorist". The attack might have been motivated by anger over money or it might have been motivated by racial bias, but without a search warrant to allow further investigation, the motive could not be clearly determined. In another example, a man overheard a father talking to his sons in Hebrew next door. He asked what language they were speaking, asked if they were Jewish, and then sprayed them with his garden hose. A search warrant could have yielded valuable evidence confirming or denying previous, underlying racial animus by the defendant in this case.

"Similarly, in Ventura County, a white homeless woman drove to her usual parking spot and noticed it was occupied by two African American teenagers. An argument ensued that one of the teenagers filmed wherein she repeatedly called them the n-word, said very derogatory things about African Americans and other marginalized groups, and brandished a kitchen knife at the two teenagers. The woman also had a prior where she had run up to a Hispanic woman jogging near Ventura Pier, yelled 'Go back to Mexico' and punched her in the face. But there were other factors that made the case for a hate crime less clear cut.

"For example, the defendant was obviously mentally ill and the brandishing had a possible self-defense aspect to it, since she didn't brandish the knife until the victim took several steps towards her in a hostile manner. A search warrant would have allowed law enforcement to search the defendant's private social media page to see if she regularly made disparaging racial posts, thus clearly elevating the case to a hate crime.

"And, of course, sadly one need only read the newspaper on virtually any week to learn that yet another older Asian man or woman was punched, pushed or otherwise assaulted while minding their own business. (According to the LA Times, there has been a 177% rise in hate crimes against Asian Americans in California. Since many of these assaults qualify as misdemeanors, without a search warrant it is very hard to know if they were motivated by bias and therefore should be charged as hate crimes.

"AB 2063 will not create a new crime, nor will it increase punishments or give greater power to the police or prosecutors, but it will allow judges to issue search warrants in constitutionally appropriate cases. This will allow us to gather the best evidence to determine if a misdemeanor hate crime has been committed, and then exonerate the innocent and hold the guilty responsible. It will also allow us to effectively communicate with our communities

to let them know when a hate crime has been committed and when one has not."

6) **Argument in Opposition**: According to the *San Francisco Public Defender*, "The author has not provided evidence that current laws are insufficient for law enforcement to make arrests for alleged hate crimes. AB 2603 would once again amend Penal Code section 1524 to expand the circumstances under which a search warrant may issue. This bill allows search warrants to issue for misdemeanor violations of Penal Code section 422.6. The continued amendments to Penal Code section 1524 are an example of how a limiting section, over the years, is continually weakened and expanded beyond its original intent.

"Not all that long ago, Penal Code section 1524 dealt with warrants issued for felonies and had only 6 categories under subdivision (a) In an example of the observation that if you give law enforcement an inch, they will take a mile (People v. McKay (2002) 27 Cal. 4th 601, 628, concurring and dissenting opinion of Brown, J.) this subdivision now has 20 categories covering many more circumstances. This bill adds yet another category related to misdemeanor conduct.

"The right to privacy is slowly being eroded, one amendment to Penal Code section 1524 at a time. Hate crimes are, of course, awful. That does not translate, however, into a need to once again broaden the ability of law enforcement to get search warrants for yet another misdemeanor."

7) **Related Legislation**:

a) SB 64 (Umberg), is identical to this bill. SB 64 is pending on the suspense file of the Senate Appropriations Committee.

b) AB 1804 (Jim Patterson), would lower the requisite amount of fentanyl to support probable cause to obtain a wiretap order. AB 2419 is currently pending on the suspense file in the Assembly Appropriations Committee.

c) AB 1892 (Flora), would authorize a judge, upon receipt of a valid application, to issue an ex parte order authorizing interception of wire or electronic communications initially intercepted within the territorial jurisdiction of the judge's court if there is probable cause to believe that an individual is committing, has committed, or is about to commit a crime related to specified obscene matter involving minors. AB 1892 is currently pending hearing in this committee. AB 2419 is currently pending a hearing in the Assembly Appropriations Committee.

d) AB 2419 (Gipson), would expand the grounds upon which a search warrant may be issued to include when the property or things to be seized consist of evidence that tend to show the crime of communications in furtherance of a solicitation of a minor, as specified, has occurred or is occurring. AB 2419 is currently pending a vote by the Assembly.

e) AB 2309 (Muratsuchi), would authorize the city attorney of any general law city or chartered city to prosecute any misdemeanor committed within the city arising out of violation of state law, without consent of the district attorney. AB 2309 is currently

pending hearing in this committee.

8) **Prior Legislation**:

a) AB 539 (Acosta), Chapter 342, Statutes 2017, expanded the grounds for issuance of a search warrant to include evidence of a misdemeanor violation of disorderly conduct, as specified.

b) AB 539 (Levine), Chapter 118, Statutes of 2015, authorized the issuance of a search warrant to compel a blood draw from a person suspected of operating a boat while under the influence of alcohol or drugs.

c) AB 1104 (Rodriguez), Chapter 124, Statutes of 2015, clarified that a search warrant may be issued when the property or things to be seized are controlled substances or any device, contrivance, instrument, or paraphernalia used for unlawfully using or administering a controlled substance, as provided in existing provisions of law in the Health and Safety Code.

d) SB 178 (Leno), Ch. 651, Stats. 2015, created the California Electronic Communications Privacy Act (CalECPA), which generally requires law enforcement entities to obtain a search warrant before accessing data on an electronic device or from an online service provider.

e) SB 717 (DeSaulnier), Chapter 317, Statutes of 2013, authorized a search warrant to allow officers to take a sample of the blood as evidence in misdemeanor driving under the influence (DUI) when a person refuses to consent, as specified.

REGISTERED SUPPORT / OPPOSITION:

Support

Arcadia Police Officers' Association
Brooke Jenkins, San Francisco District Attorney
Burbank Police Officers' Association
California Association of Highway Patrolmen
California District Attorneys Association
California Police Chiefs Association
California Reserve Peace Officers Association
California State Sheriffs' Association
Claremont Police Officers Association
Corona Police Officers Association
Culver City Police Officers' Association
Deputy Sheriffs' Association of Monterey County
Fullerton Police Officers' Association
Los Angeles City Attorney's Office
Murrieta Police Officers' Association
Newport Beach Police Association
Novato Police Officers Association

Palos Verdes Police Officers Association
Placer County Deputy Sheriffs' Association
Pomona Police Officers' Association
Riverside Police Officers Association
Riverside Sheriffs' Association
Santa Ana Police Officers Association
Upland Police Officers Association

Oppose

ACLU California Action
Buen Vecino
California Public Defenders Association
Californians United for A Responsible Budget
Communities United for Restorative Youth Justice (CURYJ)
Felony Murder Elimination Project
Oakland Privacy
San Francisco Public Defender
Silicon Valley De-bug
Team Justice
Uncommon Law
Young Women's Freedom Center

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

Date of Hearing: April 23, 2024
Counsel: Liah Burnley

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Kevin McCarty, Chair

AB 2604 (Low) – As Introduced February 14, 2024

SUMMARY: Changes the definition of "in whole or in part because of," as the term relates to hate crimes, to mean that the bias motivation of the offense may include discriminatory selection of a victim based on a protected characteristic.

EXISTING LAW:

1) Defines "Hate crime" as a criminal act committed, ***in whole or in part, because of*** one or more of the following actual or perceived characteristics of the victim:

   a) Disability;

   b) Gender;

   c) Nationality;

   d) Race or ethnicity;

   e) Religion; or,

   f) Sexual orientation; or,

   g) Association with a person or group with one or more of these actual or perceived characteristics. (Pen. Code, § 422.55, subd. (a).)

2) Defines "***in whole or in part because of***" as the bias motivation must be a cause in fact of the offense, whether or not other causes also exist. When multiple concurrent motives exist, the prohibited bias must be a substantial factor in bringing about the particular result. There is no requirement that the bias be a main factor, or that the crime would not have been committed but for the actual or perceived characteristic. (Pen. Code, § 422.56, subd. (d).)

3) Requires all state and local law enforcement agencies to adopt a hate crimes policy that shall include, among other things, the above-listed definitions and information regarding "bias motivation." (Pen. Code, § 422.87, subd. (a).)

4) Provides, for the purposes of law enforcement hate crime policies, that "bias motivation" is a preexisting negative attitude toward actual or perceived characteristics listed above. Depending on the circumstances of each case, "bias motivation" may include, but is not limited to, hatred, animosity, ***discriminatory selection of victims***, resentment, revulsion, contempt, unreasonable fear, paranoia, callousness, thrill-seeking, desire for social

dominance, desire for social bonding with those of one's "own kind," or a perception of the vulnerability of the victim due to the victim being perceived as being weak, worthless, or fair game because of a protected characteristic, including, but not limited to, disability or gender. (Pen. Code, § 422.87, subd. (a)(3)(B).)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "Consistently, we are seeing these attacks rooted in racism and xenophobia against the AAPI community. Action has to be taken to protect our communities. I am proud to author this bill as chair of the AAPI Legislative Caucus as we work to protect the AAPI community from these hate crimes."

2) **Effect of This Bill**: To be convicted of a hate crime, a defendant must intend to interfere with another person's constitutional rights and act "***in whole or in part"*** because of the other person's actual or perceived protected characteristic. (CALCRIM 1355; Pen. Code, § 422.7.) Under existing law, a defendant acts in whole or in part because of the actual or perceived characteristics of the other person if the defendant was biased against the other person based on their actual or perceived characteristic AND the bias motivation caused the defendant to commit the alleged acts. (*Ibid.*) If a defendant had more than one reason to commit the alleged acts, the bias motivation must have been a substantial motivating factor. (*Ibid.*) This bill would change the definition of "in whole or in part" to include "discriminatory selection of a victim." In other words, this bill would make discriminatory selection of a victim part of the motivation needed to prove that a crime is a hate crime. For example, a defendant could be charged with a hate crime for simply choosing a victim with a protected characteristic, even if they were motivated by opportunity and not hate. In so doing, this bill could turn any crime committed against a person with a protected characteristic a hate crime.

   Selection of the victim because of one or more of the protected characteristics is already inherent in the crime. For example, in *People v. Superior Court* (Aishman), (1995) 10 Cal.4th 735, 738, the Supreme Court noted that "As evidence of a bias motivation in the selection of the victims, the People relied on various [racist] statements purportedly made by [the defendants]." Penal Code section 422.56, subdivision (d) expressly states This subdivision is declaratory of, existing law under *People v. Superior Court* (Aishman) (1995) 10 Cal.4th 735, 738.

3) **Hate Crimes**: Hate crimes severely impact victims. The emotional effect can be significant, with victims experiencing more psychological distress than victims of other violent crimes. Experts have observed that "[e]xperiences of hate are associated with poor emotional well-being such as feelings of anger, shame, and fear. Moreover, victims tend to experience poor mental health, including depression, anxiety, posttraumatic stress, and suicidal behavior."[1] The physical health of victims also suffers. The "impacts include poor overall physical health, physical injury, stress, and difficulty accessing medical care."[2]

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[1] Cramer et al., *Hate-Motivated Behavior: Impacts, Risk Factors, and Interventions*, Health Affairs (Nov. 9, 2020) <https://www.healthaffairs.org/do/10.1377/hpb20200929.601434/>.
[2] *Ibid.*

Hate crimes also impact the victim's community. According to the California State Auditor, "these crimes likely had a significant impact on the groups to which victims belonged… [by] communicat[ing] to members of the victims' groups that they are unwelcome and unsafe in their communities."[3] Indeed, "Entire communities can feel the impacts of victimization. Members of the targeted community may experience vicarious trauma symptoms resulting from witnessing others being victimized. In addition, a review of structural discrimination shows that for a targeted vulnerable group, long-standing, systemic inequalities can be seen in economic, housing, and educational disparities."[4]

Although hate crimes make a small percentage of total reported crimes, the number of reported hate crimes in California has increased. In 2020, the Department of Justice (DOJ) reported hate crime events increased 31.0% from 1,015 in 2019 to 1,330 in 2020. The report also found hate crime offenses increased 23.9%from 1,261 in 2019 to 1,563 in 2020.[5] According to DOJ's 2021 report on hate crimes, "hate crime events" reported to law enforcement "increased 32.6% from 1,330 in 2020 to 1,763 in 2021," and "hate crime offense increased 42.1% from 1,563 in 2020 to 2,221 in 2021."[6] Specifically, the DOJ found that "[v]iolent [hate] crime offenses increased 47.4%from 1,088 in 2020 to 1,604 in 2021."[7]

A 2018 report by the California State Auditor found that law enforcement had not taken sufficient action to identify, report, and respond to hate crimes. According to the report, "Officers at…law enforcement agencies might have been better equipped to identify hate crimes if their agencies had implement better methods for doing so and provided periodic training."[8]It added, "At local law enforcement agencies we reviewed, a lack of hate crime training and protocols, in addition to little proactive guidance and oversight from DOJ, have contributed to the underreporting of hate crimes."[9]

4) **Argument in Support**: According to *The Arc & United Cerebral Palsy California Collaborative*, "Inflammatory political rhetoric beginning in 2015 concerning immigration, the COVID pandemic and LGBTQ rights and, more recently, also due to the Israel-Hamas war and other conflicts in countries and regions abroad have led to the continuing crime wave of hate crimes in California and the United States. These crimes are being committed both by hate groups that have seized these opportunities and by individuals whose biases have been aroused. This surge and, at least in California, some significant improvements in reporting brought about by several important bills and state and federal leadership have been reflected in official statistics, but hate crimes remain grossly under-reported. Anti-disability hate crimes in particular remain the invisible hate crimes.

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[3] California State Auditor, *supra*, at p. 11; see e.g., Brown et al., *How hate crime affects a whole community*, BBC (Jan. 12, 2018) <https://www.bbc.com/news/uk-42622767>.
[4] Cramer et al., *supra*.
[5] DOJ, *Hate Crime in California 2020.* Available at: <https://data-openjustice.doj.ca.gov/sites/default/files/2021-06/Hate%20Crime%20In%20CA%202020.pdf>.
[6] DOJ, *Hate Crime in California 2021*. Available at: <https://oag.ca.gov/system/files/attachments/press-docs/Hate Crime In CA 2021 FINAL.pdf.
[7] *Ibid.*
[8] California State Auditor, *Hate Crimes in California* (May 2018) https://www.auditor.ca.gov/pdfs/reports/2017-131.pdf.
[9] *Id.* at 26.

"One reason for this appalling under-reporting is that the law is unclear that crimes committed because of the selective targeting of victims due to the seven protected characteristics may constitute hate crimes depending on the evidence in each case. Examples include when a criminal commits repeated crimes against victims with a particular protected characteristic, ignoring other equally available and vulnerable potential victims. This legal oversight is despite AB 57 (Gabriel) of 2021 that made discriminatory selection an indicator of suspected hate crimes.

"AB 2604 corrects this by clearly establishing that discriminatory selection of victims may constitute bias motivation, making the crimes hate crimes."

5) **Argument in Opposition**: According to the *California Public Defenders Association (CPDA)*, "The phrase in that definition, "[committed] in whole or in part because of" is explained in "Penal Code section 422.56, subdivision (d), which currently reads " 'In whole or in part because of' means that the bias motivation must be a cause in fact of the offense, whether or not other causes also exist. . . ."

"AB 2604, section 1, amends that explanation to read, " 'In whole or in part because of' means that the bias motivation, which may include discriminatory selection of a victim because of a protected characteristic referenced in Section 422.55, must be a cause in fact of the offense, whether or not other causes also exist."

"While well-intentioned, AB 2604 is bad public policy because it is unnecessary, duplicative of existing law and overbroad. [...]

"By including "discriminatory selection of a victim" with any of the following characteristics: disability, gender, nationality, race or ethnicity, religion, and sexual orientation, in application AB 2604 would mean longer sentences and hate crime enhancements for conduct that does not have the requisite hate or animus. In other words, any crime against someone in the protected groups could be labeled a hate crime regardless of someone's motivation.

"Examples include a purse snatching of someone with limited English language proficiency, stealing a wheelchair, or stealing from a wheelchair accessible van.

"Ultimately, AB 2604 could result in a blanket one-year enhancement on many offenses that fall outside of what the law has defined as "hate crimes."

"Historically, all criminal laws, including hate crime legislation such as AB 2604, have been disproportionately weaponized against Black people.

"Most of the people convicted for hate crimes are the people that hate crime legislation allegedly protects: Black people, poor people, disabled people, queer and trans people." In 2019, though Black people make up about 13 percent of the U.S. population, they were accused of nearly 24 percent of hate crimes by law enforcement. [...]

"AB 2604 does not fill any "gap" in the penal code. If an individual commits a robbery, regardless of whether it's a hate crime or not, and receives a conviction, they will face criminal

legal system consequences."

