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California State Assembly

PUBLIC SAFETY

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AGENDA

Tuesday, July 2, 2024
9 a.m. -- State Capitol, Room 126

Analysis Packet Part II

(SB 1132 Durazo – SB 226 Alvarado-Gil)

Date of Hearing: July 2, 2024
Chief Counsel: Gregory Pagan

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Kevin McCarty, Chair

SB 1132 (Durazo) – As Amended April 9, 2024

SUMMARY: Clarifies that local county health officers (LHO) are authorized to inspect health and sanitary conditions in private detention facilities.

EXISTING LAW:

1) Requires each county board of supervisors (board) to appoint a LHO. Requires LHOs to enforce and observe orders of the board pertaining to public health and sanitary matters, including regulations prescribed by the California Department of Public Health (DPH), and statutes relating to public health. (Health & Saf., Code, § § 101000 and 101030.)

2) Requires LHOs to investigate health and sanitary conditions in every publicly operated detention facility in the county or city (including county and city jails), and all private work furlough facilities and programs, at least annually. Requires private work furlough facilities and programs to pay an annual fee commensurate with the annual cost of investigations. Permits LHOs to make additional investigations of any detention facility as determined necessary. Requires LHOs to submit a report to the Board of State and Community Corrections (BSCC), the person in charge of the jail or detention facility, and to the board or city governing board (in the case of a city that has an LHO). (Health & Saf. Code, § 101045, subd. (a).)

3) Requires LHOs, whenever requested by the sheriff, the chief of police, local legislative body, or the BSCC, but not more often than twice annually, to investigate health and sanitary conditions in any jail or detention facility, and submit a report to the officer and agency requesting the investigation and to the BSCC. (Health & Saf. Code, § 101045, subd. (b).)

4) Requires the investigating LHO to determine if the food, clothing, and bedding is of sufficient quantity and quality that at least equal minimum standards and requirements of the BSCC for the feeding, clothing, and care of prisoners in all local jails and detention facilities, and if the sanitation requirements under the California Retail Food Code, have been maintained. (Health & Saf. Code, § 101045, subd. (c).)

5) Defines a "detention facility" as a facility in which persons are incarcerated or otherwise involuntarily confined for purposes of execution of a punitive sentence imposed by a court or detention pending a trial hearing or other judicial or administrative proceeding. Defines a "private detention facility" as a detention facility that is operated by a private, nongovernmental, for-profit entity pursuant to a contract or agreement with a governmental entity. Specifies that a "detention facility" does not include:

a) A facility providing rehabilitative, counseling, treatment, mental health, educational, or medical services to a juvenile that is under the jurisdiction of the juvenile court;

b) A facility providing evaluation or treatment services to a person who has been detained, or is subject to an order of commitment by a court;

c) A facility providing educational, vocational, medical, or other ancillary services to an inmate in the custody of, and under the direct supervision of, the Department of Corrections and Rehabilitation or a county sheriff or other law enforcement agency;

d) A residential care facility;

e) A school facility used for the disciplinary detention of a pupil;

f) A facility used for the quarantine or isolation of persons for public health reasons; or,

g) A facility used for the temporary detention of a person detained or arrested by a merchant, private security guard, or other private person. (Gov. Code, § 7320.)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "“The ability of county public health officers to enter and inspect private detention facilities is not clearly addressed under current California law. As it stands the relevant statutes empower county health officials to enter public detention facilities and private work furlough facilities. The lack of clarity on oversight of private detention facilities poses a unique and critical public health challenge. Conditions in these facilities not only affect the lives of those detained, but also impacts the surrounding communities. During the COVID-19 pandemic, an outbreak at Otay Mesa Detention Facility resulted in more than 300 staff and detained individuals becoming infected.”

2) **Private Detention Facilities**. The federal government contracts with private detention facilities across the country to house immigration detainees. There are currently six private detention facilities operating in California in four counties—San Bernardino County, Kern County, San Diego County, and Imperial County. Federal, state, and local laws, including county public health orders, govern all immigration detention facilities operating in California. According to the California Department of Justice, facilities that contract to hold detained noncitizens are also required to comply with national detention standards, which establish requirements for emergency planning, security protocols, detainee classification, discipline, medical care, food service, activities and programming, detainee grievances, and access to legal services. The standards set the expectation that the Centers for Disease Control and Prevention guidelines for the prevention and control of infectious and communicable diseases are to be followed and directs each facility have written plans that address the management of infectious and communicable diseases.

3) **Inspection of Detention Facilities.** LHOs serve a number of public health functions at the local level, including managing infectious disease control, implementing emergency preparedness and response, and overseeing public health services. There are 61 appointed physician LHOs in California—one for each of the 58 counties and the cities of Berkeley, Long Beach, and Pasadena. Regulations establish minimum standards for local detention facilities, including standards for the administration and operation of the facilities, medical and mental health care, nutritional quality of food, and environmental standards. Regulations define "local detention facility" to mean "any city, county, city and county, or regional jail, camp, court holding facility, or other correctional facility, whether publicly or privately operated, used for confinement of adults or of both adults and minors, but does not include that portion of a facility for confinement of both adults and minors which is devoted only to the confinement of minors."

   County jails, city jails, and other publicly operated detention facilities are subject to biennial inspections by the BSCC. Those biennial inspections include the annual health and safety inspections that LHOs are required to conduct annually, and which LHOs are authorized to conduct more frequently if necessary. The BSCC is required to publicly post the inspection reports as well as submit a report every two years to the Legislature which includes information pertaining to the inspection of those local detention facilities that have not complied with the minimum standards, specifying the areas in which the facility has failed to comply and the estimated cost to the facility in order to comply with the minimum standards.

4) **Jurisdiction Over Private Detention Facilities**. According to the National Center for Immunization and Respiratory Diseases, communicable disease can easily spread in congregate living facilities or other housing where people who are not related reside in close proximity and share at least one common room. According to a 2021 *CalMatters* article, during the COVID-19 pandemic, there were reports that there was confusion about the role of state and local health authorities with regard to federal detention facilities, which may have led to delays for vaccine distribution. For example, immigrant rights organizations sent a letter to public health officials in Kern County asking about LHO oversight, including how it planned to ensure detainees were being tested for COVID-19. In response, the county's director of public health services said they did not have jurisdiction over the center. *CalMatters* indicated that there were similar instances of confusion over jurisdiction in other counties. This bill clarifies that LHOs have authority to inspect private detention facilities as deemed necessary. This bill would not impose an annual inspection requirement.