6) **Related Legislation**: AB 3231 (Villapudua) would define felony hate crimes as a violent felony. AB 3231 is pending in this Committee.

7) **Prior Legislation**:

   a) AB 1064 (Low), of the 2023-2024 Legislative Session, was substantially similar to this bill. AB 1064 was held under submission Assembly Appropriations Committee.

   b) AB 57 (Gabriel) Chapter 691, Statutes of 2021, requires any local law enforcement agency that adopts or updates a hate crime policy to include specified information on recognizing religion-bias hate crimes, and would require those policies to include the discriminatory selection of victims as a form of bias motivation.

   c) AB 1947 (Ting), of the 2021-2022 Legislative Session, would have required each local law enforcement agency to adopt a hate crimes policy and requires the POST to develop a model hate crimes policy. AB 1947 was held on the Senate inactive file.

   d) AB 485 (Nguyen), Chapter 852, Statutes of 2022, requires local law enforcement agencies to post information relative to hate crimes on their internet websites on a monthly basis.

   e) AB 2282 (Bauer-Kahan), Chapter 397, Statutes of 2022, expanded existing hate crimes offenses to include specified conduct on the premises of public properties and increase the associated fines imposed for committing such offenses.

   f) AB 300 (Chu), of the 2019-2020 Legislative Session, would have required a law enforcement agency to indicate in an incident report if the underlying incident is a "hate crime" or "hate incident." AB 300 was held in Senate Appropriations Committee.

   g) AB 301 (Chu), of the 2019-2020 Legislative Session, would have required the DOJ to carry out various duties related to documenting and responding to hate crimes. AB 301 was held in Assembly Appropriations Committee.

REGISTERED SUPPORT / OPPOSITION:

Support

Asian Law Alliance
California Church Impact
California District Attorneys Association
California Lulac State Organization
Hindu American Foundation, INC.
Japanese American Citizens League - San Jose Chapter
Sikh American Legal Defense and Education Fund (SALDEF)
The Arc and United Cerebral Palsy California Collaboration

Oppose

Buen Vecino
California Coalition for Women Prisoners
California Public Defenders Association
Californians United for A Responsible Budget
Communities United for Restorative Youth Justice (CURYJ)
Felony Murder Elimination Project
Legal Services for Prisoners With Children
San Francisco Public Defender
Silicon Valley De-bug
Team Justice
Uncommon Law
Young Women's Freedom Center

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

Date of Hearing: April 23, 2024
Counsel: Kimberly Horiuchi

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Kevin McCarty, Chair

AB 2629 (Haney) – As Amended March 21, 2024

SUMMARY: Prohibits any person who is determined to be incompetent to stand trial ("IST") on a misdemeanor offense, or in a post-release community supervision ("PRCS") proceeding, or in a parole revocation hearing, from possessing or owning a firearm. Specifically, **this bill**:

1) Prohibits any person who is found IST and is granted mental health diversion on a misdemeanor from possessing or owning a firearm.

2) Authorizes a person who has had their misdemeanor offense dismissed due to their mental incompetence to subsequently petition the court for a restoration of competence.

3) Allows a court, upon receiving a petition for a determination of restoration of competence, to appoint a psychologist or psychiatrist to evaluate the person and requires a court, if the psychologist or psychologist finds that the person has regained competence, to notify the Department of Justice (DOJ) to remove the prohibition on the person from possessing or receiving a firearm.

EXISTING FEDERAL LAW: Provides that it is unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person "has been adjudicated as a mental defective or has been committed to any mental institution." (18 U.S.C.S. § 922, subd. (d).)

EXISTING LAW:

1) Authorizes diversion programs for specified crimes (Pen. Code, §§ 1000 et seq. for drug abuse; Pen. Code, §§ 1001.12 et seq. for child abuse; Pen. Code, §§ 1001.70 et seq. for contributing to the delinquency of another; Pen. Code, §§ 1001.60 et seq. for writing bad checks, and for specific types of offenders; Pen. Code, §§ 1001.80 et seq. for veterans; Pen. Code, §§ 1001.83 for caregivers; Pen. Code, §§ 1001.35 et seq. for persons with mental disorders).

2) States that the purpose of mental health diversion is to promote the following:

   a) Increased diversion of individuals with mental disorders to mitigate the individuals' entry and reentry into the criminal justice system while protecting public safety;

   b) Allowing local discretion and flexibility for counties in the development and implementation of diversion for individuals with mental disorders across a continuum of care settings; and,

c) Providing diversion that meets the unique mental health treatment and support needs of individuals with mental disorders. (Pen. Code, § 1001.35.)

3) Authorizes a court to, after considering the positions of the defense and prosecution, grant pretrial mental health diversion to defendant charged with a misdemeanor or a felony if the defendant meets all of the following requirements:

   a) The court is satisfied that the defendant suffers from a mental disorder as identified in the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders, including, but not limited to, bipolar disorder, schizophrenia, schizoaffective disorder, or post-traumatic stress disorder, but excluding antisocial personality disorder, borderline personality disorder, and pedophilia, and the defense produces evidence of the defendant's mental disorder which must include a recent diagnosis by a qualified mental health expert;

   b) The court is satisfied that the defendant's mental disorder was a significant factor in the commission of the charged offense, as provided;

   c) In the opinion of a qualified mental health expert, the defendant's symptoms of the mental disorder motivating the criminal behavior would respond to mental health treatment;

   d) The defendant consents to diversion and waives their right to a speedy trial, unless a defendant has been found to be an appropriate candidate for diversion in lieu of commitment due to the their mental incompetence and cannot consent to diversion or give a knowing and intelligent waiver of their right to a speedy trial;

   e) The defendant agrees to comply with treatment as a condition of diversion; and,

   f) The court is satisfied that the defendant will not pose an unreasonable risk of danger to public safety, as defined, if treated in the community. In making this determination, the court may consider the opinions of the district attorney, the defense, or a qualified mental health expert, and may consider the defendant's violence and criminal history, the current charged offense, and any other factors that the court deems appropriate. (Pen. Code, § 1001.36, subds. (a)-(b).)

4) Excludes defendants from mental health diversion eligibility if they are charged with murder, voluntary manslaughter, a sex-registerable offense except for indecent exposure, or offenses involving weapons of mass destruction. (Pen. Code, § 1001.36, subd. (b)(2).)

5) Defines "pretrial diversion" as the postponement of prosecution to allow a defendant to undergo mental health treatment subject to the following conditions:

   a) The court is satisfied that the recommended inpatient or outpatient program of mental health treatment will meet the specialized mental health treatment needs of the defendant;

   b) The defendant may be referred to a program of mental health treatment utilizing existing inpatient or outpatient mental health resources. Before approving a proposed treatment program, the court shall consider the request of the defense, the request of the

prosecution, the needs of the defendant, and the interests of the community. The treatment may be procured using private or public funds, and a referral may be made to a county mental health agency, existing collaborative courts, or assisted outpatient treatment only if that entity has agreed to accept responsibility for the treatment of the defendant, and mental health services are provided only to the extent that resources are available and the defendant is eligible for those services;

c) The provider of the mental health treatment program in which the defendant has been placed shall provide regular reports to the court, the defense, and the prosecutor on the defendant's progress in treatment;

d) The period during which criminal proceedings against the defendant may be diverted shall be no longer than two years;

e) Upon request, the court shall conduct a hearing to determine whether restitution is owed to any victim as a result of the diverted offense and, if owed, order its payment during the period of diversion. However, a defendant's inability to pay restitution due to indigence or mental disorder shall not be grounds for denial of diversion or a finding that the defendant has failed to comply with the terms of diversion. (Pen. Code, § 1001.36, subd. (c).)

6) States that if any of the following circumstances exists, the court shall, after proper notice, hold a hearing to determine whether the criminal proceedings should be reinstated, whether the treatment should be modified, or whether the defendant should be conserved and referred to the conservatorship investigator of the county of commitment to initiate conservatorship proceedings for the defendant:

a) The defendant is charged with an additional misdemeanor allegedly committed during the pretrial diversion and that reflects the defendant's propensity for violence;

b) The defendant is charged with an additional felony allegedly committed during the pretrial diversion;

c) The defendant is engaged in criminal conduct rendering him or her unsuitable for diversion; or,

d) A qualified mental health expert opines that:

i. The defendant is performing unsatisfactorily in the assigned program; or

ii. The defendant is gravely disabled, as defined. (Pen. Code, § 1001.36, subd. (d).)

7) Requires the court to dismiss the criminal charges if the defendant has performed satisfactorily in diversion. A court may conclude that the defendant has performed satisfactorily if the defendant has substantially complied with the requirements of diversion, has avoided significant new violations of law unrelated to the defendant's mental health condition, and has a plan in place for long-term mental health care. (Pen. Code, § 1001.36, subd. (e).)

8) States that no person who has been found not guilty by reason of insanity of any crime other than those specified, shall purchase or receive, or attempt to purchase or receive, or shall have in their possession, custody, or control any firearm or any other deadly weapon unless the court of commitment has found the person to have recovered sanity, as specified. (Welf. and Inst. Code, 8103, subd (c)(1).)

9) Specifies that no person found by a court to be IST, shall purchase or receive, or attempt to purchase or receive, or shall have in their possession, custody, or control, any firearm or any other deadly weapon, unless there has been a finding with respect to the person of restoration to competence to stand trial by the committing court. (Welf. and Inst. Code, 8103, subd (d)(1).)

10) States no person who has been placed under conservatorship by a court, as specified, because the person is gravely disabled as a result of a mental disorder or impairment by chronic alcoholism, shall purchase or receive, or attempt to purchase or receive, or shall have in their possession, custody, or control, any firearm or any other deadly weapon while under the conservatorship if, at the time the conservatorship was ordered or thereafter, the court that imposed the conservatorship found that possession of a firearm or any other deadly weapon by the person would present a danger to the safety of the person or to others. (Welf. and Inst. Code, 8103, subd (e)(1).)

11) Specifies that a person who has been taken into custody on a 72 hour hold because that person is a danger to themselves or others, assessed as specified, and admitted to a designated facility because that person is a danger themselves or others, shall not own or possess any firearm for a period of five years after the person is released from the facility. (Welf. and Inst. Code, 8103, subd (f)(1).)

12) States that a person taken into custody on a 72 hour hold may possess a firearm if the superior court has found that the people of the State of California have not met their burden of showing by a preponderance of the evidence that the person would not be likely to use firearms in a safe and lawful manner. (Welf. and Inst. Code, 8103, subd (f).)

13) Provides that a person subject to a 72 hour hold may make a single request for a hearing at any time during the five-year period. (Welf. and Inst. Code, 8103, subd (f)(4).)

14) Specifies that within seven days after the request for a hearing, the DOJ shall file copies of the reports described in this section with the superior court. (Welf. and Inst. Code, 8103, subd (f)(5).)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Authors' Statement:** According to the author: "AB 2629 will close a loophole in existing law that allows people who are deemed criminally insane to purchase and buy guns. Compared to other high-income countries, the United States has stood out as the only country with a persistent problem with gun violence. Since 2014, California has had more than 12,000 deaths caused by guns – with thousands of Californians to dying due to this loophole not being closed. Preventing tragedies before they happen by prohibiting gun ownership for

individuals who are mentally incompetent is a common sense solution that will improve public safety.

When an individual is deemed by the court to be mentally incompetent during a felony criminal proceeding or due to a developmental disability, the person becomes prohibited from purchasing or possessing firearms until their rights are restored by the courts. (Welf. & Inst. Code § 8103(d)(1).) This firearm prohibition also applies to individuals found mentally incompetent to stand trial during misdemeanor proceedings in federal court or the courts of any other state. (Welf. & Inst. Code § 8103(d)(1).)

Although the standard for determining mental incompetency is the same for both felony and misdemeanor proceedings, such a finding only results in a firearm prohibition in felony cases, or in misdemeanor proceedings held in federal or other states' courts. When a person is found incompetent to stand trial in a misdemeanor proceeding in California, however, and the person is not ordered into a diversion program, existing law inexplicably does not trigger the same firearm safeguards. Instead, in many of these cases the court must simply dismiss the matter and the person is released without treatment or supervision, but retaining their ability to purchase and possess firearms.

This bill will clarify that firearm prohibitions apply in any case where a person is found mentally incompetent to stand trial – regardless of whether the underlying charge is a felony or misdemeanor – and not placed into a diversion program. As the relevant factor is the person's mental health status and not the underlying crime, it makes sense to apply the firearms prohibitions consistently in all mental incompetency cases."

2) **Misdemeanor IST:** Under state and federal law, all individuals who face criminal charges must be mentally competent to help in their defense. A defendant is mentally incompetent to stand trial "if, as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner. (Pen. Code, § 1367.) Due process requires the court to initiate a determination of competency on its own motion when substantial evidence exists that the defendant is incompetent. (*People v. Pennington* (1967) 66 Cal.2d 508, 518.)

When substantial evidence of incompetence exists, the trial court cannot proceed with the case against the defendant without first holding a competency hearing. (*Id.* at 521.) The court must appoint a psychiatrist or licensed psychologist to examine the defendant. If defense counsel opposes a finding on incompetence, the court must appoint two experts: one chosen by the defense, one by the prosecution. (Pen. Code, § 11369, subd. (a).) The examining expert(s) must evaluate the defendant's alleged mental disorder and the defendant's ability to understand the proceedings and assist counsel, as well as address whether antipsychotic medication is medically appropriate. (Pen. Code, § 1369, subd. (a).)

Both parties have a right to a jury trial to decide competency. (Pen. Code, § 1369.) A formal trial is not required when jury trial has been waived. (*People v. Harris* (1993) 14 Cal.App.4th 984.) If the court finds a defendant mentally incompetent to stand trial, the person is committed to Department of State Hospitals (DSH) or other (inpatient or outpatient) treatment facility for treatment to regain competency in order to be brought back to court to face the charges against them. (Pen. Code, § 1370, subd. (a).) A treatment facility includes a county jail, if the county board of supervisors, the county mental health director, and the

county sheriff, concur and make specified findings. A court can also find that the defendant is eligible for mental health diversion and may grant diversion on that basis. (Pen. Code, §§ 1370 and 1370.01.)

On a felony offense or offenses, the person may be committed to the treatment facility for two years or the period equal to the maximum term of imprisonment for the most serious underlying offense with which they are charged, whichever is shorter. (Pen. Code, § 1370, subd. (c)(1).) If the treatment facility determines that there is no substantial likelihood that the defendant will regain mental competence in the foreseeable future or if the patient has not regained competency after this period, the defendant is returned to the committing court. (Pen. Code, § 1370, subds. (b) & (c).)

If the defendant has not regained competence after the maximum period of commitment or the treating agency finds that there is no reason to believe the offender will regain competence, the court may release the person or initiate conservatorship proceedings. (*In re Davis* (1973) 8 Cal.3d 798.) If the defendant is facing an indictment or an information on a felony charge involving death, great bodily injury or serious threat to another and the statutory three years has past, the court may initiate a *Murphy* conservatorship.

Since 2022, the state no longer refers defendant charged with misdemeanors to DSH given the backlog of assignments to DSH. (See SB 317 (Stern), Chapter 599, Statutes of 2021.) When a defendant is charged with a misdemeanor but is IST, a court may grant the defendant mental health diversion (if the defendant qualifies) or dismiss the charges, which are options available under existing law.

If the court determines that the defendant is not eligible for diversion, the court may (1) order modification of the treatment plan in accordance with a recommendation from the treatment provider; (2) refer the defendant to assisted outpatient treatment (Laura's Law) if such treatment is available in the county and the agency agrees to accept responsibility for treatment of the defendant; (3) refer for possible conservatorship proceedings if based on the opinion of a qualified mental health expert, the defendant appears to be gravely disabled; or (4) refer the defendant to Care Court, pursuant to Welfare and Institutions Code section 5978.

This bill amends Penal Code section 1370.01 to specify that a person who is granted misdemeanor IST is prohibited from possessing a firearm but authorizes the restoration of firearm rights if a defendant restores competency.

3) **Arguments in Support:** According to the *California Department of Justice*: "The vast majority of people with mental health conditions are not violent. However, some individuals' mental conditions do cause more significant impairments and higher risk of violence, suicidality, or unsafe use of weapons. Accordingly, state and federal gun safety laws generally disqualify individuals from accessing firearms if a civil or criminal court has found they have a severe condition or disability that makes them a danger to self or others or that renders them unable to contract or manage their own affairs. This generally includes circumstances where a court finds that an individual has a severe condition or disability such that they require an appointed conservator or guardian or are mentally incompetent to stand trial in a criminal proceeding.