5) **Health Concerns in Private Detention Facilities**. According to a January 2023 article published in the *Los Angeles (LA) Times*, an investigation by the California Division of Occupational Safety and Health found six violations of state code by a private detention facility operator, which appealed. The *LA Times* reported that the complaint was filed by Immigrant Defense Advocates and the California Collaborative for Immigrant Justice on behalf of several detainees, alleging safety violations including failures by the facility administrators to provide personal protective equipment, maintain sanitary work spaces, prevent the spread of COVID-19 and safeguard against workplace-related illnesses and injuries.

6) **Argument in Support**: According to the *Ella Baker Center for Human Rights*, "Detention facilities pose a unique challenge with respect to public health and sanitary conditions, and as such, are typically inspected by public health officials. Detention facilities can pose a public

health risk to individuals held inside, as well as those who work, visit, or live near these sites.

"In the past, the majority of private detention facilities in California operated pursuant to joint contracts with counties, but have since shifted to direct contracts with the federal government. Despite this change, according to their federal contracts these private facilities remain subject to California state and local public health oversight.

"While public health oversight laws empower inspections of "publicly operated detention facilities and all private work furlough facilities" they do not explicitly cover private detention facilities. [See California Code, Health and Safety Code - HSC § 101045].

"Poor health conditions in these facilities have been widely documented, with reports by Disability Rights noting that the Adelanto Detention facility, "... has an inadequate mental health care and medical care system, made worse by the facility's harsh and counter-therapeutic practices."

"Private detention facilities continue to pose challenges with respect to health, safety and sanitary conditions. Detained individuals in these facilities continue to file numerous grievances in private facilities. These grievances primarily revolve around detainees facing challenges in accessing timely medical attention, enduring prolonged waits for treatment of persistent conditions—stretching to months—and encountering difficulties in obtaining essential medications. One specific detainee recounted losing multiple teeth due to a two-year delay in receiving dental cavity fillings. During inspections, a prison dentist reportedly proposed that detainees could improve their dental hygiene by using strings from their shoes for flossing their teeth.

"The goal of SB 1132 is to ensure that county health officials have the ability to enter these facilities when necessary. The bill does not impose an annual inspection requirement to county health officials, but empowers them to ensure that these private facilities adhere to public health orders and guidelines that are necessary to keep our state safe."

7) **Prior Legislation**:

a) AB 263 (Arambula), Chapter 294, Statutes of 2021, requires a private detention facility operator to comply with, and adhere to, all local and state public health orders and occupational safety and health regulations.

b) AB 3228 (Bonta, Ch. 190, Stats. 2020) requires a private detention facility operator to comply with, and adhere to, the detention standards of care and confinement agreed upon in the facility's contract for operations. This bill also provides a private right of action for an individual injured by noncompliance with the above standards, as specified, and allows the court to award a prevailing plaintiff reasonable attorney's fees and costs.

REGISTERED SUPPORT / OPPOSITION:

Support

ACLU California Action
Advancing Justice - Asian Law Caucus
Alliance for Boys & Men of Color
Amnesty International USA
Asian Americans Advancing Justice - California
California Coalition for Women Prisoners
California Collaborative for Immigrant Justice
California Immigrant Policy Center
California Pan - Ethnic Health Network
California Public Defenders Association
California Rural Legal Assistance Foundation (crla Foundation)
California Voices for Progress
Center for Gender & Refugee Studies
Center for Immigration Law & Policy At Ucla School of Law
Central Valley Immigrant Integration Collaborative
Communities United for Restorative Youth Justice (CURYJ)
Disability Rights California
Dolores Huerta Foundation
Ella Baker Center for Human Rights
Friends Committee on Legislation of California
Health Officers Association of California
Human Impact Partners
Immigrant Defense Advocates
Immigrant Legal Defense
Indivisible CA Statestrong
Initiate Justice
Inland Coalition for Immigrant Justice
Interfaith Movement for Human Integrity
Keck Human Rights Clinic
Kern Welcoming and Extending Solidarity to Immigrant
LA Cosecha
Latin Advocacy Network
Lawyers Committee for Civil Rights of The San Francisco Bay Area
National Lawyers Guild San Francisco Bay Area Chapter
Nextgen California
Norcal Resist
Oakland Privacy
Orale: Organizing Rooted in Abolition Liberation and Empowerment
Public Counsel
San Francisco Marin Medical Society
Secure Justice
Smart Justice California, a Project of Tides Advocacy
Social Justice Collaborative
Southeast Asia Resource Action Center

The Immigrant Health Equity and Legal Partnership
The Justice & Diversity Center of The Bar Association of San Francisco
Worksafe

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

Date of Hearing: July 2, 2024
Counsel: Kimberly Horiuchi

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Kevin McCarty, Chair

SB 1133 (Becker) – As Amended May 16, 2024

SUMMARY: Specifies that at an automatic bail review hearing, the court shall determine whether there remains clear and convincing evidence of a risk to public safety or the victim, or a risk of flight, and that no less restrictive alternative can reasonably protect against that risk, and entitles a defendant who has nonmonetary conditions of release, other than those specified, to an automatic review of those conditions at the next regularly scheduled court date after the defendant has been in compliance with those conditions for 60 days. Specifically, **this bill**:

1) Provides that at the automatic review of an order fixing a bail amount for a person detained in custody on a criminal charge prior to conviction, for want of bail, at that hearing, the court shall review the considerations required by Penal Code Section 1275, and additionally determine whether there exists clear and convincing evidence of a risk to public safety or the victim, or a risk of flight, and that no less restrictive alternative can reasonably protect against that risk.

2) Clarifies that the above review shall be held not later than five days from the time of the original order fixing the amount of bail on the original accusatory pleading, unless the defendant agrees to a later hearing.