Under existing California law, when an individual is deemed by the court to be mentally incompetent during a felony criminal proceeding or due to a developmental disability, the person becomes prohibited from purchasing or possessing firearms unless they successfully petition a court to remove this prohibition. This firearm prohibition also applies to individuals found mentally incompetent to stand trial during misdemeanor proceedings that occurred in federal court or the courts of any other state. Inexplicably, however, a mental incompetency determination in a misdemeanor case from a court of this state does not result in a firearm prohibition under California law. Unfortunately, this has resulted in dangerous situations where defendants have remained in possession of firearms after they were found mentally incompetent to stand trial for offenses involving violence or misuse of those weapons.

It is important to emphasize that incompetent-to-stand-trial determinations are distinct from determinations about whether an individual qualifies for pre-trial diversion from prosecution. An individual may qualify for diversion if the court finds that a mental illness was a significant factor in their commission of an offense. Recently enacted changes in the law have also given courts discretion to issue orders prohibiting firearm possession by persons granted pre-trial diversion. By comparison, to find that a person is mentally incompetent to stand trial, the court must find that, as a result of a mental health disorder or developmental disability, the person is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational matter.

This finding occurs in cases involving especially severe disabilities or impairments that would typically indicate the individual cannot be expected to safely possess firearms or comply with gun safety laws and responsibilities. AB 2629 will close this loophole in California law to clarify that firearm prohibitions apply in any case where a person is found mentally incompetent to stand trial – regardless of whether the underlying charge is a felony or misdemeanor. Notably, there are provisions allowing affected persons to petition for the return of their firearms rights on an individualized basis. The standard and procedure for determining incompetency to stand trial is the same for both felony and misdemeanor proceedings. As the firearm prohibition for incompetency cases is based on the individual's mental condition and capacities – not the underlying crime – the law should be consistent between felony and misdemeanor incompetency determinations. Making certain that guns do not fall into the wrong hands is a goal we all share. AB 2629 furthers those efforts by bringing consistency in our firearms safety laws."

4) **Arguments in Opposition:** According to the *ACLU California Action*: "This bill would prohibit any person deemed incompetent to stand trial in a misdemeanor proceeding or in a post release community supervision or parole revocation hearing from purchasing, receiving, attempting to purchase or receive, or have possession, custody, or control of a firearm or any other deadly weapon unless there has been a finding of restoration to competence. While we appreciate the goal of preventing gun and other violence, we are concerned that this bill will expose vulnerable people with serious mental illness to future criminal penalties for potential violations of the prohibition created by the bill. Under current law, people charged with felonies and deemed incompetent to stand trial are subject to the firearm and deadly weapon prohibitions described above. (Welfare and Institutions Code, §8103, subd. (d)(1).)

While we still have concerns with the possibility of this vulnerable population facing future criminal liability for violations of the existing prohibitions, our concerns are partially mitigated by the fact that the relevant process for restoration to competence is one that occurs during the lifecycle of the case when the person is still represented by an attorney, the charges are in place, and there are resources already allocated for evaluation. In contrast, the people who would be subject to the prohibitions under AB 2629 would include people charged with misdemeanors whose charges have been dismissed and who are not otherwise under the court's jurisdiction as well as others who have not been restored to competence before the termination of their case and would not otherwise be re-evaluated for competence.

While the bill provides a process for a person to seek a finding of restoration, it is unlikely an indigent person will have a meaningful opportunity to avail themselves of such a process given the resources and legal expertise required to navigate the court system for a voluntary process such as this. Given the breadth of our misdemeanor laws and the consequences of violating a firearms or deadly weapons prohibition, we fear this bill will expose already vulnerable people originally charged with misdemeanor offenses to further engagement with the criminal legal system and subject them to potentially severe future penalties."

5) Related Legislation:

a) AB 2518 (Davies) Prohibits any person adjudicated a ward of the court, as specified, for the crimes of murder, attempted murder, or voluntary manslaughter from owning, possessing, or having custody of a firearm. AB 2518 is pending hearing in this committee today.

b) AB 2739 (Maienschein) Requires 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 on the Assembly floor.

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 court's obligations in making determinations as to sown peace officers carrying a firearm either on or off duty. AB 2759 is pending on the Assembly floor.

6) Prior Legislation:

a) AB 178 (Ting), Chapter 45, Statutes of 2022, allocates $40 million to the Judicial Council to support a court-based firearm relinquishment program to ensure the consistent and safe removal of firearms from individuals who become prohibited from owning or possessing firearms and ammunition pursuant to court order.

b) AB 1594 (Ting), Chapter 98, Statutes of 2022, authorizes DOJ, local governments and survivors of gun violence to file a civil action in a California court for damages against a gun manufacturer, importer or dealer that violates firearm industry standards of conduct, as specified.

c) SB 129 (Skinner), Chapter 69, Statutes of 2021, allocates funds to DOJ to disburse to local sheriffs' departments for APPS enforcement operations, and outlined reporting requirements for participating sheriffs' departments.

d) SB 94 (Committee on Public Safety), Chapter 25, Statutes of 2019, requires DOJ to send an annual report to the Legislature detailing information related to APPS including the number of individuals in the database, firearms removed, number of staff enforcing APPS, and information regarding collaborative task forces with local law enforcement agencies.

e) AB 809 (Feuer), Chapter 745, Statutes of 2011, requires the DOJ to collect and retain firearm transaction information for all types of firearms, including long guns.

SUPPORT

California Department of Justice (Sponsor)

OPPOSITION

ACLU California Action

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

Date of Hearing: April 23, 2024
Counsel: Liah Burnley

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Kevin McCarty, Chair

AB 2692 (Papan) – As Amended April 17, 2024

SUMMARY: Removes the two-year limitation on the period of felony mental health diversion. Specifically, **this bill**:

1) Removes the two-year limitation period on felony mental health diversion and instead, allows a judge, in their discretion, to order a period of diversion not to exceed two years.

2) Allows the court in its discretion, grant credit toward the period of diversion for time spent in custody or in mental health treatment related to the defendant's current pending case.

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.

4) Changes the calculation for the maximum period of confinement for people who are declared IST and have a developmental disability from starting at the date of commitment to starting at the date of admission.

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, for individuals declared IST who have developmental disabilities, At the end of two years from the date of commitment admission or a period of commitment equal to the maximum term of imprisonment provided by law for the most serious offense charged in the information, indictment, or misdemeanor complaint, or the maximum term of imprisonment provided by law for a violation of probation or mandatory supervision, whichever is shorter, a defendant who has not become mentally competent shall be returned to the committing court. (Pen. Code, § 1370 (c)(1)(A).)

10) 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).)

11) 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).)

12) 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).)

13) 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).)

14) 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).)

15) 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).)

16) 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).)

17) 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).)

18) 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.)

19) 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).)

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

21) 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) **Argument in Support**: Arguments submitted in support are no longer relevant.

3) **Argument in Opposition**: According to the *California Public Defenders Association (CDAA)*, "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."

4) **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) 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.

   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 Senate 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.

5) **Prior Legislation**:

a) AB 2547 (Ta), of the 2023-2024 Legislative Session, 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 failed passage in this Committee.

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

c) 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.

d) 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.

e) 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.

f) 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.

g) 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.

h) 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.

i) 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 23, 2024
Counsel: Ilan Zur

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Kevin McCarty, Chair

AB 2695 (Ramos) – As Amended March 18, 2024

SUMMARY: Requires specified law enforcement reports to identify whether an incident occurred in Indian country.

1) Requires records and data, including statistical data that specified law enforcement agencies are required to report to the Attorney General (AG), upon the AG's request, to be disaggregated by whether an incident occurred in Indian Country.

2) Requires law enforcement domestic violence incident reports to include a notation of whether the incident took place in Indian country.

EXISTING FEDERAL LAW:

1) Defines "Indian country" as all land within the limits of any Indian reservation under the jurisdiction of the United States Government. (18 U.S.C. § 1151.)

2) States that California has jurisdiction over offenses committed by or against Indians in Indian Country to the same extent that the State has jurisdiction over offenses committed elsewhere in the State. (18 U.S.C. § 1162.)

3) Provides that the criminal laws of California shall have the same force and effect within Indian country as they have elsewhere within the State. (18 U.S.C. § 1162.)

EXISTING STATE LAW:

1) Requires each law enforcement agency to develop a system for recording all domestic violence-related calls for assistance made to the department, including whether weapons are involved, or whether the incident involved strangulation or suffocation. (Pen. Code, § 13730, subd. (a).)

2) Requires all domestic violence-related calls for assistance shall be supported with a written incident report identifying the domestic violence incident. (*Ibid.*)

3) Requires that monthly, the total number of domestic violence calls received and the numbers of those cases involving weapons or strangulation or suffocation shall be compiled by each law enforcement agency and submitted to the Attorney General. (*Ibid.*)

4) Requires the Attorney General to report annually to the Governor, the Legislature, and the public the total number of domestic violence-related calls received by California law enforcement agencies, the number of cases involving weapons, the number of cases

involving strangulation or suffocation, and a breakdown of calls received by agency, city, and county. (Pen. Code, § 13730, subd. (b).)

5) Requires each law enforcement agency shall develop an incident report form that includes a domestic violence identification code, and in all incidents of domestic violence, a report shall be written and shall be identified on the face of the report as a domestic violence incident. The report shall include at least all of the following:

   a) A notation of whether the officer or officers who responded to the domestic violence call observed any signs that the alleged abuser was under the influence of alcohol or a controlled substance.

   b) A notation of whether the officer or officers who responded to the domestic violence call determined if any law enforcement agency had previously responded to a domestic violence call at the same address involving the same alleged abuser or victim.

   c) A notation of whether the officer or officers who responded to the domestic violence call found it necessary, for the protection of the peace officer or other persons present, to inquire of the victim, the alleged abuser, or both, whether a firearm or other deadly weapon was present at the location, and, if there is an inquiry, whether that inquiry disclosed the presence of a firearm or other deadly weapon.

   d) Requires the confiscation of any firearm or other deadly weapon discovered by an officer at the scene of a domestic violence incident.

   e) A notation of whether there were indications that the incident involved strangulation or suffocation. This includes whether any witness or victim reported any incident of strangulation or suffocation, whether any victim reported symptoms of strangulation or suffocation, or whether the officer observed any signs of strangulation or suffocation. (Pen. Code, § 13730, subd. (d).)

6) Requires every city marshal, chief of police, railroad and steamship police, sheriff, coroner, district attorney, city attorney and city prosecutor having criminal jurisdiction, probation officer, county board of parole commissioners, work furlough administrator, the Department of Justice, Health and Welfare Agency, Department of Corrections, Department of Youth Authority, Youthful Offender Parole Board, Board of Prison Terms, State Department of Health, Department of Benefit Payments, State Fire Marshal, Liquor Control Administrator, constituent agencies of the State Department of Investment, and every other person or agency dealing with crimes or criminals or with delinquency or delinquents, when requested by the Attorney General:

   a) To install and maintain records needed for the correct reporting of statistical data as required.

   b) To report statistical data to the department at those times and in the manner that the AG prescribes.

   c) To give to the AG, or their agent, access to such statistical data. (Pen. Code, § 13020.)

7) Requires DOJ to do all of the following to comply with criminal statistics:

   a) Collect all data necessary for the work of the department from all persons and agencies;

   b) Prepare and distribute to all those persons and agencies cards, forms, or electronic means used in reporting data, and in addition include items of information needed by federal bureaus or departments;

   c) Recommend the form and content of records that must be kept by those persons and agencies;

   d) Instruct those persons and agencies in the installation, maintenance, and use of those records;

   e) Process, tabulate, analyze, and interpret the data collected;

   f) Supply federal bureaus or departments engaged in the collection of national criminal statistic data at their request;

   g) Make available to the public, through the department's OpenJustice Web portal, information relating to criminal statistics, to be updated at least once a year; the Attorney General may approve reports on special aspects of criminal statistics;

   h) Periodically review the requirements of units government using criminal justice statistics, and to make recommendations for changes; and,

   i) Evaluate, on an annual basis, the progress of California's transition from summary crime reporting to incident based reporting. (Pen. Code, § 13010.)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "The Missing and Murdered Indigenous Persons Crisis is an epidemic that has plagued Indian Country for generations. Families are affected by disappearances, and are further traumatized by law enforcement inaction and under-reporting. My previous legislation AB 3099 attempted to start the dialogue and address the crisis, but it is clear that more information is needed. AB 2695 will help to provide the information needed, and start giving us a clear picture of what we need to address the MMIP crisis."

2) **Murdered and Missing Indigenous People:** Rates of murder, rape, and violence against Native Americans and Alaska Natives are all higher than the national averages. This is most true for Native American and Alaskan women. A 2016 study by the National Institute for Justice found that 84.3% of American Indian and Alaska Native women have experienced violence in their lifetime, including 56.1% who have experienced sexual violence. (Indian Affairs Missing and Murdered Indigenous People Crisis, *Urban Indian Health Institute*. Available at: <https://www.uihi.org/wp-content/uploads/2018/11/Missing-and-Murdered-Indigenous-Women-and-Girls-Report.pdf> [as of April 15, 2024].) The National Crime

Information Center estimated there were $5,712 reports of missing Native American women in 2016. CNN US, *Why do so many Native American women go missing? Congress aims to find out* (April 9, 2019). Available at: <https://www.cnn.com/2019/04/09/us/native-american-murdered-missing-women/index.html> [as of April 15, 2024].) California, which has the largest Native American population in the country, has the fifth most cases of missing and murdered Indigenous people. A recent report by the Sovereign Bodies Institute identified the lack of scrutiny and insufficient data surrounding 105 missing and murdered Indigenous women and girls cases across Northern California. Cal Matters, *"Pervasive Failure to investigate:" Report finds lack of scrutiny in cases of missing and murdered Indigenous women* (April 19, 2023). Available at < https://calmatters.org/california-divide/2020/08/unsolved-missing-indigenous-women/> [as of April 15, 2024].) Further, murders of Indigenous women in Northern California are estimated to be about seven times less likely to be solved than homicides against all other victims. (*Ibid.*) The Sovereign Bodies Institute estimates that there have been about 1,700 cases since 1990, however the actual number of missing persons is likely much higher than estimated, given issues collecting data on crimes against Native American Women. (*Ibid.*)

3) **Data Collection**: The California Department of Justice collects data on domestic-violence related calls for assistance directly from local law enforcement agencies. (See <https://oag.ca.gov/crime/cjsc/stats/domestic-violence>.) Domestic violence calls that involved the use, or threat to use, of a firearm, knife or cutting instrument or other dangerous weapon are reported according to the type of weapon used regardless of the outcome or injury. There is also a separate category for the use of a personal weapon such as hands, fists, or feet if it is considered an aggravated assault under Uniform Crime Reporting (UCR) guidelines. An aggravated assault is an unlawful attack by one person upon another for the purpose of inflicting severe or aggravated bodily injury, such as broken bones, internal injuries, or cuts requiring stitches. (See data characteristics and known limitations, <https://oag.ca.gov/sites/all/files/agweb/pdfs/cjsc/stats/data_domestic_violence.pdf?>) Additionally, law enforcement must report if a domestic violence incident involved strangulation.

4) **Effect of this bill:** This bill seeks to improve reporting surrounding the Missing and Murdered Indigenous Persons Crisis by requiring law enforcement records and data submitted to the AG to be disaggregated by whether an incident occurred in Indian Country, and similarly requires law enforcement domestic violence incident reports to include a notation of whether the incident took place in Indian country. This can reasonably be expected to support improved accuracy surrounding the number of domestic violence incidents and potential domestic violence-related murders that occur in Indian country.

5) **Argument in Support**: According to the California Attorney General's Office "The DOJ proudly houses the Office of Native American Affairs (ONAA), which serves as a liaison between the DOJ and California's tribes to address justice-related issues for the overall improvement of the health, safety, and welfare of tribal citizens. As part of its goal to improve justice for tribal citizens, the DOJ is tasked with providing technical assistance relating to tribal issues to local law enforcement agencies, and tribal governments with Indian lands. Existing law also requires DOJ to study and report on how to increase state criminal justice protective and investigative resources for reporting and identifying missing Native Americans in California, particularly women and girls.

Moreover, California is a mandatory Public Law 83-280 state and as such, shares criminal jurisdiction over Indian lands with the sovereign tribal governments of those lands. However, there are currently no specific requirements that criminal justice reporting agencies provide information about crimes being committed in California Indian Country, which is comprised of approximately 103 reservations and rancherias located within 34 of California's 58 counties. Unfortunately, indigenous people, particularly women and girls, are affected by domestic violence, human trafficking, and violent crimes at disproportionately higher rates, and are statistically more likely to become missing. Knowing the scope and type of incidents occurring on Indian lands is a crucial component to understanding the MMIP crisis and developing data-driven strategies to end it."

6) **Argument in Opposition**: None

7) **Related Legislation**

a) AB 1863 (Ramos), would require the California Highway Patrol to develop policies and procedures of how a Feather Alert is activated, authorizes specified entities to directly request Alert activations, expands the criteria for determining whether to request and activate an Alert, and outline how decisions about activations are communicated. AB 1863 is pending in this committee.

b) AB 2279 (Cervantes) would establish the Bureau of Missing and Murdered Indigenous and Women, Girls, and Persons within the Department of Justice. AB 2279 is pending hearing in the Assembly Appropriations Committee.

c) AB 2944 (Waldron) would create the Red Ribbon Panel to address the murdered or missing indigenous persons (MMIP) crisis. is pending in this committee. AB 2977 is pending hearing in the Assembly Appropriations Committee.

8) **Prior Legislation**:

a) AB 1977 (Lackey) of the 2021-2022 Legislative Session, would have required a local law enforcement agency to specify whether a child was present during a domestic violence incident. AB 1977 was held in the Assembly Appropriations Committee.

b) AB 3099 (Ramos) Chapter 170, Statutes of 2020, requires the DOJ, upon funding, to provide technical assistance relating to tribal issues to local law enforcement agencies and tribal governments and to report on how to increase state criminal justice protective and investigative resources for reporting and identifying missing Native Americans in California, particularly women and girls.

c) AB 1854 (Frazier), of the 2019-2020 Legislative Session, would create the Missing or Murdered Native American Women Task Force in the Department of Justice, and would provide for the membership of that task force. AB 1854 was held in Assembly Public Safety Committee.

d) AB 1653 (Frazier), of the 2019-2020 Legislative Session, would have created the Missing and Murdered Indigenous Women Task Force to consult with California's Indian tribes to ensure resources are used effectively to investigate cases of missing and

murdered indigenous persons in the state. AB 1653 was held in the Assembly Appropriations Committee.

REGISTERED SUPPORT / OPPOSITION:

Support

Cahuilla Band of Indians
California Department of Justice

Opposition: None

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

Date of Hearing: April 23, 2024
Chief Counsel: Gregory Pagan

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Kevin McCarty, Chair

AB 2710 (Lackey) – As Amended April 8, 2024

SUMMARY: Requires the Commission on Peace Officer Standards and Training (POST) to convene a panel of law enforcement experts to report to the Legislature on specific topics related to active shooter incidents. Specifically, **this bill**:

1) Provides that to best prepare law enforcement and communities to respond to active shooter incidents, POST shall convene a panel of law enforcement experts to report to the Legislature and POST by January 1, 2027, on the following:

   a) Successful training and response protocols that have been demonstrated in active shooter incidents, including, but not limited to, matters related to command and control and coordination with the primary response agency;

   b) Law enforcement coordination with and the preparedness by schools and other sensitive sites on lockdowns and drills;

   c) Modern and updated technology and equipment, including, but not limited to, firearms, individual first aid kits, unmanned aerial vehicles, and breaching tools, to improve response times and preparedness;

   d) Proactive intervention strategies, including, but not limited to, multiagency and multidiscipline threat assessment teams;

   e) The use of school resource officers on campus for threat prevention, detection, and assessment; and,

   f) A report submitted to the Legislature, as specified.

2) States that these provisions shall be repealed on January 1,2031.

EXISTING LAW:

1) Requires POST to implement a course or courses of instruction for the training of law enforcement officers in the handling of acts of civil disobedience and adopt guidelines that may be followed by police agencies in responding to acts of civil disobedience. (Pen. Code, § 13151.5, subd. (a).)

2) Provides that POST consists of 15 members appointed by the Governor, after consultation with, and with the advice of, the Attorney General and with the advice and consent of the Senate. Racial, gender, and ethnic diversity shall be considered for all appointments to the

commission. (Pen. Code, § 13500, subd. (a).)

3) States that the commission shall be composed of the following members:

   a) Two sheriffs or chiefs of police or peace officers nominated by their respective sheriffs or chiefs of police, peace officers who are deputy sheriffs or city police officers, or any combination thereof;

   b) Three sheriffs or chiefs of police or peace officers nominated by their respective sheriffs or chief of police;

   c) Four peace officers of the rank of sergeant or below with a minimum of five years' experience as a deputy sheriff, city police officer, marshal, or state-employed peace officer for whom the commission sets standards. Each member shall have demonstrated leadership in the recognized employee organization having the right to represent the member;

   d) One elected officer or chief administrative officer of a county in this state;

   e) One elected officer or chief administrative officer of a city in this state;

   f) Two members who shall not be peace officers;

   g) One educator or trainer in the field of criminal justice; and,

   h) One peace officer in California of the rank of sergeant or below with a minimum of five years of experience as a deputy sheriff, city police officer, marshal, or state-employed peace officer for whom the commission sets standards. This member shall have demonstrated leadership in a California-based law enforcement association that is also a presenter of POST-certified law enforcement training that advances the professionalism of peace officers in California. (Pen. Code, § 13500, subd. (b).)

4) States that the Attorney General shall be an ex officio member of the commission. (Pen. Code, § 13500, subd. (c).)

5) States that of the members first appointed by the Governor, three shall be appointed for a term of one year, three for a term of two years, and three for a term of three years. Their successors shall serve for a term of three years and until appointment and qualification of their successors, each term to commence on the expiration date of the term of the predecessor. (Pen. Code, § 13500, subd. (d).)

6) States that the Governor shall designate the chair of the commission from among the members of the commission. The person designated as the chair shall serve at the pleasure of the Governor. The commission shall annually select a vice chair from among its members. A majority of the members of the commission shall constitute a quorum. (Pen. Code, § 13501.)

7) States that members of the commission shall receive no compensation, but shall be reimbursed for actual and necessary travel expenses incurred in the performance of their

duties. (Pen. Code, § 13502.)

8) States that the commission has the following powers:

   a) To meet at those times and places as it may deem proper;

   b) To employ an executive secretary, and necessary clerical and technical assistants;

   c) To contract with other agencies, public or private, or persons as it deems necessary for the purpose of services, facilities, studies, and reports to the commission that will best assist it to carry out its duties and responsibilities;

   d) To cooperate with and to secure the cooperation of county, city, city and county, and other local law enforcement agencies in investigating any matter within the scope of its duties and responsibilities, and in performing its other functions;

   e) To develop and implement programs to increase the effectiveness of law enforcement and when those programs involve training and education courses to cooperate with and secure the cooperation of state-level officers, agencies, and bodies having jurisdiction over systems of public higher education in continuing the development of college-level training and education programs;

   f) To cooperate with and secure the cooperation of every department, agency, or instrumentality in the state government;

   g) To do any and all things necessary or convenient to enable it fully and adequately to perform its duties and to exercise the power granted to it. The commission shall not have the authority to adopt or carry out a regulation that authorizes the withdrawal or revocation of a certificate previously issued to a peace officer; and,

   h) The commission shall not have the authority to adopt or carry out a regulation that authorizes the withdrawal or revocation of a certificate previously issued to a peace officer. (Pen. Code, § 13503.)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "Active shooter incidents have unfortunately become more prevalent in recent years, particularly in places like schools and public spaces, threatening the safety and security of our communities. This unfortunate reality illustrates the need for a panel of law enforcement experts to examine the most effective responses to active shooter incidents thoroughly. By pooling their expertise and experiences, these experts will deliver invaluable insights into successful training, response protocols, and the utilization of school resource officers for threat prevention, detection, and assessment. With this information, we can arm our law enforcement agencies, schools, and institutions with the tools and strategies they need to mitigate the risk of active shooters effectively."

REGISTERED SUPPORT / OPPOSITION:

Support

None

Opposition

None

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

Date of Hearing: April 23, 2024
Counsel: Kimberly Horiuchi

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Kevin McCarty, Chair

AB 2788 (Low) – As Amended April 16, 2024

SUMMARY: Changes the requirement for imposing the upper term for sentencing specified defendants prohibited from owning a firearm, as specified, when there is evidence of use of a firearm in the commission of a new felony or attempted felony. Specifically, **this bill**: >

1) States a defendant charged with a felony or an attempted felony wherein the person was armed with a firearm regardless of the elements of crime, and was otherwise prohibited from possessing a firearm, as specified, shall be subject to the following:

   a) Notwithstanding existing law related to determinate sentencing, a court shall consider and afford great weight to the fact that the defendant was armed or used a firearm while prohibited from possessing a firearm in determining whether it imposes the upper term on the felony or attempted felony.

   b) Notwithstanding existing law pertaining to determinate sentencing, a court may use the fact that the defendant was armed or used a firearm while prohibited from possessing a firearm in determining whether to impose the upper term.

   c) Notwithstanding existing law imposing probation, as specified, the duration of probation shall be five years.

   d) The courts shall mandate treatment, rehabilitation, or education programs to be completed during incarceration, the successful completion of which shall be required before good conduct credits are awarded.

   e) Probation granted to the person shall place the person on the maximum level of regular supervision.

2) States this sentencing requirement shall not be considered an enhancement for purposes of existing law related to the dismissal of enhancements in the interest of justice.

3) Defines the following terms:

   a) "Armed with a firearm" has the same meaning as that term is used in existing law related to committing a felony or attempted felony while armed with a firearm.

   b) "Use of a firearm" has the same meaning as existing law related to use of a machine gun or assault weapon in the commission of a felony or attempted felony.

c) "Possessing" for purposes of this provision, includes owning purchasing, receiving, or having in possession or under custody or control of a firearm.

EXISTING LAW:

1) States a criminal defendant is entitled:

   a) To a speedy and public trial.

   b) To be allowed counsel as in civil actions, or to appear and defend in person and with counsel, except that in a capital case they shall be represented in court by counsel at all stages of the preliminary and trial proceedings.

   c) To produce witnesses on their behalf and to be confronted with the witnesses against them, in the presence of the court, except that:

      i. Hearsay evidence may be admitted to the extent that it is otherwise admissible in a criminal action under the law of this state.

      ii. The deposition of a witness taken in the action may be read to the extent that it is otherwise admissible under the law of this state. (Pen. Code, 686.)

2) Authorizes a court, after holding a hearing and making findings, as specified, to order the removal of any spectator who is intimidating a witness. (Pen. Code, § 686.2, subd. (a).)

3) States in any case in which a person is arrested and released without trial or in which a person is arrested, tried, and acquitted, if such person is indigent and is released or acquitted at a place to which he has been transported by the arresting agency and which is more than 25 airline miles from the place of his arrest, the arresting agency shall, at their request, return or provide for return of such person to the place of their arrest. (Pen. Code, § 686.5.)

4) Prohibits any person from being subjected to a second prosecution for a public offense for which they have once been prosecuted and convicted or acquitted. (Pen. Code, § 687.)

5) States circumstances in aggravation include facts relating to the crime and facts relating to the defendant:

   a) Facts relating to the crime, whether or not charged or chargeable as enhancements, include the fact that:

      i) The crime involved great violence; great bodily harm; threat of great bodily harm; or other acts disclosing a high degree of cruelty, viciousness, or callousness;

      ii) The defendant was armed with or used a weapon at the time of the commission of the crime;

      iii) The victim was particularly vulnerable;

iv) The defendant induced others to participate in the commission of the crime or occupied a position of leadership or dominance of other participants in its commission;

v) The defendant induced a minor to commit or assist in the commission of the crime;

vi) The defendant threatened witnesses, unlawfully prevented or dissuaded witnesses from testifying, suborned perjury, or in any other way illegally interfered with the judicial process;

vii) The defendant was convicted of other crimes for which consecutive sentences could have been imposed but for which concurrent sentences are being imposed;

viii) The manner in which the crime was carried out indicates planning, sophistication, or professionalism;

ix) The crime involved an attempted or actual taking or damage of great monetary value;

x) The crime involved a large quantity of contraband;

xi) The defendant took advantage of a position of trust or confidence to commit the offense; and,

xii) The crime constitutes a hate crime under existing law; no hate crime enhancements listed in current law are imposed and the crime is not subject to sentencing under Penal Code Section 1170.8. (Rules of Court 4.421, subd. (a)).

b) Facts relating to the defendant include the fact that:

i) The defendant has engaged in violent conduct that indicates a serious danger to society;

ii) The defendant's prior convictions as an adult or sustained petitions in juvenile delinquency proceedings are numerous or of increasing seriousness;

iii) The defendant has served a prior prison term;

iv) The defendant was on probation or parole when the crime was committed;

v) The defendant's prior performance on probation or parole was unsatisfactory; and,

vi) Any other facts statutorily declared to be circumstances in aggravation. (Rules of Court 4.421(b).)

8) States circumstances in mitigation include facts relating to the crime and facts relating to the defendant:

a) Facts relating to the crime:

i) The defendant was a passive participant or played a minor role in the crime;

ii) The victim was an initiator of, willing participant in, or aggressor or provoker of the incident;

iii) The crime was committed because of an unusual circumstance, such as great provocation, that is unlikely to recur;

iv) The defendant participated in the crime under circumstances of coercion or duress, the criminal conduct was partially excusable for some other reason not amounting to a defense;

v) The defendant, with no apparent predisposition to do so, was induced by others to participate in the crime;

vi) The defendant exercised caution to avoid harm to persons or damage to property, the amounts of money or property taken were deliberately small, or no harm was done or threatened against the victim;

vii) The defendant believed that he or she had a claim or right to the property taken, or for other reasons mistakenly believed that the conduct was legal;

viii) The defendant was motivated by a desire to provide necessities for his or her family or self; and,

ix) The defendant suffered from repeated or continuous physical, sexual, or psychological abuse inflicted by the victim of the crime; the victim of the crime, who inflicted the abuse, was the defendant's spouse, intimate cohabitant, or parent of the defendant's child; and the facts concerning the abuse do not amount to a defense. (Rules of Court 4.423(a).)

b) Facts relating to the defendant:

i) The defendant has no prior record, or has an insignificant record of criminal conduct, considering the recency and frequency of prior crimes;

ii) The defendant was suffering from a mental or physical condition that significantly reduced culpability for the crime;

iii) The defendant voluntarily acknowledged wrongdoing before arrest or at an early stage of the criminal process;

iv) The defendant is ineligible for probation and but for that ineligibility would have been granted probation;

v) The defendant made restitution to the victim; and,

vi) The defendant's prior performance on probation or parole was satisfactory. (Rules of Court 4.423(b).)

9) Declares legislative intent that the purpose of imprisonment for crime is punishment. This purpose is best served by terms proportionate to the seriousness of the offense with provision for uniformity in the sentences of offenders committing the same offense under similar circumstances. The Legislature further finds and declares that the elimination of disparity and the provision of uniformity of sentences can best be achieved by determinate sentences fixed by statute in proportion to the seriousness of the offense as determined by the Legislature to be imposed by the court with specified discretion. (Penal Code Section 1170(a)(1).)

10) Provides that when a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court shall, in its sound discretion, order imposition of a sentence not to exceed the middle term, except as otherwise provided. (Pen. Code, 1170, subd. (b)(1).)

11) States the court may impose a sentence exceeding the middle term only when there are circumstances in aggravation of the crime that justify the imposition of a term of imprisonment exceeding the middle term and the facts underlying those circumstances have been stipulated to by the defendant or have been found true beyond a reasonable doubt at trial by the jury or by the judge in a court trial. (Pen. Code, § 1170, sub. (b)(2).)

12) Provides that where evidence supporting an aggravating circumstance is admissible to prove or defend against the charged offense or enhancement at trial, or it is otherwise authorized by law, upon request of a defendant, trial on the circumstances in aggravation alleged in the indictment or information shall be bifurcated from the trial of charges and enhancements. The jury shall not be informed of the bifurcated allegations until there has been a conviction of a felony offense. (Pen. Code, § 1170, subd. (b)(2).)

13) States for each for each four-day period in which a prisoner is confined in or committed to a facility as specified in this section, one day shall be deducted from the prisoner's period of confinement unless it appears by the record that the prisoner has refused to satisfactorily perform labor as assigned by the sheriff, chief of police, or superintendent of an industrial farm or road camp. (Pen. Code, § 4019, subd. (b).)

14) Requires that any person convicted of a nonviolent felony offense and sentenced to state prison be eligible for parole consideration after completing the full term for their primary offense. (Cal. Const. Art. 1, § 32, subd. (a)(1).)

15) Defines "full term for the primary offense" as the longest term of imprisonment imposed by the court for any offense, excluding the imposition of an enhancement, consecutive sentence, or alternative sentence. (Cal. Const. Art. 1, § 32, subd. (a)(1)(A).)