3) Provides that when a court has imposed upon a defendant a nonmonetary condition or conditions of release, other than a protective order or statutorily mandated conditions, that person is entitled to an automatic review of those conditions at the next regularly scheduled court date after the defendant has been in compliance with those conditions for 60 full days.

4) Provides that at that review, there shall be a rebuttable presumption that the conditions are no longer necessary and shall be removed if the person has remained in compliance with the condition or conditions for 60 days.

5) Provides that the district attorney may rebut this presumption by establishing clear and convincing evidence that the condition or conditions remain necessary to mitigate risk to public safety or to the victim, or to mitigate risk of flight, and that no less restrictive alternative can address that risk.

6) Provides that an automatic review under this section shall occur at the next regularly scheduled court date after every 60-day period during which the defendant has been in compliance with all nonmonetary conditions of release, other than a protective order or statutorily mandated conditions.

7) Clarifies that this section does not replace any other existing opportunity for review of nonmonetary conditions of release.

EXISTING LAW:

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

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

   a) Capital crimes;

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

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

3) States that in setting, reducing or denying bail, the judge or magistrate shall take into consideration the protection of the public, the safety of the victim, the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of their appearing at the trial or hearing of the case; public safety and the safety of the victim shall be the primary considerations. (Cal. Const., art. I, § 28, subd. (f)(3).)

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

5) Provides that the Judicial Council shall adopt rules for court administration, practice and procedure, and perform other functions prescribed by statute. (Cal. Const., art. VI, § 6, subd. (d).)

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

7) Allows a court, by local rule, to prescribe the procedure by which the uniform countywide schedule of bail is prepared, adopted, and annually revised by the judges. If a court does not adopt a local rule, the uniform countywide schedule of bail shall be prepared, adopted, and annually revised by a majority of the judges. (Pen. Code, § 1269b, subd. (d).)

8) Provides that in adopting a uniform countywide schedule of bail for all bailable felony offenses the judges shall consider the seriousness of the offense charged. In considering the seriousness of the offense charged the judges shall assign an additional amount of required bail for each aggravating or enhancing factor chargeable in the complaint. In considering offenses in which a violation of a controlled substance offense is alleged, the judge shall assign an additional amount of required bail for offenses involving large quantities of controlled substances. (Pen. Code, § 1269b, subd. (e).)

9) Requires the countywide bail schedule to contain a list of the offenses and the amounts of bail applicable for each as the judges determine to be appropriate. If the schedule does not

list all offenses specifically, it shall contain a general clause for designated amounts of bail as the judges of the county determine to be appropriate for all the offenses not specifically listed in the schedule. A copy of the countywide bail schedule shall be sent to the officer in charge of the county jail, to the officer in charge of each city jail within the county, to each superior court judge and commissioner in the county, and to the Judicial Council. (Pen. Code, § 1269b, subd. (f).)

10) Specifies if a defendant has appeared before a judge of the court on the charge contained in the complaint, indictment, or information, the bail shall be in the amount fixed by the judge at the time of the appearance. If that appearance has not been made, the bail shall be in the amount fixed in the warrant of arrest or, if no warrant of arrest has been issued, the amount of bail shall be pursuant to the uniform countywide schedule of bail for the county in which the defendant is required to appear, previously fixed and approved. (Pen. Code, § 1269b, subd. (b).)

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

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

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

14) States that if a defendant is arrested without a warrant for a bailable felony offense or for the misdemeanor offense of violating a domestic violence restraining order, and a peace officer has reasonable cause to believe that the amount of bail set forth in the schedule of bail for that offense is insufficient to ensure the defendant's appearance or to ensure the protection of a victim, or family member of a victim, of domestic violence, the officer shall file a declaration with the judge requesting an order setting a higher bail. (Pen. Code, 1269c.)

15) Allows a defendant to ask the judge for release on bail lower than that provided in the schedule of bail or on his or her own recognizance and states that the judge is authorized to set bail in an amount that he or she deems sufficient to ensure the defendant's appearance or to ensure the protection of a victim, or family member of a victim, of domestic violence, and to set bail on the terms and conditions that he or she, in his or her discretion, deems appropriate, or he or she may authorize the defendant's release on his or her own recognizance. (Pen. Code, § 1269c.)

16) After a defendant has been admitted to bail upon an indictment or information, the Court in which the charge is pending may, upon good cause shown, either increase or reduce the amount of bail. If the amount be increased, the Court may order the defendant to be committed to actual custody, unless he give bail in such increased amount. (Pen. Code, § 1289.)

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

18) Specifies conditions for a defendant's release on their own recognizance (OR). (Pen. Code, § 1318.)

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

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

FISCAL EFFECT: Unknown.

COMMENTS:

1) **Author's Statement**: According to the author, "[i]n California, once a court sets bail or imposes pretrial conditions in a criminal case, those decisions are rarely revisited—and even when they are, the law is not clear as to how those reviews should occur. SB 1133 will make two important changes to the process of reviewing pretrial decisions—bringing more clarity, consistency, and fairness to the pretrial system.

   First, SB 1133 will align the evidentiary standard for bail review with the California Supreme Court's standard. In 2021, the California Supreme Court in In re Humphrey clarified the standard of proof judges should be using for bail determinations, but that is not yet reflected in statute. Per Humphrey, a person may not be detained pretrial unless a judge determines there is clear and convincing evidence of risk to public safety or the victim, or risk of flight, and that no less restrictive alternative can reasonably protect against that risk. Right now, judges do not necessarily follow the same standard when making bail decisions, resulting in disparities in bail setting and bail amounts across the state.

   Next, SB 1133 will also create an automatic review for other nonmonetary pretrial conditions like electronic monitoring and mandatory drug testing at the next court date following 60 days of compliance. Specifically, SB 1133 requires judges to periodically reevaluate pretrial conditions so that people are not subject to monitoring unless necessary to address the perceived risks. At the person's next regularly scheduled court date after 60 days of compliance, there would be a rebuttable presumption that the conditions are no longer necessary. That presumption can be overcome if the district attorney establishes that the conditions remain necessary to mitigate public safety or flight risk, and that no less restrictive alternative conditions can address that risk. This would align California with peer states: Illinois passed a 60-day conditions review for electronic monitoring in 2021, and Michigan has introduced comparable policy this session.

   Ensuring more opportunities for reviewing pretrial decisions is good for safety, justice, and county budgets. Although these decisions are intended to address any risk to public safety or missed court appearance, research shows that unnecessary pretrial detention results in

heightened pressure to plead guilty, increased rates of re-arrest at any point in the future, and a high price tag for counties—and that overly onerous pretrial release conditions do not appear to reduce re-arrest rates, but instead needlessly expose people to technical violations. SB 1133 seeks to address these issues and ensure better access to pretrial justice across California."

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

   Courts require many defendants to deposit "money" bail – i.e., the amount ordered by the court or the amount charged as a bond by a bail surety - in order to be released from custody. Bail is intended to act as a financial guarantee to the court that the defendant will appear for all required court hearings. An arrestee may post bail with his or her own cash, or may post bail using a bail bond.

   Currently, each county sets a bail schedule based exclusively on the charged offense. The bail schedule is used by the arresting officer to allow an arrestee to post bail before their court appearance. Once a defendant is brought before the court, there must be an individualized determination of the appropriate amount of bail. Another function of the bail system is protection of the community, although there is no assessment of risk, at least when bail is posted before the arrestee appears before the court.

3) **Objections to Monetary Bail:** There are a number of challenges the bail system faces. A growing number of people acknowledge that the bail system has a negative impact on communities of color and those who come from the lower end of the socio-economic spectrum. In short, those who have money have the ability to confront their criminal charges while free from confinement in county jail.

   Those who are too poor to post bail are forced to remain incarcerated, and are more likely to plead guilty in order to get out of custody. Prior to the initial court appearance, the determination as to who remains detained while awaiting resolution of criminal charges is made based on money, and not whether the person is a present danger to the community or whether he or she will return to court. The ability to be out of custody while facing criminal charges carries a number of inherent advantages. A defendant who is released on bail is able to carry on with his or her life while awaiting the disposition of the criminal case. For instance, criminal defendants who are out on bail are not only able to maintain employment but they are also encouraged to do so.

   According to information provided by the author and the California Penal Code Revision Commission:

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[1] Cal. Const. art. I, § 12.

"(a) According to the Committee on Revision of the Penal Code:
(1) Pretrial detention is often the single best predictor of case outcomes. It increases the likelihood of a conviction and the severity of a conviction and sentence while reducing future employment and access to social safety nets.[2]

(2) Rates of pretrial detention are higher on average for people of color and bail amounts are also consistently higher for Black and Latino defendants.[3]

(3) The severity of pretrial detention and cascading negative consequences from being incarcerated can often exert undue pressure on people held in custody to plead guilty.[4]

(b) According to the Prison Policy Initiative, pretrial detention has negative consequences for public safety. Any time spent in pretrial detention beyond 23 hours is associated with a consistent and significant increase in the likelihood of future re-arrest.[5]

(c) According to Advancing Pretrial Policy and Research, excessive conditions of pretrial release do not appear to reduce re-arrest rates, but instead unnecessarily subject people to technical violations and revocation of bail.[6]

A law requiring a 60-day automatic conditions review hearing for pretrial electronic monitoring was passed in Illinois in 2021.[7] Michigan has introduced comparable policy this session.[8]

4) **SB 10 (Hertzberg) and Subsequent Referendum:** SB 10 (Hertzberg) was signed into law on August 28, 2018. SB 10 eliminated cash bail in California. In its place, SB 10 created a risk-based non-monetary pre-arraignment and pretrial release system for people arrested for criminal offenses including preventative detention procedures for person's determined to be too high a risk to assure public safety if released.

   A veto referendum to overturn the law was filed on August 29. On January 16, 2019, the California Secretary of State reported that the estimated number of valid signatures exceeded 110 percent of the 365,880 required signatures, putting the targeted law, SB 10, on hold until

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[2] California Committee on Revision of the Penal Code, 2023 Annual Report and Recommendations, p. 55.
[3] California Committee on Revision of the Penal Code, 2022 Annual Report and Recommendations, p. 66.
[4] California Committee on Revision of the Penal Code, 2023 Annual Report and Recommendations, p. 55.
[5] Prison Policy Initiative, "Releasing people pretrial doesn't harm public safety," July 6, 2023.
[6] Advancing Pretrial Policy and Research, Pretrial Research Summary: Pretrial Monitoring, p. 3.
[7] 2021 (Illinois State Legislature, HB 3653 (Public Act 101-0652), 101st General Assembly, 2021, ilga.gov/legislation/BillStatus.asp?DocNum=3653&GAID=15&DocTypeID=HB&LegId=120371&SessionID=108&GA=101).
[8] (Michigan State House of Representatives, House Bill 4656, 102nd Legislature, 2023, legislature.mi.gov/documents/2023-2024/billintroduced/House/pdf/2023-HIB-4656.pdf).

the November 2020 election. The referendum was identified as Proposition 25 on the ballot. A "Yes" vote indicated a preference to uphold the statutory changes made by SB 10 and end the use of cash bail in California.

Voters rejected SB 10 by a margin of 55% to 45%. The voters' veto of SB 10 maintained the existing structure of cash bail for criminal defendants in California. In the case of *Assembly v. Deukmajian*, the California Supreme Court provided the following guidance to the Legislature when it seeks to enact new legislation in an area where the voters have rejected an earlier legislative effort by means of a referendum: "Unless the new measure is 'essentially different' from the rejected provision and is enacted 'not in bad faith, and not with intent to evade the effect of the referendum petition,' it is invalid.'"[9] In this case, this bill is likely substantially different than anything having to do with direct money bail. It simply provides an opportunity for review of bail to ensure people are not being held in jail for unnecessary reasons, to force a plea, or where there is just no evidence of flight or risk to public safety. Given the current state of California's jails – such action seems consistent with the values of pre-trial assessments and Realignment.