16) States the California Department of Corrections and Rehabilitation ("CDCR") shall have authority to award credits earned for good behavior and approved rehabilitative or educational achievements. (Cal. Const. Art. 1, § 32, subd. (b).)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement:** According to the author: "California has undertaken numerous public safety reforms in the past decade — including Proposition 57 in 2016 that allowed the early release of serious felons — in hopes of reducing the prison population, maintaining public safety, and improving persistently high recidivism rates. These reforms lowered incarceration levels, and in their aftermath, crime rates have fluctuated. Recidivism rates provide another important measurement of these public safety policy changes and the effectiveness of correctional interventions under these policy changes. Overall, recidivism rates have remained generally stable, hovering around 44-46% over the last decade.

   While there have been a number of positive impacts actualized through these reforms, there remains a small group of repeat offenders that have continued to take advantage of early release opportunities and commit heinous crimes when entering back into society.

   Then on August 16, 2023, an individual with multiple prior offenses shot at two police officers in Santa Clara County after they were called to a domestic dispute. One of the officers was hit and suffered a gunshot wound to the abdomen resulting in injuries to the intestine, colon, liver, gallbladder, ureter and a spinal fracture.

   The repeat offender had an extensive previous criminal history including a recent assault with a deadly weapon and participating in criminal street gang activities. In addition, the record show the repeat offender was on felony probation for felony assault with force likely to cause great bodily injury and felony possession of a firearm. As such, this individual was prohibited from possessing a firearm.

   One of the two responding officers that day, was Assemblymember Low's brother. Despite having multiple prior convictions the repeat offender was allowed to continue to commit crimes without any concern for human life. Specifically, AB 2788 would make a person who is prohibited from owning a firearm due to prior convictions, and who commits a felony involving the use of a firearm subject to various conditions, including, among others, requiring that the person be detained, booked, and held in custody until arraignment, requiring treatment, rehabilitation, or education programs to be completed before the person can receive good conduct credits, and, if probation is granted, requiring it to be for a duration of 5 years.

   The tragic incident in Santa Clara County on August 16, 2023, where a repeat offender with a lengthy criminal record severely injured a police officer, underscores the urgent need for legislative action. This legislation will serve to address such loopholes by imposing stricter penalties on those who violate firearm ownership prohibitions, thereby enhancing public safety and preventing further tragedies like the one suffered by the responding officer. This bill represents a crucial step towards safeguarding Californians from repeat criminal offenders."

2) **Existing Law for Felons in Possession of a Firearm:** This bill seeks to impose specific penalties on a person who is armed with a firearm in the commission of a felony or attempted felony and who is otherwise prohibited from possessing a firearm.

Penal Code section 12022.53 punishes any person who commits a specified felony while using a firearm to an additional 10 year enhancement. (Pen. Code, § 12022.53, subd. (b).) Any person who discharges a firearm in the commission of specified felony shall be sentenced to additional 20 years. (Pen. Code, § 12022.53, subd. (c).)

Any person who commits a specified felony involving the use of a firearm causing great bodily injury or death shall be sentenced to an additional term of 25 years to life. (Pen. Code, § 12022.53, subd. (d).) Specified felonies include sex offenses, kidnapping, assault with intent to commit a felony, and robbery, among others. (Pen. Code, § 12022.53, subd. (a)(1-18).) Any person who is just armed with a firearm during the commission of a felony rather than using a firearm to commit a felony may be sentenced to an additional consecutive year in state prison as an enhancement. (Pen. Code, § 12022, subd. (a)(1).) This bill would require consideration of the upper term in any offense where a person merely has a gun but did not use it in the commission of a felony.

More generally, any felon in possession of a firearm is guilty of a felony even where there is not an underlying violation of the law. If a person has been convicted of a felony, it is a per se felony if they intentionally possessed a firearm. (Pen. Code, § 29800, subd. (a)(1).) Moreover, Penal Code section 12022 provides an additional enhancement for any person convicted of specified drug crimes who personally uses a firearm of up to one year. (Pen. Code, § 12022, subd. (a)(1) and (c).)

Any person armed with an assault weapon who commits a specified drug crime may be sentenced to an additional three years in county jail. (Pen. Code, § 12022, subd. (a)(2).) If a person knows a co-conspirator or principle personally has a firearm in the commission of specified drug crimes, the defendant may be sentenced to one, two, or three years in county jail. (Pen. Code, § 12022, subd. (a)(2).) Any person who personally uses a firearm in the commission of a felony or attempted felony shall receive an additional one, two, or three years in state prison. (Pen. Code, § 12022, subd. (b).)

These firearms-related crimes are not subject to a penalty of county jail under the Realignment Act of 2011. (See Pen. Code, § 1170, subd. (h).). If a defendant is prohibited from possessing a firearm as a felon, and is convicted of possessing a firearm, the defendant may be sentenced to up to three years in state prison.

There are multiple other statutes that may provide a higher penalty than the upper term on a non-specified felony offense. This bill states it is not meant to be an enhancement for purposes of judicial discretion to dismiss, but if it is not an enhancement, it is reducing criminal penalties for using a firearm in the commission of specified crimes where a person is otherwise prohibited from a prior conviction from possessing a firearm.

Criminal sentencing laws in California are extremely complicated and require considerable experience to navigate. Perhaps it makes more sense to determine if there is a gap in existing law before proposing new sentencing statutes that increase prison sentences where there is no evidence any infirmity in the law.

3) **Determinate Sentencing Law (DSL):** This bill requires a court to give weight to imposing the upper term where a defendant is charged with an offense involving the use of a firearm

and is otherwise prohibited from possessing a firearm. However, changes to determinate sentencing in the early 2000s require that each element aggravating a criminal penalty be pled and prove to a trier of fact. This bill appears to re-direct the weighing of aggravating and mitigating factors to impose the upper term and does not specify any plead and prove standard.

Prior to 1977, convicted felons received indeterminate sentences in which the term of imprisonment included a minimum with no prescribed maximum. For example, an individual might receive a "five-years-to-life" sentence. After serving five years in prison, the individual would remain incarcerated until the state parole board determined that the individual was ready to return to the community and was a low risk to commit crimes in the future.

In 1976, the Legislature and the Governor enacted a new sentencing structure for felonies, called "determinate sentencing," which took effect the following year. Under this structure, most felony punishments have a defined release date based on the "triad" sentencing structure. The triad sentencing structure provides the court with three sentencing options for each crime. For example, a first-degree burglary offense is punishable by a term in prison of two, four, or six years. The middle term is the presumptive term to be given to an offender found guilty of the crime. (See Pen. Code, § 1170, subd. (b)(1).) The upper and lower terms may be imposed if circumstances concerning the crime or offender warrant more or less time in state prison. (See Rules of Ct. 4.421.)

Cunningham v. California (2007) 549 U.S. 270 (hereinafter *Cunningham*) held California's determinate sentencing law violated the defendant's Sixth Amendment right to a jury trial because it authorized the court to increase the defendant's sentence by finding facts not reflected in the jury verdict. Specifically, the trial judge could find factors in aggravation beyond a preponderance of evidence to increase the defendant's sentence from the presumptive middle term to the upper term and, as such, is constitutionally flawed. The Court stated, "Because the DSL authorizes the judge, not the jury, to find the facts permitting an upper term sentence, the sentence cannot withstand measurement against our Sixth Amendment precedent." (*Cunningham*, *supra*, 549 U.S., at 274.) *Cunningham* overruled the California State Supreme Court in *People vs. Black* (2005) 35 Cal. 4th 1238. *Black* held California's DSL constitutional. The California Supreme Court stated:

> "In operation and effect, the provisions of the California DSL simply authorize a sentencing court to engage in the type of fact-finding that traditionally has been incident to the judge's selection of an appropriate sentence within a statutorily prescribed sentencing range. Therefore, the upper term is the 'statutory maximum' and a trial court's imposition of an upper term sentence does not violate a defendant's right to a jury trial under the principles set forth in [existing law]." (*Black, supra,* 35 Cal. 4th, at 1254.)

The United States Supreme Court relied on several earlier decisions to justify the holding in this case. In 2000, the Court ruled in *Apprendi vs. New Jersey* that the Federal Constitution's jury-trial guarantee proscribes a sentencing scheme that allows a judge to impose a sentence above the statutory maximum based on a fact, other than a prior conviction, not found by a

jury or admitted by the defendant. (*Apprendi vs. New Jersey* (2000) 530 US 466, 490; *Cunningham*, *supra*, at 274-75.)

The United States Supreme Court further clarified this "bright-line rule" in *Blakely vs. Washington*, "The relevant statutory maximum is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings." (*Blakely vs. Washington* (2004) 542 U.S. 296, 303.) In 2005, the United States Supreme Court struck down portions of the Federal Sentencing Guidelines (FSG) in *Booker vs. United States* (2005) 543 U.S. 220. However, the Court saved the FSG by excising the part of the guidelines it found unconstitutional, namely the provision making the guidelines binding on district judges. The Court reasoned:

> "If the [FSG] as currently written could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment. We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range. Indeed, everyone agrees that the constitutional issues presented by [this case] would have been avoided entirely if Congress had omitted from the [FSG] the provisions that make the Guidelines binding on district judges. . . . For when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant." (*United States v. Booker* (2005) 543 U.S. 220, 233.)

Aggravating factors in support of an upper term require a trier of fact to determine whether the factors are true. This bill appears to end-run Cunningham by requiring a court to use a "great weight" standard under specified circumstances to determine if the upper term is appropriate, even where the facts are not proven to a jury.

3) **State Prison Credits:** This bill provides that any person who is prohibited from owning a firearm who commits a new felony may not receive good conduct credits until after they complete specified rehabilitation programs. However, Article I, section 32 renders to CDCR a determination of credits.[1]

Penal Code section 2930, *et seq.,* governs the application of custody credits when a person is incarcerated in state prison, which, as explained below, is likely subject to approval by CDCR. Penal Code Section 2933 credits were formerly awarded for performance in work assignments and educational programs, and were called "worktime" credits. However, effective January 25, 2010, Section 2933 was amended to provide for the award of credits on the basis of continuous incarceration. (See former Penal Code § 2933(a).) The amendment to

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[1] Code of Civil Procedure section 526 allows any California taxpayer to file suit against the state or a state agency to enjoin or order an agency to take a specific action. Any taxpayer, as specified, may file suit against any legislative action for injunctive relief if it violates state law or the Constitution.

Section 2933 were accompanied by the enactment of Penal Code Section 2933.05, which authorizes the awarding of credits for completion of specific program objectives for approved rehabilitative programming.

Certain restrictions may apply to the amount of credits a person may earn, or reduction of sentence that may be awarded. An inmate convicted of murder, as specified, or a violent felony, as defined in Penal Code section 667.5, subd. (c), may only be entitled to 15% credit depending on what the person was convicted of and when the conviction occurred. (Former Pen. Code, § 190, subd. (a) and §§ 190, subd. (c); Pen. Code, §§ 667.70, 2933, 2934; *People v. Jenkins* (1995) 10 Cal. 4th 234 (murderer subject to sentencing under Penal Code § 667.7 is to be sentenced under that statute and not under Penal Code § 190, but credit restrictions under Penal Code § 2933 still apply as if sentenced under Penal Code § 190.)

A person sentenced to state prison may also be entitled to "continuous incarceration credits." For every six months of continuous incarceration, an eligible person may be awarded credit reductions of six months. (Penal Code § 2933, subd. (b).) People sentenced to CDCR may also be entitled to "program credits." In addition to any credit awarded pursuant to Penal Code Section 2933, CDCR may also award a prisoner program credit reductions from their term of confinement pursuant to Penal Code Section 2933.05.

4) **Proposition 57 and CDCR Exclusive Authority to Adopt Credits:** Proposition 57, the "The Public Safety and Rehabilitation Act of 2016" (hereinafter "Prop. 57") of the November 2016 election changed the rules governing parole and the granting of custody credits to inmates in state prison. Prop. 57 authorized CDCR to award credits earned for good behavior and approved rehabilitative or educational achievements. Before Prop. 57, the matter of conduct credits earned in prison was governed by statute. (See e.g., Pen. Code, §§ 2933 and 2933.1.) Specifically, Prop. 57 added section 32 to article I of the California Constitution which states, in pertinent part:

> "§32. (a) The following provisions are hereby added to enhance public safety, improve rehabilitation, and avoid the release of prisoners by federal court order, notwithstanding anything in this article or any other provision of law....
>
> (2) Credit Earning: The Department of Corrections and Rehabilitation **shall have authority** to award credits earned for good behavior and approved rehabilitative or educational achievements.
>
> (b) The Department of Corrections and Rehabilitation **shall adopt regulations in furtherance of these provisions**, and the Secretary of the Department of Corrections and Rehabilitation shall certify that these regulations protect and enhance public safety." (Emphasis added.) (Cal. Const., art. I, § 32, subd. (a)(2).)

Currently, there are some courts interpreting section 32 as granting **exclusive authority** to CDCR to decide when, and under what circumstances, a person may receive conduct credits. Judge J. Richard Couzens (Ret.) and Presiding Justice of the 2nd Appellate District both held

that it appears Prop 57 granted CDCR ***sole authority*** to decide credits – not the Legislature. Both Judge Couzens and Justice Bigelow are the Judicial Council statewide experts on Realignment and felony sentencing post-2014.

> "[I]t is not clear whether the credits awarded by CDCR for good behavior are in addition to the credits currently authorized under sections 2933 and 2933.05, or whether CDCR has exclusive jurisdiction to determine all good conduct and rehabilitation credits earned by inmates. It is unlikely that it was the intent of the sponsors of the Act to simply confirm CDCR's existing authority to grant conduct credits. Rather, the Act is intended to increase the authority of CDCR to grant conduct credits for good behavior and participation in rehabilitation programs. At a minimum, therefore, the Act likely gives CDCR authority to award credits in addition to those already provided by statute, and not to be limited because of the nature of the current crime. If CDCR has exclusive jurisdiction to determine conduct credits, presumably it may set credits at a higher or lower rate than currently provided by statute. It is at least arguable that CDCR is given total control over credits because the Act specifies that CDCR 'shall have authority to award credits notwithstanding . . . any other provision of law.'"

Additionally, in *People v. Brown* (2016) 63 Cal.4th 335, the Supreme Court considered the scope of Elections Code section 9002, which permits amendments to an initiative if they are "reasonably germane" to the measure's theme, purpose, or subject. In opining the proposed amendments to Proposition 57 which would grant CDCR the power to award credits violated this section, Justice Chin's dissenting opinion discussed the implications:

> "The constitutional amendment would also give the Department of Corrections and Rehabilitation (department) constitutional authority to award behavior and other credits. The Legislature has already enacted detailed mandatory provisions for the department to award conduct and participation credits. (See Pen. Code, § 2931 et seq.) But the amended measure's proposed constitutional language is permissive. Presumably, authority to award credits includes authority not to award credits or to award lower credits than the statutes currently require. Because the Constitution prevails over mere statutes, it appears the proposed constitutional amendment would displace the current statutory provisions for credits and shift authority over such credits from the legislative to the executive branch of government. For the moment, I will assume that altering the balance of power between the two branches of government in this way would not be an impermissible constitutional revision. ... But shifting power from one branch of government to another is not reasonably germane to the

> original measure, which left the separation of powers between the branches of government untouched. (*Brown, supra*, 63 Cal.4th at p. 359.)

Justice Chin's dissent further states:

> "The proposed constitutional amendment gives the department "authority to award credits earned for good behavior and approved rehabilitative or educational achievements." (Amended measure, § 3, adding art. I, proposed § 32, subd. (a)(2).) But it does not explain how this new, apparently permissive constitutional provision would interact with the detailed, mandatory provisions for credits the Legislature has enacted. As I have already discussed, the constitutional provision would seem to displace the statutory scheme. But I am not sure that is the intent. Displacing the statutory credit scheme might be one of the measure's "unintended consequences".... (*Brown, supra,* 63 Cal.4th at p. 361.)

It remains an open question whether the Legislature still has the authority to enact statutes pertaining to credits. However, as noted by Justice Chin, it is possible that one of the "unintended consequences" of Prop. 57 was to shift this authority exclusively to the executive branch. This bill interferes with CDCR's ability to issue credits and is likely not operative or unconstitutional.

5) **Arguments in Support:** According to the *California Police Officers Association*: AB 2788 will apply to anyone that is prohibited from owning a firearm and commits a felony using a firearm, or anyone who is convicted of two crimes against a person and commits a third crime against a person within three years, and requires that those offenders be denied bail until arraignment. This bill also requires a judge to consider the repetitive nature of the person's crimes and give weight towards maximum sentences allowed for all charges, mandates the courts to require rehabilitation or education programs be completed during incarceration for good conduct credits to be awarded, and requires five years of maximum level supervised probation if probation is granted."