5) **Argument in Support**: According to *Initiate Justice Action* "[u]nder the current system, judges typically set financial bail or impose other conditions of pretrial release in a matter of minutes—or even seconds—and without much information to inform that decision. Many circumstances can arise after that initial hearing to justify modifying someone's bail amount or conditions of release: the defense might have more information for a proper bail argument, the prosecution might offer a plea to a lesser charge, or new information might surface indicating less risk to public safety. But even so, initial pretrial release decisions are not often revisited.

   Bail amounts in California are also astronomical. The median bail is $50,000 which is five times the national median bail amount.[10] In Los Angeles alone, the median bail amount is a whopping $235,000.[11] This further demonstrates how a hastily made bail decision comes at a tremendous cost, especially for low-income Californians, and creates greater challenges for public safety.

   In addition to being an issue of fairness, a well-informed bail decision is a matter of public safety: just 24 hours of jail incarceration increases a person's risk of being rearrested, due to the immediate destabilization caused by detention. Revisiting bail is also a critical opportunity to reduce the risk of coerced guilty pleas that are driven by inability to afford money bail, as recognized by the California Committee on Revision of the Penal Code.

   SB 1133 strengthens and clarifies the existing mechanisms for revisiting pretrial release decisions in four ways. First, it aligns the evidentiary standard for initial bail review with the California Supreme Court's standard as articulated in In re Humphrey, ensuring that courts across the state follow the same decision making framework. Second, it changes the

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[9] *Assembly v. Deukmejian* (1982), 30 Cal.3d 638, 678 (citing *Reagan v. City of Sausalito* (1962), 210 Cal.App.2d 618, 629-631 and *Martin v. Smith* (1959), 176 Cal.App.2d 115, 118-119.

[10] Sonya Tafoya, Pretrial Detention and Jail Capacity in California (San Francisco: Public Policy Institute of California, 2015), perma.cc/PL6V-TGYH. For rising jail costs nationally and in California, see Pew Charitable Trusts, "Local Spending on Jails Tops $25 Billion in Latest Nationwide Data," January 29, 2021, perma.cc/M9H6-QE4M; and Vera Institute of Justice (Vera), "What Jails Cost: Cities,", vera.org/publications/what-jails-cost-cities.

[11] Vera, Money Bail and the Lost Angeles County Jail System (New York: Vera, 2022), 2, perma.cc/P9K6-GLX8

timeframe for automatic bail review from five days to three days, reducing the risk that people will needlessly suffer from loss of housing, employment, or custody of children while in jail.

Third, it clearly defines "good cause" for reviewing bail at any other point in the pretrial period, clarifying certain circumstances that should always give rise to reviewing a pretrial release decision. Finally, it creates an automatic review hearing for other non-monetary pretrial conditions, such as electronic monitoring and mandatory drug testing, ensuring that people who are compliant with conditions do not have to navigate release requirements that are more onerous than necessary.

Ensuring adequate opportunities for reviewing pretrial decisions is good for safety, justice, and county budgets. Although these decisions are intended to address any risk to public safety or missed court appearance, research shows that unnecessary pretrial detention results in heightened pressure to plead guilty, increased rates of re-arrest and a high price tag for counties. SB 1133 seeks to address these issues by improving access to bail and pretrial conditions review across California."

6) **Argument in Opposition**: According to the *California District Attorneys Association* "[t]he newest amendments to SB 1133 removed several of the most beneficial provisions of the bill, namely the proposed additions of subsections (a) and (c) to Penal Code 1289, which explicitly allowed for bail review upon a complaint and provided equity in notice requirements.

CDAA is still opposed to this bill due to the provision which adds 1289.1 to the Penal Code. This provision forces review of nonmonetary conditions of release every 60 days and creates a rebuttable presumption that they are no longer necessary. The district attorney bears the burden of establishing by clear and convincing evidence that these conditions remain necessary to mitigate the risk to the public. This provision will provide for numerous releases of dangerous criminals into the public and will mire the judicial system with innumerable unnecessary bail review hearings.

In a typical DUI case, a judge may order the defendant to attend self-help meetings during the pendency of his case. In a typical theft case, a defendant may be ordered to stay away from the location where the crime occurred. In 2022 there were more than 125,000 DUI arrests in California and more than 500,000 theft-related arrests in California. (California Department of Justice, Crime in California 2022.) Most of these arrests result in prosecution and many of these cases remain pending for years. Section 1289.1 will require the judicial system to conduct hundreds of thousands of additional bail review hearings every year, just on these two categories of crimes, let alone the hundreds of other crimes and conditions of release that are possible. These hearings will occur even when there has been no change whatsoever in circumstances and no reduction in danger to the public. This is a waste of judicial resources with no grounding in reality. This provision assumes that all defendants become less of a risk over time, with no evidence whatsoever to support that. Not only that, but this provision gives the defendant the presumption that they are not a danger to the public, despite the fact that the court must presume the charges are true, and despite the fact that the California Constitution mandates that safety of the public and the safety of the victim shall be the primary considerations at every bail hearing. This provision is illogical, wasteful, and unconstitutional.

The addition of 1289.1 will force unwarranted bail review hearings which fail to protect victims and the public as required by the California Constitution."

7) **Related Legislation**: AB 2391 (Vince Fong) Amends the definition of "public safety" to include protection from physical or economic injury for the purpose of the court determining whether a defendant should be released on their own recognizance in a misdemeanor case. AB 2391 was referred to, but never heard in the Assembly Committee on Public Safety.

8) **Prior Legislation**:

   a) AB 329 (Bonta) requires bail to be set at $0 for all offenses except, among others, serious or violent felonies, violations of specified protective orders, battery against a spouse, sex offenses, and driving under the influence. AB 329 was referred to, but never heard in the Assembly Committee on Public Safety.

   b) SB 262 (Hertzberg), of the 2021-22 Legislative Session, would have prohibited costs relating to conditions of release from custody from being imposed on a person released on bail or their own recognizance including, but not limited to, fees relating to conditions of release or the imposition of conditions of release that require the person released to pay for those conditions.SB 262 failed passage on the Assembly floor.

REGISTERED SUPPORT / OPPOSITION:

Support

ACLU California Action
Aouon Orange County
California Public Defenders Association
Californians for Safety and Justice
Californians United for A Responsible Budget
Care First California
Children's Defense Fund - CA
Courage California
Ella Baker Center for Human Rights
Essie Justice Group
Felony Murder Elimination Project
Initiate Justice
Initiate Justice Action
Justice2jobs Coalition
LA Defensa
Legal Services for Prisoners With Children
Los Angeles Regional Reentry Partnership (LARRP)
Rubicon Programs
San Francisco Pretrial Diversion Project
San Francisco Public Defender
Silicon Valley De-bug
Smart Justice California, a Project of Tides Advocacy

The Bail Project
Uncommon Law
Vera Institute of Justice

Oppose

American Bail Coalition
California Bail Agents Association
California District Attorneys Association
Crime Victims United of California
Golden State Bail Agents Association, INC.

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

Date of Hearing: July 2, 2024
Counsel: Ilan Zur

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Kevin McCarty, Chair

SB 1161 (Becker) – As Introduced February 14, 2024

SUMMARY: Requires a juvenile court, if a person whose case has been certified to a juvenile court has their records sealed in juvenile court, to order all criminal court records associated with that juvenile record sealed. Specifically, **this bill**:

1) Requires a juvenile court, if the person whose case has been certified to a juvenile court has their records sealed in juvenile court, to order all criminal court records associated with that juvenile record sealed.

2) Prohibits defense counsel for the minor from being ordered to seal their records, for specified petitions in juvenile courts.

3) Provides that a person who has been convicted of a felony, or misdemeanor involving moral turpitude, may obtain record sealing relief, including specified dismissals, vacatur, and reduction of a felony to a misdemeanor, if all of that person's felony convictions, and misdemeanor convictions involving moral turpitude, have been subsequently dismissed, vacated, pardoned, or reduced to misdemeanors that do not involve moral turpitude.

4) Adds citation records to those records that must be sealed when record sealing is ordered, adds the citing law enforcement agency to the entities that must be notified by the probation department to seal the citation records, and requires the citing law enforcement agency to seal the records in its custody relating to the citation following notification by the probation department.

5) Requires the probation department, the Department of Justice ("DOJ"), and law enforcement agencies to seal the citation, arrest, and other records in their custody relating to a juvenile's citation, arrest, and detention if the prosecutor has declined to initiate proceedings within the applicable statute of limitations, and notified the probation department of that decision. Requires the probation department to seal the citation, arrest, and other records in its custody upon notification of the prosecutor's decision, and to notify the relevant law enforcement agencies regarding record sealing.

6) Requires the probation department to seal the citation, arrest, and other records in its custody and proceed notify the relevant law enforcement agencies regarding record sealing if the probation department deems it unnecessary to refer the juvenile to a program of diversion or supervision, or elects to counsel the juvenile and take no further action.

7) Requires the probation department to seal the arrest and other records in its custody relating to the juvenile's arrest in any case that was referred to the prosecuting attorney and the

prosecuting attorney notifies the probation officer that it has declined to file a petition, and to notify the relevant law enforcement agencies regarding record sealing.

8) Adds citation records for misdemeanors and adds arrest and citation records for a felony to those records that must be sealed under specified conditions.

9) Requires the probation officer to promptly release, upon request, copies of the juvenile probation record to the minor who is the subject of the juvenile probation record, their parent or guardian, or their counsel, and to remove identifying information pertaining to any other juvenile, as specified.

10) Authorizes counsel for the minor requesting the juvenile probation record to receive an unredacted juvenile probation record for the sole purpose of complying with counsel's ethical duties to evaluate whether a conflict of interest exists, as specified.

11) Defines "juvenile probation record" as records or information relating to the taking of a minor into custody, temporary custody, or detention, including the police, arrest, and crime reports.

12) Defines "any other juvenile" as additional minors who were taken into custody or temporary custody, or detained, and who also could be considered a subject of the juvenile police record, as defined, or juvenile probation record, as defined.

13) Provides that a minor be given equal consideration for informal probation, as specified, regardless of whether the minor lives in the county where the offense occurred.

14) Provides that the juvenile court may transfer jurisdiction to another county, terminate its jurisdiction, or seal the record or records of the youth while an appeal is pending, and provides that these actions do not affect the jurisdiction of the appellate court.

15) Provides if the appellate court remands the matter to the juvenile court after jurisdiction has been terminated or the record has been sealed as specified, the juvenile court shall access its records and assume jurisdiction to the extent necessary to follow the directions of the appellate court, and if the matter returns to the juvenile court after jurisdiction has been transferred to another county, the matter shall return to the juvenile court that last exercised jurisdiction.

16) Specifies when access to juvenile case files pertaining to matters within the jurisdiction of the juvenile court are limited, and provides that this does not limit or repeal any other applicable legal standard or protections designed to safeguard private, confidential, and privileged information.

17) Modifies the definition of "juvenile case file" to mean means a petition filed in a juvenile court proceeding, reports of the probation officer, and all other records, including any writing, as specified, or electronically stored information relating to the minor, that is filed in that case or made available to the probation officer in making the probation officer's

report, or to the judge, referee, or other hearing officer, and thereafter retained by the probation officer, judge, referee, or other hearing officer.

EXISTING LAW:

1) Requires the judge, whenever a case is before any court upon an accusatory pleading and it is suggested or appears to the judge before whom the person is brought that the person charged was, at the date the offense is alleged to have been committed, under the age of 18 years, to immediately suspend all proceedings against the person on the charge. (Welf. & Inst. Code, § 604, subds. (a).)

2) Requires the judge to examine into the age of the person, and if, from the examination, it appears to their satisfaction that the person was at the date the offense is alleged to have been committed under the age of 18 years, requires the judge to immediately certify specified information, and requires the certification and accusatory pleading to be promptly transmitted to the clerk of the juvenile court. (Welf. & Inst. Code, § 604, subds. (a) & (c).)

3) Provides that a judge of the juvenile court in which a petition was filed or that has taken jurisdiction of a case, as specified, may dismiss the petition, or may set aside the findings and dismiss the petition, if the court finds that the interests of justice and the welfare of the person who is the subject of the petition require that dismissal, or if it finds that they are not in need of treatment or rehabilitation. (Welf. & Inst. Code, § 782, subd. (a).)