6) **Arguments in Opposition:** According *to Smart Justice*: AB 2788 would make a person who is prohibited from owning a firearm due to prior convictions who commits a felony involving the use of a firearm, or a person who is convicted of two crimes against a person, and who commits a third crime against a person, within three years, subject to various conditions, including, among others, requiring that the person be detained, booked, and held in custody until arraignment, requiring treatment, rehabilitation, or education programs to be completed before the person can receive good conduct credits, and, if probation is granted, requiring it to be for a duration of 5 years. The conditions this bill would impose are unneeded and counterproductive.

Current law provides judge discretion regarding the pretrial release of individuals and the imposition of appropriate sentences based on the seriousness of an offense and the criminal history of the individual. Establishing the mandates required by this bill only serves to

restrict courts ability to tailor the appropriate conditions and sentences needed in each case. In addition, the bill's requirement that courts mandate treatment, rehabilitation, or education programs to be completed during incarceration, the successful completion of which shall be required before good conduct credits are awarded impedes rehabilitative and programming efforts by jails and prisons.

Courts might impose education or treatment programs not available to individuals based on prison or jail in which they are incarcerated. Rehabilitative programs do not necessarily have a "completion" point. This bill would create a disincentive for individuals to enroll in rehabilitation or educational programs that are ongoing, for which an individual would be in custody for too short a time to "complete," or were not specifically mandated by the court but which might be readily available and helpful to the individual.

7) **Prior Legislation:** AB 1509 (Lee), of the 2021-22 Legislative Session, reduces the penalty for using a firearm in the commission of specified crimes - from 10 years, 20 years, or 25-years-to-life to one, two or three years - and authorizes recall and resentencing for a person serving a term for specified firearms enhancements. AB 1509 was held on suspense in the Assembly Appropriations Committee.

REGISTERED SUPPORT / OPPOSITION:

Support

Arcadia Police Officers' Association
Burbank Police Officers' Association
California Association of Highway Patrolmen
California District Attorneys Association
California Narcotic Officers' Association
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
Placer County Deputy Sheriffs' Association
Pomona Police Officers' Association
Riverside Police Officers Association
Riverside Sheriffs' Association
Santa Ana Police Officers Association
Upland Police Officers Association

Opposition

ACLU California Action
California Alliance for Youth and Community Justice
California Attorneys for Criminal Justice
California Public Defenders Association
Californians United for A Responsible Budget
Felony Murder Elimination Project
Initiate Justice
LA Defensa
Legal Services for Prisoners With Children
San Francisco Public Defender
Silicon Valley De-bug
Smart Justice California, a Project of Tides Advocacy
Team Justice
Transformative Programming Works
Uncommon Law
Young Women's Freedom Center

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

Date of Hearing: April 23, 2024
Counsel: Liah Burnley

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Kevin McCarty, Chair

AB 2790 (Pacheco) – As Amended March 21, 2024

SUMMARY: Makes it a felony to steal any infant formula or baby food as specified, over-the-counter medication, vitamin, supplement, as specified, or any medical product intended for the diagnosis or treatment of an illness, as specified, from a merchant's premises or online marketplace pursuant to the organized retail theft statute. Specifically, **this bill**:

1) Specifies that any person who acts in concert with one or more persons to steal any of the following merchandise from one or more merchant's premises or online marketplace with the intent to sell shall be guilty of a felony:

   a) Any infant formula or baby food that is required to have a "use by" date on its packaging;

   b) Any over-the-counter medication, vitamin, or supplement that has an expiration date on its packaging; and,

   c) Any medical product intended for the diagnosis or treatment of an illness, such as a blood glucose testing strip or ketone urine strip, that has an expiration date on its packaging.

2) Provides that the felony shall be punishable by a term of imprisonment in a county jail for 16 months, or two or three years.

3) Deletes the sunset date for the organized retail theft statute.

EXISTING LAW:

1) States that a person who commits any of the following acts is guilty of organized retail theft:

   a) Acts in concert with one or more persons to steal merchandise from one or more merchant's premises or online marketplace with the intent to sell, exchange, or return the merchandise for value;

   b) Acts in concert with two or more persons to receive, purchase, or possess merchandise knowing or believing it to have been stolen;

   c) Acts as an agent of another individual or group of individuals to steal merchandise from one or more merchant's premises or online marketplaces as part of an organized plan to commit theft; or,

d) Recruits, coordinates, organizes, supervises, directs, manages, or finances another to undertake any of these acts or any other statute defining theft of merchandise. (Pen. Code, § 490.4, subd. (a).)

2) Punishes organized retail theft, as follows:

a) If violations of the provisions directed at acting in concert or as an agent are committed on two or more separate occasions within a one-year period, and if the aggregated value of the merchandise stolen, received, purchased, or possessed within that period exceeds $950, the offense is punishable as a misdemeanor by imprisonment in a county jail not exceeding one year, or as a felony, punishable by a term of imprisonment in a county jail for 16 months, or two or three years;

b) Any other violation of the provisions directed at acting in concert or as an agent is punishable as a misdemeanor by imprisonment in a county jail not exceeding one year; and,

c) A violation of the recruiting, coordinating, organizing, supervising, directing, managing, or financing provision is punishable is punishable as a misdemeanor by imprisonment in a county jail not exceeding one year, or as a felony, punishable by a term of imprisonment in a county jail for 16 months, or two or three years. (Pen. Code, § 490.4, subd. (b).)

3) Defines "Shoplifting" as entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed $950. Shoplifting shall be punished as a misdemeanor. (Pen. Code, § 459.5.)

4) States that every person who steals, takes, carries, leads, or drives away the personal property of another is guilty of theft. (Pen. Code, § 484, subd. (a).)

5) Punishes petty theft as a misdemeanor. (Pen. Code §490.)

6) Defines grand theft as theft of money, labor, real or personal property of a value exceeding $950. Grand theft is a wobbler, punishable by imprisonment in a county jail not exceeding one year, or as a felony by imprisonment in the county jail for 16 months, two years, or three years (Pen. Code, § 487, 489.)

7) Provides that the value of the money, labor, real property, or personal property taken exceeds $950 over the course of distinct but related acts, the value of the money, labor, real property, or personal property taken may properly be aggregated to charge a count of grand theft, if the acts are motivated by one intention, one general impulse, and one plan. (Pen. Code, § 487, subd. (e).)

8) Provides that it is conspiracy if any two or more people conspire to commit any crime. If they conspire to commit a felony, the offense is punishable in the same manner and to the same extent as is provided for the punishment of that felony. If they conspire to commit any other crime, the conspiracy shall be punishable as a misdemeanor by imprisonment in a county jail for not more than one year, or as a felony, punishable by imprisonment in the county jail for

16 months, or two or three years, or by a fine not exceeding $10,000, or by both. (Pen. Code, § 182.)

9) Provides that any person concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or, have advised and encouraged its commission, or who, by threats, menaces, command, or coercion, compel another to commit any crime, are principals in any crime so committed. A person who aids and abets a crime faces the same punishment as the one who directly commits the crime. (Pen. Code, § 31.)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "Assembly Bill 2790 will increase penalties for the theft of specific public health related goods with the intention of being resold on online platforms, such as Facebook marketplace.

   "Stolen medicines and medical devices, intended for resale, pose a serious public health risk. These items are often stored improperly, further endangering the public. Retail stores follow "use by" or "sell by" dates for over-the-counter medications and infant formula. Proper storage with temperature control helps prevent contamination from external sources.

   "AB 2790 aims to combat organized retail theft, safeguard public health, and promote fairness in access to essential goods."

2) **Organized Retail Theft**: AB 1065 (Jones-Sawyer), Chapter 803, Statutes of 2018, among other things, created the crime of organized retail theft. AB 1065 had a sunset date of January 1, 2021. AB 331 (Jones-Sawyer), Chapter 113, Statutes of 2021, re-established the crime of organized retail theft through January 1, 2026.

   The crime of organized retail theft, codified as Penal Code section 490.4, occurs when two or more people act to steal merchandise from a merchant's store or online marketplace. Organized retail theft of $950 or less is a misdemeanor, punishable by up to one-year imprisonment in county jail. Organized retail theft of more than $950 is a wobbler--prosecutors can charge it as a felony or a misdemeanor. Felony organized retail theft carries a county jail sentence of 16 months, 2 years, or 3 years. (Pen. Code, § 490.4, subd. (b).) A person can be convicted of organized retail theft even if the other person they were acting with are never charged or convicted. (Pen. Code, § 490.4, subd. (d).)

   To determine whether a defendant should be prosecuted for organized retail theft, rather than petty theft or grand theft, courts can consider any competent evidence, including: whether the defendant previously conspired with others to carry out theft or related offense; whether the defendant had tools that would help steal and carry away merchandise; and, whether the stolen property is of the type of quantity that suggests it is intended for resale. (Pen. Code, § 404.4, subd. (c).)

3) **Effect of this Bill**: Under existing law, the organized retail theft statute does not make any distinction about the type of merchandise that must be stolen to qualify as organized retail

theft. Any merchandise stolen from a merchant's premises or online marketplace falls into the parameters of the organized retail theft statute.

This bill would make such a distinction for specific items and provides that stealing these specific items, with intent to sell, results in increased felony penalties. These specified items include infant formula or baby food that has a "use by" date; over-the-counter medication, vitamin, or supplement that has an expiration date on its packaging; and, any medical product intended for diagnosis or treatment of an illness that has an expiration date on its packaging. Given that stealing any product is already a crime, this level of particularity is not necessary in the organized retail theft statute.

Further, this bill takes away discretion from the prosecutor to charge thefts of these particular items as misdemeanors and instead requires the thefts to be charged as a felony—without any regard to the value of the items stolen. In other words, **a person could be charged with a felony, if they act in concert with one or more persons to steal $30 of infant formula with the intent to resell the item to a family member so that they could feed their child**. This offense would be punishable by imprisonment in the county jail for a term of 16 months, or two or three years.

4) **Existing Law Already Allows for Increased Penalties for Thefts**: To the extent this bill is aimed at increasing penalties for thefts, there are currently a number of laws that prosecutors can use to charge cargo theft that call for increased penalties.

Grand theft of property (including any baby food, medications, and medical products) valued over $950 is already chargeable as a felony offense, punishable by imprisonment in county jail for a period of 16 months, two or three years. (Pen. Code, § 489, subd. (c)(1).) Existing law also allows for increased penalties for thefts less than $950, for example by aggregation of theft offenses. Repeated acts of theft can be aggregated and prosecuted as one felony if they are conducted pursuant to one intention, one general impulse, and one plan. (*People v. Bailey* (1961) 55 Cal.2d 514, 518-519 (*Bailey*).)

Moreover, under California law, if two or more persons conspire to commit any crime, even misdemeanor petty theft, they can be charged with a felony for the conspiracy itself. Thus, any time there is more than one person involved in any act of stealing the items specified in this bill, the offense can be charged as felony conspiracy, regardless of the value of the items stolen. (Pen. Code, § 182.) Also, in all cases, the defendant is also constitutionally required to make full restitution to the victim in the amount stolen, with interest, in addition to any other penalty fine. Cal. Const., art. I, § 28, subd. (b)(13); Pen. Code, § 1202.4, subd. (f)(3).)

Notably, as discussed above, the existing organized retail theft statue already covers this offense. Pursuant to this statute, any person who acts in concert with one or more persons to steal merchandise with the intent to sell the product can be punished with a misdemeanor if the value of the items stolen are less than $950 or a felony if the value exceeds $950. (Pen. Code, § 490.4.) Accordingly, this bill is unnecessary.

5) **Reports of Exaggerated Losses by Retailers – Separating Fact from Fiction:** Some complaints of retail theft were overstated. For example, in 2021, Walgreens closed five stores in San Francisco purportedly due to retail theft. However, the San Francisco Police Department's data on shoplifting did not support this explanation for the closures. Recently,

the chief financial officer of Walgreens acknowledged the shoplifting threat had probably been overstated. The company likely spent too much on security measures and mischaracterized the amount of theft at stores. In fact, shrinkage (the inventory that was bought but could not be sold primarily due to shoplifting) actually decreased to around 2.5 to 2.6 percent of sales, compared to 3.5 percent the prior year.[1]

Others say retail theft, while an issue, might be overstated as an excuse to write off mediocre sales and historic inflation might be a key reason why we're seeing any theft bump at all Things have become expensive – "we are in an economy right now where some everyday staples have risen in price six times faster than the overall rate of inflation. Until July of this year, American paychecks grew at a slower rate than inflation as a whole." Some retailers lump theft in with heavy discounting, soft sales and macroeconomic conditions as other factors that cut into their margins.[2]

What's more, the National Retail Federation has not solidified any data around increased rates of organized retail theft or what percentage of external theft is organized crime. Retailers are not required to break down how much they actually lose to theft. "Retailers and trade associations are increasingly using their positions to influence lawmakers to pass new legislation that benefits them, hurts competitors and could disproportionally affect marginalized people." [3]

Additionally, the Federal Trade Commission recently reported that retail stores likely inflated prices to accommodate for lost revenue resulting from the pandemic. The FTC states, in summary, that:

> Notably, consumers are still facing the negative impact of the pandemic's price hikes, as the Commission's report finds that some in the grocery [including drug stores] retail industry seem to have used rising costs as an opportunity to further raise prices to increase their profits, which remain elevated today.

Retail stores actually saw significant profits over the past few years despite claims that stores are losing profits as a result of theft and other market forces.

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[1] See New York Times, *Walgreens Executive Says Shoplifting Threat Was Overstated* (Jan. 6, 2023) <https://www.nytimes.com/2023/01/06/business/walgreens-shoplifting.html> ; see also Los Angeles Times, *Retailers Say Thefts Are at Crisis Level. The Numbers Say Otherwise* (Dec. 15, 2021) <https://www.latimes.com/business/story/2021-12-15/organized-retail-theft-crime-rate>; CNN Business, '*Maybe We Cried Too Much' Over Shoplifting, Walgreens Executive Says* (Jan. 7, 2023) <https://www.cnn.com/2023/01/06/business/walgreens-shoplifting-retail/index.html>; The Atlantic, *The Great Shoplifting Freak-Out* (Dec. 203, 2021) <https://www.theatlantic.com/health/archive/2021/12/shoplifting-holiday-theft-panic/621108/>.)

[2] (Freight Waves, *What's Behind the Reports of 'Unprecedented' Retail Theft* (Oct. 2023). Available at: <https://www.freightwaves.com/news/whats-behind-the-reports-of-unprecedented-retail-theft>; see also Bloomberg, *Thieves Target Donuts and Ham as Food Prices Jump* (Feb. 2024). Available at: <https://www.bloomberg.com/news/newsletters/2024-02-23/supply-chain-latest-food-theft-rises-on-grocery-inflation>.

[3] CNBC, *Companies say organized retail crime is on the rise, but there's no data to prove it.* (Aug. 2023). Available at < https://www.cnbc.com/2023/08/09/claims-about-organized-retail-theft-are-nearly-impossible-to-verify.html>.

> "In the first three-quarters of 2023, retailer profits rose even more, with revenue reaching 7% over total costs, casting doubt on the assertions of some companies that rising prices at the grocery store are the result of retailers' own rising costs." (Federal Trade Commission, "*Feeding America in a Time of Crisis, The United States Grocery Supply Chain and the COVID-19 Pandemic*" (March 21, 2024).

Finally, the Federal Bureau of Investigation (FBI) data on crime statistics reports that crime is actually down nationwide by a significant margin – contributing to the conclusion that the crime rate was a temporary phenomenon brought on by the pandemic and rapidly escalating costs for basic goods and services.

> The new fourth-quarter numbers [for 2023] show a 13% decline in murder in 2023 from 2022, a 6% decline in reported violent crime and a 4% decline in reported property crime.
>
> After a terrible period of underfunding and understaffing caused by the pandemic, local governments have, by most measures, returned to pre-pandemic levels," wrote John Roman, a criminologist at the University of Chicago. In an interview, Roman said, 'The courts were closed, a lot of cops got sick, a lot of police agencies told their officers not to interact with the public. Teachers were not in schools, not working with kids.[4]

Given that claims of massive retail theft appear to be inconsistent with the data, the Legislature should consider evidence-based solutions to address property crimes.

6) **Increased Penalties Do Not Deter Crime**: Unduly long sentences are counterproductive for public safety and contribute to the dynamic of diminishing returns as the incarcerated population expands.[5] 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. (*Ibid.*)

   Research shows that increasing the severity of the punishment does little to deter the crime. According to the National Institute 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. Studies show that for most individuals convicted of a crime, short to moderate prison sentences may be a deterrent but longer prison terms produce only a limited deterrent effect. In addition, the crime prevention benefit falls far short of the social and economic costs.[6]

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[4] FTC, *Report on Grocery Supply Chain Disruptions* (March 2024). Available at: <https://www.ftc.gov/news-events/news/press-releases/2024/03/ftc-releases-report-grocery-supply-chain-disruptions>.
[5] *Long-Term Sentences: Time to Reconsider the Scale of Punishment*, 87 UMKC L. Rev., 1 (Nov. 5, 2018).
[6] National Institute of Justice, *Five Things about Deterrence* <https://www.ojp.gov/pdffiles1/nij/247350.pdf> [as of Feb. 15, 2023].

> This finding makes intuitive sense. Consider a person who is thinking about stealing a car or burglarizing a local business. If he is thinking rationally, he will take into account a variety of factors when considering how to commit the crime, including time of day, ease of entry, presence of security personnel or technology, or his ability to leave the crime scene. He does this to avoid being caught in the act because being arrested and prosecuted will impose significant burdens on him. Additionally, because he is not planning on being apprehended, he is unlikely to be thinking about how much time he might spend in prison and whether his sentence will be three, five, or seven years.
>
> Notably, this example looks at the behavior of a rational person, which rarely fits the picture of a substantial portion of those who actually commit a crime. Many are teenagers seeking peer approval for their illegal behavior, individuals under the influence of alcohol or drugs at the time of the offense, or are motivated by economic challenges. Many of these individuals are not even thinking about the risk of being caught, let alone know how much prison time they may face.
>
> The limited impact of extending sentence length becomes even more attenuated for long-term incarceration. If the penalty for a second robbery conviction is twenty years and a legislative body increases that penalty to twenty- five, few would-be robbers undeterred by the prospect of "only" a twenty year sentence would balk at an additional five years.
>
> Again, there are multiple possible reasons for imposing a given prison term, depending on the circumstances of the crime. But policymakers and judges should be cognizant of the evidence to support any particular goal of sentencing. If the length of a prison term has little deterrent value, it may be time to forego the rationale of "sending a message." [7]

An analysis of 116 studies showed that incarceration does not deter people from committing future crimes and, in fact, incarceration can actually make someone more likely to be arrested and commit crimes later (due to heightened barriers to securing employment, identification, housing, and other basic services necessary to successfully reenter society).[8] These findings are consistent with other research from national institutions of renown.[9]

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[7] *Long-Term Sentences: Time to Reconsider the Scale of Punishment*, 87 UMKC L. Rev., 1 (Nov. 5, 2018) (citations omitted).

[8] Brookings, *Retail Theft In US Cities: Separating Fact from Fiction* (March 6, 2024). Available at: <https://www.brookings.edu/articles/retail-theft-in-us-cities-separating-fact-from-fiction/>.

[9] National Research Council of the National Academies of Sciences, Engineering, and Medicine, *The Growth of Incarceration in the United States: Exploring Causes and Consequences*, (April 2014) at pp. 130 -150. Available at: <https://academicworks.cuny.edu/cgi/viewcontent.cgi?article=1026&context=jj_pubs>.

7) **Argument in Support**: According to the *Coalition of Law Enforcement and Retail* (CLEAR), "AB 2790 would protect products such as infant formula, baby food, over the counter medications and blood glucose testing instruments from being stolen off the shelves of retailers in bulk, and then resold to unsuspecting California consumers. organized retail crime networks that target these items, often disregard safety handling protocols, and expose these sensitive products to conditions that degrade the nutritional value, compromise the effectiveness of medications, and affect the accuracy of critical glucose readings. This includes a common practice to manipulate the federally mandated expiration dates to resell millions of dollars in potentially harmful infant formula through sophisticated ORC criminal networks.

"In addition to the public safety concerns, the thefts of these specific products have a well-documented history in connection with major criminal organizations and the largest ORC cases on record in California, including a fifty-million-dollar criminal enterprise in San Mateo in 2022 and several multi-million-dollar cases in Los Angeles over the last year. Infant formula specifically has been at the center of multiple California State benefit scandals and price gouging schemes by organized fraudsters being investigated by the State Attorney Generals Office.

"Our national coalition believes that the protection and security of California communities is vital, and we are deeply disturbed that some of the most vulnerable members of those communities are being put in harm's way by nefarious crime rings that put profits over people. We feel AB 2790 will prove to be a valuable tool to protect the integrity of the sensitive products that the public relies upon for health and wellness [...]"

8) **Argument in Opposition**: According to *Californians for Safety and Justice*, "AB 2790 would allow law enforcement to charge someone with organized retail theft for stealing any amount of baby formula, baby food, blood glucose test strips, or over-the-counter medications. Currently, in order to be charged pursuant to Section 490.4, the aggregated value of items stolen must exceed $950 and the theft must have occurred on two or more separate occasions within a 12-month period. If enacted, AB 2790 would represent a massive expansion of this Penal Code section with the express intent of criminalizing families and people with chronic illnesses, and will disproportionately impact low-income Black and brown communities.

"Giving birth and raising children in California is notoriously expensive. A report by FAIR Health found that the average in-network cost for vaginal delivery in California is $16,577, compared to a national average of $12,968.1 For anyone out of network, the costs are astronomical, at a median value of $35,710. Raising a child is also absurdly expensive - in California, it costs $23,586 per year - which is 1.63x the cost of annual in-state tuition at the University of California. The cost of baby formula and baby food constitute a large percentage of that high annual cost, which can reach as high as $1,500 per year. Similarly, for someone diagnosed with diabetes, they could be spending hundreds of dollars per month on blood glucose test strips depending on the severity of their diagnosis.

"California should be in the business of helping young families obtain the necessary goods and services to raise healthy children and build strong communities, not throw them in jail for trying to secure food for their babies. The real robbery concern are the runaway prices baby formula manufacturers are charging thanks to their successful market consolidation -

with average prices increasing by nearly 18% in a single year. Indeed, just four companies - Abbott, Perrigo, Nestle, and Mead Johnson - control 98% of the entire baby formula market nationwide. Even more alarming is that due to the market consolidation, if a single factory shuts down for any reason as occurred in 2021, it triggers a nationwide shortage. California families just bore the brunt of the notorious 2021 shortage, wherein supply rates were as much as 70% below average. In fact, the closure of a single Abbott factory in Michigan was responsible for 43% of the baby formula shortage.

"Instead of failed carceral solutions that will neither reduce formula theft nor help families feed their babies, we urge the Legislature to examine real solutions that hold manufacturers accountable for their runaway profiteering. In 2022 during the height of the greedflation period, Governor Newsom signed an Executive Order prohibiting manufacturers from charging prices that were 10% or more above their market price as of February 2022.6 The Legislature can build on the Governor's efforts by codifying a similar measure in state law. We also encourage the Legislature to work with the California Department of Public Health to increase enrollment in the Women, Infants & Children (WIC) Program, given that nearly 60% of infants born each year in California are WIC eligible, and the program provides no-cost coverage to families. [...]"

9) **Related Legislation**:

a) AB 1802 (Jones-Sawyer) would extend the sunset date for organized retail theft to January 1, 2031. AB 1802 is pending in Assembly Appropriations Committee.

b) AB 1960 (Soria) would reenact sentence enhancement for theft offenses when the loss exceeds specified dollar amounts. AB 1960 is pending in Assembly Appropriations Committee.

c) AB 1990 (W. Carrillo) would authorize peace officers to make a warrantless arrest for misdemeanor shoplifting, as specified. AB 1990 is pending in Assembly Appropriations Committee.

d) AB 1779 (Irwin) would allow, a prosecutor to bring a case in any county where theft offenses occurred for offenses that occur in multiple jurisdictions, as specified. AB 1779 is pending in Assembly Appropriations Committee.

e) AB 1787 (Villapudua) would among other things, repeal the sunset provision in the organized retail theft statute. AB 1787 is in Assembly Appropriations Committee.

f) AB 1794 (McCarty) would clarify aggregation requirements for grand theft, among other things. AB 1794 is pending in Assembly Appropriations Committee.

g) AB 2406 (Davies) would make it a wobbler to use a minor to engage in theft related offenses. AB 2406 is pending in this Committee.

h) AB 2438 (Petrie-Norris) would make any person who acts in concert to take, damage, or destroy any property in the commission of a felony punishable by an additional and consecutive term of imprisonment. AB 2438 failed passage in this Committee.

i) AB 2943 (Zbur) would, among other things, extend the organized retail theft statute until January 2031, and make it a crime for any person to possess property unlawfully that was acquired through one or more acts of shoplifting, theft, or burglary from a retail business, if the property is not possessed for personal use. AB 2943 is pending in Assembly Appropriations Committee.

10) **Prior Legislation**:

a) AB 329 (Ta), of the 2023-2024 Legislative Session, would have expanded the territorial jurisdiction in which the Attorney General can prosecute specified theft offenses and associated offenses connected together in their commission to include cargo theft. AB 329 failed passage in this Committee.

b) AB 335 (Alanis), of the 2023-2024 Legislative Session, would have required the Little Hoover Commission to submit a report to the Legislature describing the reported retail thefts, as specified. AB 335 was held under submission in Assembly Appropriations Committee.

c) AB 331 (Jones-Sawyer), Chapter 113, Statutes of 2021, extended the sunset date for organized retail theft through January 1, 2026.

d) AB 23 (Muratsuchi), of the 2023-2024 Legislative Session, would have decreased the threshold amount for grand theft from $950 to $400. The hearing on AB 23 was canceled the request of the author.

e) AB 329 (Ta) would have imposed higher penalties for shoplifting and petty theft if the crime is committed by a non-citizen of the state of California. AB 329 failed passage in this committee.

f) AB 2294 (Jones-Sawyer), Chapter 856, Statutes of 2022, authorized the misdemeanor arrest of a person that has a prior arrest, citation or conviction for theft, as specified, and authorized a city or county prosecuting authority or county probation department to create a diversion or deferred entry of judgment program for persons who commit a theft offense or repeat theft offenses.

g) AB 2356 (Rodriguez), Chapter 22, Statues of 2022, expanded the definition of "grand theft" where the aggregate amount taken by all participants exceeds $950.

h) AB 1603 (Salas), of the 2021-2022 Legislative Session, would have reduced the threshold amount for petty theft and shoplifting to be punished as a misdemeanor from $950 to $400. AB 1603 failed passage in this Committee.

i) AB 2390 (Muratsuchi), of the 2021-2022 Legislative Session, would have authorized the aggregation of the value of property from one or more acts of theft or shoplifting, as specified. AB 2390 failed passage in this Committee.

j) AB 1065 (Jones-Sawyer), Chapter 803, Statutes of 2018, created the crime of organized retail theft and expanded jurisdiction to prosecute cases of theft or receipt of stolen

merchandise.

REGISTERED SUPPORT / OPPOSITION:

Support

Arcadia Police Officers' Association
Burbank Police Officers' Association
California Narcotic Officers' Association
California Police Chiefs Association
California Reserve Peace Officers Association
Claremont Police Officers Association
Coalition of Law Enforcement and Retail
Corona Police Officers Association
Culver City Police Officers' Association
Deputy Sheriffs' Association of Monterey County
Fullerton Police Officers' Association
League of California Cities
Murrieta Police Officers' Association
Newport Beach Police Association
Novato Police Officers Association
Palos Verdes Police Officers Association
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

Oppose

A New Way of Life Reentry Project
ACLU California Action
California Alliance for Youth and Community Justice
California Attorneys for Criminal Justice
Californians for Safety and Justice
Californians United for A Responsible Budget
Children's Defense Fund - CA
Communities United for Restorative Youth Justice (CURYJ)
Drug Policy Alliance
Ella Baker Center for Human Rights
Felony Murder Elimination Project
Friends Committee on Legislation of California
Initiate Justice
Initiate Justice Action
LA Defensa
Legal Services for Prisoners With Children
Pacific Juvenile Defender Center
San Francisco Public Defender

Smart Justice California, a Project of Tides Advocacy
Team Justice
Uncommon Law
Underground Grit
Vera Institute of Justice
Young Women's Freedom Center
California Public Defenders Association

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

Date of Hearing: April 23, 2024
Counsel: Liah Burnley

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Kevin McCarty, Chair

AB 2823 (Joe Patterson) – As Introduced February 15, 2024

SUMMARY: Requires the period of probation for vehicular manslaughter while intoxicated and gross vehicular manslaughter while intoxicated to be not less than three years and allows probation to be imposed, in specified cases, ***for 15 years to life***. Specifically, **this bill**:

1) Provides that, if a person is convicted of vehicular manslaughter while intoxicated or gross vehicular manslaughter while intoxicated and is granted probation, the period of probation shall be not less than three years and not more than five years.

2) Allows probation to be imposed for a longer term if the maximum sentence provided for the offense exceeds five years in state prison. In such cases, a period of probation may be imposed up to 15 years to life, the maximum time for which a sentence of imprisonment can be pronounced for gross vehicular manslaughter while intoxicated.

EXISTING LAW:

1) Provides that gross vehicular manslaughter while intoxicated is the unlawful killing of a human being without malice aforethought, in the driving of a vehicle, where the driving was under the influence of alcohol or drugs, as specified, with gross negligence. (Pen. Code, § 191.5, subd. (a).)

2) Provides that gross vehicular manslaughter while intoxicated as a felony, punishable by imprisonment in the state prison for 4, 6, or 10 years. (Pen. Code, § 191.5, subd. (c)(1).)

3) Provides that a person convicted of gross vehicular manslaughter while intoxicated, who has one or more prior specified convictions, shall be punished with a felony by imprisonment in the state prison ***for a term of 15 years to life***. (Pen. Code, § 191.5, subd. (d).)

4) Provides that vehicular manslaughter while intoxicated is the unlawful killing of a human being without malice aforethought, in the driving of a vehicle, where the driving was under the influence of alcohol or drugs, as specified, but without gross negligence. (Pen. Code, § 191.5, subd. (b).)

5) Provides that vehicular manslaughter while intoxicated is punishable as a misdemeanor by imprisonment in a county jail for not more than one year or as a felony by imprisonment in the county jail for 16 months or two or four years. (Pen. Code, § 191.5, subd. (c)(2).)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "California law has a major disparity in how the criminal justice system grants probation to those who drive under the influence that results in an injury or death of another person. If you take the life of someone while driving under the influence, you shouldn't be on probation for less time than a person who didn't. By aligning the terms of probation, we can ensure the person who took a life can receive much needed services from our probation officers while being responsibly monitored to ensure they don't recidivate."

2) **Probation Terms**: Probation is the suspension of a custodial sentence and a conditional release of a defendant into the community. Probation can be "formal" or "informal." "Formal" probation is under the direction and supervision of a probation officer. As a general proposition, the level of probation supervision will be linked to the level of risk the probationer presents to the community.

   Defendants convicted of misdemeanors, and most felonies, are eligible for probation based on the discretion of the court. When considering the imposition of probation, the court evaluates the safety of the public, the nature of the offense the interests of justice, the loss to the victim, and the needs of the defendant. (Pen. Code, § 1202.7.) The court also has broad discretion to impose conditions that foster the defendant's rehabilitation and protect public safety. (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1120.) A valid condition must be reasonably related to the offense and aimed at deterring misconduct in the future. (*Id.* at 1121.)

   Prior to 2021, when a defendant was convicted of a felony, the court could impose a term of probation for up to five years, or no longer than the prison term that can be imposed if the maximum prison term exceeds five years. (Pen. Code, § 1203.1.) In misdemeanor cases, the court could impose a term of probation for up to three years, or no longer than the maximum term of imprisonment if more than three years. (Pen. Code, § 1203a.) AB 1950 (Kamlager), Chapter 328, Statutes of 2020, limited probation to two years for a felony and one year for a misdemeanor.

   This bill rolls back these recent reforms made by the Legislature and would ***require*** a court to impose probation for a term of no less than three years, and a term of up to 15 years to life, depending on the circumstances of the case.

3) **Vehicular Manslaughter While Intoxicated And Gross Vehicular Manslaughter While Intoxicated**: The difference between vehicular manslaughter while intoxicated and gross vehicular manslaughter while intoxicated is the degree of negligence required. Vehicular manslaughter while intoxicated is a lesser crime than gross vehicular manslaughter while intoxicated. Vehicular manslaughter while intoxicated only requires ordinary negligence, which is the failure to use reasonable care to prevent reasonably foreseeable harm to oneself or someone else. A person is negligent if they do something that a reasonably careful person would not do in the same situation. On the other hand, gross vehicular manslaughter while intoxicated requires a person to act in a reckless way that creates a high risk of death or great bodily injury. In other words, a person acts with gross negligence when they disregard human life. (Compare CALCRIM NO. 590 [Gross Vehicular Manslaughter While Intoxicated] with CALCRIM No. 591 [Vehicular Manslaughter While Intoxicated].)