4) Provides that the court has jurisdiction to order dismissal or setting aside of the findings and dismissal regardless of whether the person who is the subject of the petition is, at the time of the order, a ward or dependent child of the court. (Welf. & Inst. Code, § 782, subd. (a).)

5) Provides that five years or more after the jurisdiction of the juvenile court has terminated over a person adjudged a ward of the court or after a minor appeared before a probation officer, or, in any case at any time after the person has reached the age of 18, the person or county probation officer may petition the juvenile court for sealing of the records, including arrest records, relating to the person's case, in the custody of the juvenile court, the probation officer, and any other agencies and public officials as the petitioner alleges to have custody of the records. (Welf. & Inst. Code, § 781, subd. (a)(1)(A).)

6) Requires the court to order all records, papers, and exhibits in the person's case in the custody of the juvenile court sealed, including the juvenile court record, minute book entries, and entries on dockets, and any other records relating to the case in the custody of the other agencies, entities, and officials as are named in the order, if the court finds that since the termination of jurisdiction or action, the person has not been convicted of a felony or of any misdemeanor involving moral turpitude and that rehabilitation has been attained to the satisfaction of the court. (Welf. & Inst. Code, § 781, subd. (a)(1)(A).)

7) Provides that once the court has ordered the person's records sealed, the proceedings in the case shall be deemed never to have occurred, and the person may properly reply accordingly to any inquiry about the events, the records of which are ordered sealed (Welf. & Inst. Code, § 781, subd. (a)(1)(A).)

8) Requires the court, if a minor satisfactorily completes an informal program of supervision, probation, as specified, or a term of probation for any offense, to order the petition dismissed and order sealed all records pertaining to the dismissed petition in the custody of the juvenile court, law enforcement agencies, the probation department, or the DOJ. (Welf. & Inst. Code, § 786, subd. (a).)

9) Provides that upon the order of dismissal under the court-initiated sealing process, the arrest and other proceedings in the case shall be deemed not to have occurred. (Welf. & Inst. Code, § 786, subd. (b).)

10) Requires the probation department to seal the arrest and other records in its custody relating to a juvenile's arrest and referral and participation in a diversion or supervision program upon satisfactory completion of a program of diversion or supervision to which a juvenile is referred by the probation officer or the prosecutor, as specified. (Welf. & Inst. Code, § 786.5, subd. (a).)

11) Requires the probation department to notify the arresting law enforcement agency to seal the arrest records, and requires the arresting law enforcement agency to seal the records in its custody relating to the arrest, and that upon sealing of the records, the arrest or offense giving rise to any of the circumstances shall be deemed not to have occurred (Welf. & Inst. Code, § 786.5, subds. (b) & (c).)

12) Allows any person who has been arrested for a misdemeanor, with or without a warrant, while a minor, may, during or after minority, petition the court in which the proceedings occurred or, if there were no court proceedings, the court in whose jurisdiction the arrest occurred, for an order sealing the records in the case, including any records of arrest and detention, if any of the following occurred: 1) the person was released due to insufficient grounds for making a criminal complaint against the person arrested; 2) the proceedings were dismissed, or the person was discharged, without a conviction; or 3) the person was acquitted. (Pen. Code, § 851.7, subd. (a).)

13) Provides that if a petition for the sealing of a juvenile arrest record is granted, the arrest, detention, and any further proceedings in the case shall be deemed not to have occurred. (Pen. Code, § 851.7, subd. (b).)

14) Authorizes the court to, if a petition has been filed by the prosecuting attorney to declare a minor a ward of the court, without adjudging the minor a ward of the court and with the consent of the minor and the minor's parents or guardian, continue any hearing on a petition for six months and order the minor to participate in a program of informal supervision, and requires court to order the petition be dismissed if the minor successfully completes the program of supervision. (Welf. & Inst. Code, § 654.2, subd. (a).)

15) Authorizes the probation officer to recommend informal supervision if the minor is eligible for informal supervision, and the probation officer believes the minor would benefit from the program. (Welf. & Inst. Code, § 654.2, subd. (b).)

16) Specifies the jurisdiction of the juvenile court which may adjudge a person to be a dependent child of the court. (Welf. & Inst. Code, § 300.)

17) Specifies the groups of nonminors who are either within the court's jurisdiction or who the court is authorized to retain in its jurisdiction and requires the court to assume transition jurisdiction, as specified, over a person notwithstanding a court order vacating the underlying adjudication pursuant to Section 236.14 of the Penal Code. (Welf. & Inst. Code, § 303, subds. (a)-(c), (f).)

18) Provides that a nonminor who attained 18 years of age while subject to an order for foster care placement and who has not attained 21 years of age for whom the court has dismissed dependency jurisdiction, as specified, or delinquency jurisdiction, as specified, or transition jurisdiction, as specified, but has retained general jurisdiction or the county child welfare services, probation department, or tribal placing agency on behalf of the nonminor, may petition the court in the same action in which the child was found to be a dependent or delinquent child of the juvenile court, for a hearing to resume the dependency jurisdiction over a former dependent or to assume or resume transition jurisdiction over a former delinquent ward. (Welf. & Inst. Code, § 388, subd. (e)(1).)

19) Provides that such a petition may be brought notwithstanding a court order vacating the underlying adjudication, as specified. (Welf. & Inst. Code, § 388, subd. (e)(1).)

20) Specifies which minors and nonminors are within the transition jurisdiction of the juvenile court. (Welf. & Inst. Code, § 450, subd. (a).)

21) Authorizes the court, at a hearing during which termination of jurisdiction over a ward is considered, to modify its order of jurisdiction and assume transition jurisdiction over the ward as an alternative to termination of jurisdiction, and to assume transition jurisdiction over a ward, transition dependent, or nonminor dependent whose underlying adjudication is vacate, as specified. (Welf. & Inst. Code, § 451, subd. (a).)

22) Specifies the categories of individuals who are authorized to inspect a juvenile case file, and specifies when access to juvenile case files pertaining to matters within the jurisdiction of the juvenile court, as specified, are limited (Welf. & Inst. Code, § 827, subd. (a).)