To prove that the defendant is guilty of vehicular manslaughter while intoxicated, the prosecution must show:

1. The defendant drove under the influence of drugs and/or alcohol;
2. While driving under the influence the defendant also committed an act that might cause death;
3. The defendant committed the act that might cause death with ordinary negligence; and,
4. The defendant's negligent conduct caused the death of another person. (CALCRIM No. 591.)

To prove that the defendant is guilty of gross vehicular manslaughter while intoxicated, the prosecution must show:

1. The defendant drove under the influence of drugs and/or alcohol;
2. While driving under the influence the defendant also committed an act that might cause death;
3. The defendant committed the act that might cause death with gross negligence; and,
4. The defendant's grossly negligent conduct caused the death of another person. (CALCRIM No. 590.)

4) **Increased Penalties Do Not Deter Crime**: Unduly long sentences are counterproductive for public safety and contribute to the dynamic of diminishing returns as the incarcerated population expands.[1] 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.[2]

Research shows that increasing the severity of the punishment does little to deter the crime. According to the National Institute 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. Studies show that for most individuals convicted of a crime, short to moderate prison sentences may be a deterrent but longer prison terms produce only a limited deterrent effect. In addition, the crime prevention benefit falls far short of the social and economic costs.[3] This is intuitive: most individuals are not even thinking about the risk of being caught, let alone know how much prison time they may face.[4]

An analysis of 116 studies showed that incarceration does not deter people from committing future crimes and, in fact, incarceration can actually make someone more likely to be arrested and commit crimes later (due to heightened barriers to securing employment, identification,

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[1] *Long-Term Sentences: Time to Reconsider the Scale of Punishment*, 87 UMKC L. Rev., 1 (Nov. 5, 2018).
[2] *Ibid.*
[3] National Institute of Justice, *Five Things about Deterrence* <https://www.ojp.gov/pdffiles1/nij/247350.pdf> [as of Feb. 15, 2023].
[4] *Long-Term Sentences: Time to Reconsider the Scale of Punishment*, 87 UMKC L. Rev., 1 (Nov. 5, 2018) (citations omitted).

housing, and other basic services necessary to successfully reenter society).[5] These findings are consistent with other research from national institutions of renown.[6]

5) **Argument in Support**: According to *California District Attorneys Association (CDAA)*, "There is no explanation for why a reduced probationary term is warranted for someone who is convicted of vehicular manslaughter while being under the influence when compared to the probationary term mandated for someone convicted of simply driving under the influence. This is especially true considering the additional restitution obligations that are often imposed as a condition of probation upon a defendant that is convicted of vehicular manslaughter. AB 2823 fixes this inconsistency by ensuring that a person who is convicted of the unlawful killing of a human being, without malice, while driving under the influence is to be granted the same period of probation as a person who is convicted of driving under the influence."

6) **Argument in Opposition**: According to *American Civil Liberties Union California Action,* "Probation is an arduous process where even the slightest technical violation or missed meeting can result in a lengthy prison sentence. Expanding that time period will not contribute to greater rehabilitation, but rather, increase disparities. Our research shows that many probation violations result from social and economic disadvantages, including poverty, housing insecurity, problematic drug use, mental health conditions, and racial bias. In most cases, these factors are present in combination. For example, Black and brown people are more likely to be poor and homeless than their white counterparts, and many people with mental health conditions use drugs to cope with their symptoms. Meanwhile, poverty and homelessness can exacerbate mental health conditions. More time on probation means more monthly supervision fees and more time to mess up— which can trigger additional fines and incarceration.

   "After a nearly 500 percent increase in the US jail and prison population from 1980 to 2007, and nearly 400 percent rise in probation and parole populations, incarceration and supervision growth is finally slowing. States across the country are gradually reforming laws and policies to reduce their reliance on incarceration. Yet many reforms have failed to tackle the role of probation and parole in perpetuating mass incarceration. Data show that, between 1978 and 2008 the proportion of US state and federal prison admissions that resulted from violations of parole, extended supervision, or "split sentence" probation doubled. In the late seventies, 16 percent of state and federal prison admissions stemmed from such violations; by 2008, that number was 36 percent. This proportion declined sharply in 2011, likely due in large part to California's "realignment" policy, which, among other things, limited imprisonment for supervision violations—leading to a sizeable reduction in prison admissions for these violations. California cannot afford to backstep on its progress combatting mass incarceration."

7) **Related Legislation**:

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[5] Brookings, *Retail Theft In US Cities: Separating Fact from Fiction* (March 6, 2024). Available at: <https://www.brookings.edu/articles/retail-theft-in-us-cities-separating-fact-from-fiction/>.

[6] National Research Council of the National Academies of Sciences, Engineering, and Medicine, *The Growth of Incarceration in the United States: Exploring Causes and Consequences*, (April 2014) at pp. 130 -150. Available at: <https://academicworks.cuny.edu/cgi/viewcontent.cgi?article=1026&context=jj_pubs>.

a) AB 2106 (McCarty) would increase the term of probation for persons convicted of a controlled substance offense. AB 2016 is pending in Assembly Appropriations Committee.

b) AB 2943 (Zbur) would, among other things, increase the maximum term of probation for shoplifting. AB 2943 is pending in Assembly Appropriations Committee.

8) **Prior Legislation**:

a) AB 1067 (Jim Patterson), of the 2023-2024 Legislative Session, would have increased the penalties for fleeing the scene of an accident resulting in the death of another person from an alternate felony-misdemeanor with a maximum punishment of four years in state prison, to an alternate felony-misdemeanor having a maximum punishment of six years in the state prison. AB 1607 failed passage in Assembly Appropriations Committee.

b) AB 1551 (Gipson), of the 2023-2024 Legislative Session, would have required the California Victim Compensation Board to pay child victims loss of support until they are 18 years old, for gross vehicular manslaughter while intoxicated, vehicular manslaughter while intoxicated, or a hit and run while intoxicated, if the offense caused the death of the child's parent or guardian AB 1551 failed passage in Assembly Appropriations Committee.

c) AB 582 (Jim Patterson), of the 2021-2022 Legislative Session, was the same as AB 1067. AB 582 was held in the Assembly Appropriations Committee.

d) AB 1950 (Kamlager), Chapter 328, Statutes of 2020, specifies that a court may not impose a term of probation longer than two years for a felony conviction and one year for a misdemeanor conviction

e) AB 195 (Jim Patterson), of the 2019-2020 Legislative Session, as amended in the Senate, was the same AB 1067. AB 195 failed passage in the Senate Public Safety Committee.

f) AB 2014 (E. Garcia), of the 2017-2018 Legislative Session, would have increased the penalty for fleeing the scene of an accident resulting in death or serious bodily injury from two, three, or four years in state prison to two, four, or six years in state prison. The hearing on AB 2014 was canceled in this committee at the request of the author.

REGISTERED SUPPORT / OPPOSITION:

Support

California Association of Highway Patrolmen
California District Attorneys Association
California Police Chiefs Association
California State Sheriffs' Association
Peace Officers Research Association of California (PORAC)
Placer County District Attorney's Office

Oppose

ACLU California Action

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

Date of Hearing: April 23, 2024
Counsel: Ilan Zur

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Kevin McCarty, Chair

AB 2824 (McCarty) – As Amended March 21, 2024

SUMMARY: Expands the criminal penalties associated with committing battery against operators, drivers or passengers of specified public transportation vehicles, to include employees and contractors of a public transportation provider.

EXISTING LAW:

1) Defines assault an "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another" punishable by a fine up to $1,000 or up to six months in county jail. (Pen. Code, §§ 240, 241, subd. (a).)

2) Defines "battery" as the willful and unlawful use of force or violence upon another person, and makes the offense punishable by up to six months in the county jail, by a fine not to exceed $2,000, or by both. (Pen. Code, §§ 242 & 243, subd. (a).)

3) Provides that when a battery is committed upon any person and serious bodily injury is inflicted upon that person, the offense is punishable as a "wobbler" with a possible sentence of up to one year in the county jail, or for two, three, or four years in the county jail. (Pen. Code, § 243, subd. (d).)

4) Provides when a battery is committed against the person of an operator, driver, or passenger on a bus, taxicab, streetcar, cable car, trackless trolley, or other motor vehicle, including a vehicle operated on stationary rails or on a track or rail suspended in the air, used for the transportation of persons for hire, or against a school bus driver, or against the person of a station agent or ticket agent for the entity providing the transportation, and the person who commits the offense knows or reasonably should know that the victim, in the case of an operator, driver, or agent, is engaged in the performance of his or her duties, or is a passenger the offense shall be punished by a fine not exceeding $10,000, or by imprisonment in a county jail not exceeding one year. (Pen. Code, § 243.3.)

5) Provides that if injury is inflicted on a victim of the above battery, the offense shall be punished by a fine not exceeding $10,000, or by imprisonment in a county jail not exceeding one year or in the state prison for 16 months, or two or three years. (Pen. Code, § 243.3.)

6) Provides that except as provided above, when a battery is committed against any person on the property of, or in a motor vehicle of, a public transportation provider, the offense shall be punished by a fine not to exceed 2,000, or by imprisonment in a county jail up to 1 year. (Pen. Code, § 243.35, subd. (a).)

7) Defines, "public transportation provider" as a publicly or privately owned entity that operates, for the transportation of persons for hire, a bus, taxicab, streetcar, cable car, trackless trolley, or other motor vehicle, including a vehicle operated on stationary rails or on a track or rail suspended in air, or that operates a school-bus. (Pen. Code, § 243.35, subd. (b).)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "Ensuring that workers and riders on public transit are safe is a top priority. AB 2824 improves public transit safety by enhancing penalties on those who would harm a public transit employee or contractor."

2) **Increase in Assaults in Transit Workers**: According to the U.S. Department of Transportation "Assaults on transit workers are a significant and growing concern in the transit industry. From 2008 to 2021, the National Transit Database (NTD) documented an average of 241 transit worker assault major events1 per year, including 192 per year occurring in or on transit vehicles, 44 per year occurring in transit revenue facilities, and five per year occurring in other non-public locations, such as maintenance shops and yards. The number of reported transit worker assaults per 100 million vehicle revenue miles (VRM) increased by an average of eight percent per year from 2008 to 2021—a 121 percent total increase from the 2008 transit worker assault rate. This data may significantly underestimate the true number and rate of assaults on transit workers. Today, NTD reporting requirements focus on the most serious events—those that meet the NTD 'major event' reporting threshold, as defined by the NTD reporting manual." United States Department of Transportation, *Required Actions Regarding Transit Worker Assault* (Oct. 4, 2022). Available at: <https://www.transit.dot.gov/sites/fta.dot.gov/files/2022-10/FTA-Special-Directive-22-21-to-the-Metro-Transit.pdf> [as of April 16, 2024].)

3) **Background**: An assault is "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (Pen. Code, § 240.) A battery is "any willful and unlawful use of force or violence upon the person of another." (Pen. Code, § 242.) Assault is essentially attempted battery. "Simple assault" is included in the offense of battery, and a conviction of the latter would subsume the assault. By definition one cannot commit battery without also committing a "simple" assault which is nothing more than an attempted battery. (*People v. Fuller* (1975) 53 Cal. App. 3d 417.) An example of an assault would be if a person swung at another person without hitting them, whereas if the person did strike the other person, the conduct would become a battery.

   Existing laws specifically address assault and battery on operators, drivers, or passengers on a bus, taxicab, streetcar, cable car, trackless trolley, or other motor vehicle, including a vehicle operated on stationary rails or on a track or rail suspended in the air, used for the transportation of persons for hire, or against a school-bus driver, station agent or ticket agent for the entity providing the transportation. Whereas a simple assault or battery is punishable by up to six months in jail, if a simple assault or battery is committed on an operator, driver, or passenger of the above specified transportation options where the perpetrator knows the victim is a passenger, or an operator, driver, or agent engaged in the performance of their duties, the perpetrator *faces the possibility of an additional six months in jail, for a maximum*

sentence of up to one year in jail or fine up to $10,000. (Pen. Code, § 243.35.) Even if a battery perpetrator does not meet the above knowledge requirement, battery committed against any person on the property of, or in a motor vehicle of, a public transportation provider, is punishable by a fine up to $2,000, or up to one year in county jail. (Pen. Code, § 243.35, subd. (a).)

Further, battery resulting in serious bodily injury is punishable as a "wobbler" with a possible sentence of up to one year in the county jail, or for two, three, or four years in the county jail. (Pen. Code, § 243, subd. (d).) Similarly, battery resulting in an injury, committed against an operator, driver, or passenger of the above specified transportation options where the perpetrator knows the victim is a passenger, or an operator, driver, or agent engaged in the performance of their duties, is punishable by a maximum fine of $10,000, or imprisonment in county jail up to one year, or state prison for 16 months, or two or three years. (Pen. Code, § 243.3.)

4) **Effect of this Bill:** AB 2824 would expand the additional penalties ($10,000 fine or imprisonment in a county jail up to one year, and a $10,000 or imprisonment in state prison for 16 months, or two or three years if an injury is inflicted) associated with battery against specified transportation officials where the perpetrator knows the victim is a passenger, or an operator, driver, or agent engaged in the performance of their duties, to include *employees or contractors of public transportation providers*. Existing law limits such additional penalties to operators, drivers, or passengers on a bus, taxicab, streetcar, cable car, trackless trolley, or other motor vehicle, including a vehicle operated on stationary rails or on a track or rail suspended in the air, used for the transportation of persons for hire, or against a school bus driver, person of a station agent, or ticket agent. AB 2823 promotes uniform application of Penal Code Section 243.3 by clarifying that this applies to any employees or contractors of public transportation providers, even if they do not fall into these specific roles. A battery against any person on the property of, or in a motor vehicle of, a public transportation provider, is subject to separate additional penalties ($2,000, or up to a year in county jail), although such penalties are only available in specified locations (on the property or in the vehicle of a transportation provider) (Pen. Code, § 243.35, subd. (a).) AB 2824 provides that such additional penalties on person who knowingly commit battery against specified transportation officials apply to any employee or public transportation provider, and irrespective of whether the battery occurred on the property or in the vehicle of the provider.

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

6) **Argument in Opposition**: According to ACLU California Action "Under existing law, a person who is convicted of battery or assault on any person, including utility workers engaged in the performance of their duties, can be fined by up to $2,000 and $1,000 respectively, and sentenced by up to six months in jail. (Penal Code §243, subdivision (a); Penal Code §241, subdivision (a).). If the person inflicts serious bodily injury in the commission of the battery, the person can be punished by up to four years in jail. (Penal Code §243, subdivision (d).). If a person commits assault by means of force likely to produce great bodily injury, the person can be fined by up to $10,000 and sentenced to up to four years in prison. (Penal Code §245, subdivision (a)(4).). And if the person actually inflicts great bodily injury, the person can be punished by an additional three years in prison on top of the underlying sentence (Penal Code §12022.7, subdivision (a).). Great bodily injury inflicted during felony battery or felony assault will also constitute a "violent felony" and a

"serious felony" for purposes of future sentence enhancements and alternative sentencing schemes. (Penal Code §667.5, subdivision (c)(8); Penal Code §1192.7, subdivision (c)(8).).

We believe that these existing penalties are more than sufficient to punish the behavior contemplated by AB 2824, and that adding new provisions specifically to address batteries and assaults on utility workers will only add to our already complicated Penal Code without measurable benefit. Recent studies have found that certainty of punishment (in other words, the fact that someone will be punished for a particular crime) has a greater deterrent effect than the severity of the punishment itself. Thus, expanding Penal Code §243.3 for offenses that can already be punished under California law will not deter future crime or make our communities any safer."

7) **Related Legislation**: AB 977 (Rodriguez) of the 2023-2024 Legislative Session, makes an assault or a battery committed against a physician, nurse, or other healthcare worker of a hospital engaged in providing services within the emergency department punishable by imprisonment in a county jail not exceeding one year, by a fine not exceeding $2,000, or by both that fine and imprisonment. AB 977 is pending in Senate Rules Committee.

8) **Prior Legislation**:

   a) AB 946 (Washington), Chapter 305, Statutes of 1997, raises, from $2,000 to $10,000, the fines for specified crimes committed against public transit drivers and passengers.

   b) AB 588 (Rainey), Chapter 423, Statutes of 1996, makes it a special battery offense to commit battery against a person who is on the property of, or on a motor vehicle, of a public transportation provider.

REGISTERED SUPPORT / OPPOSITION:

Support

None

Oppose

ACLU California Action

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