23) Defines "juvenile case file" as "a petition filed in a juvenile court proceeding, reports of the probation officer, and all other documents filed in that case or made available to the probation officer in making the probation officer's report, or to the judge, referee, or other hearing officer, and thereafter retained by the probation officer, judge, referee, or other hearing officer." (Welf. & Inst. Code, § 827, subd. (e).)

FISCAL EFFECT: Unknown.

COMMENTS:

1) **Author's Statement**: According to the author, "[t]he Welfare and Institutions Code (WIC) governing juvenile justice has not been updated to reflect technological advances or process changes. This lack of updates has created lengthy processes in juvenile court and breakdowns in communication which have negatively impacted youth in the system.

For example, due to a gap in current law, youth who are arrested but never charged must utilize the same complex process to have their records sealed as youth who have been formally adjudicated. These non-adjudicated youth would have to wait until they are 18 or 5 years after the referral, prove they have not suffered any crimes involving moral turpitude, and demonstrate rehabilitation to the court even though they were never charged with a crime.

SB 1161 makes clarifying amendments to the WIC in a number of areas, including access to juvenile records, record sealing when charges will not be filed, availability of informal probation, access to institutional records, and preservation of foster care benefits for non-minor dependent youth in order to improve the clarity and efficacy of the WIC.

This bill helps to ultimately streamline both access and sealing opportunities for eligible youth in the juvenile justice system."

2) **Background:** According to the U.S. Department of Justice Office of Justice Programs "Research identified a variety of misconceptions regarding expunging juvenile records that persist—leading to an array of unintended consequences for youth with arrest and/or court records. Most prominently, the public continues to believe that all states automatically expunge juvenile records when juveniles turn 18 and that all records remain confidential. This is simply not true.

   Many youth face collateral consequences from arrests or adjudications that follow them throughout their lives. The most significant collateral consequences—including difficulty finding employment, serving in the military, and accessing educational services and housing—can thwart youth's ability to lead productive lives.

   To lessen the impact of collateral consequences, states, localities, and the federal government have implemented various promising practices. Efforts like ban the box are strengthening state laws. Federal programs and online resources are educating employers, landlords, and the public; most importantly, they are helping youth and their families. However, criminal and juvenile justice systems, educational institutions, employers, landlords, and the public all have an ongoing role to play in ensuring that youthful transgressions do not lead to permanent collateral consequences."[1]

3) **Effect of the Bill:** SB 1161 makes numerous changes to California law relating to juvenile record sealing, juvenile case files, eligibility for informal probation, jurisdiction of appellate courts, and modifications to clarify existing law.

   Most notably, SB 1161: 1) requires sealing of criminal court records when a person who was improperly charged in adult criminal court has been certified to a juvenile court and the person's juvenile court records are sealed; 2) prohibits defense counsel for the minor from being ordered to seal their records, for specified petitions in juvenile courts; 3) allows a person with a conviction for a misdemeanor involving moral turpitude or a felony to petition for juvenile record sealing if the felony or misdemeanor conviction was dismissed, vacated,

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[1] U.S. Department of Justice: Expunging Juvenile Records: Misconceptions, Collateral Consequences, and Emerging Practices (Dec. 2020), available at: https://ojjdp.ojp.gov/publications/expunging-juvenile-records.pdf

or pardoned, or the felony was reduced to a misdemeanor that does not involve moral turpitude; 4) allows a minor's misdemeanor citation record, or felony citation or arrest record to be sealed when proceedings were not commenced, the proceedings were dismissed, or the minor was acquitted; 5) adds citation records to the type of records that must be sealed when a juvenile satisfactorily completes a program of diversion or informal supervision; 6) requires specified entities to seal citation, arrest, and other records in cases where the prosecutor has declined to initiate proceedings or the probation department has elected not to refer the juvenile to a program of diversion or supervision; 7) provides that a minor be given equal consideration for informal probation regardless of whether the minor lives in the county where the offense occurred; 8) clarifies when jurisdiction of the appellate court is not affected by a juvenile record sealing; and 9) "defines juvenile probation record," and "any other juvenile" for the purposes of this bill, and modifies the definition of "juvenile case file" to include electronic records.

4) **Argument in Support**: According to *California Attorneys for Criminal Justice*, "As practicing criminal lawyers who have experience in juvenile delinquency courts, CACJ understands that while S.B. 1161's amendments to the WIC are fairly minor on an individual basis, collectively, they constitute a substantial improvement of the current code, providing much-needed clarification to the WIC and affording significant benefits to those impacted by the juvenile justice system. For example, youth who were arrested but never charged with a crime or referred to a diversion program by probation must utilize the same lengthy and complex process to have their records sealed as youth who have been formally adjudicated. These youth currently have to wait until they are 18 or five years after the referral, prove they have not suffered any crimes involving moral turpitude, and demonstrate rehabilitation to a juvenile judge even though they were never charged with a crime nor became involved in the court system to begin with. During this time the mere fact of arrest can make obtaining internships, jobs, and other opportunities difficult. S.B. 1161 enacts a simplified process that is already codified in the WIC for youth on law enforcement or probation diversion, and applies that simplified process to youth who experience an even lesser degree of intervention by law enforcement or probation.

   "S.B. 1161 also provides that related criminal records are sealed when a case is transferred back to juvenile court from a criminal court; clarifies that expunged adult convictions do not serve as a bar to record sealing; and ensures that defense attorneys may have access to their own clients' juvenile records to assist them in dealing with collateral consequences as well as potential post-adjudication or post-conviction relief.

   "S.B. 1161 also ensures that nonminor dependent youth remain eligible to receive extended foster care services and benefits despite their charges being dismissed, so that these youth do not have to choose between earning a "clean slate" and receiving critical foster care benefits. This is a great step in preventing recidivism and furthering the rehabilitative purpose of juvenile courts."

5) **Argument in Opposition**: According to the *California District Attorneys Association*, "The legislative purpose of juvenile sealing laws is to protect minors from future prejudices resulting from their delinquency records. (In re G.Y. (2015) 234 Cal. App. 4th 1196) The legislature has gone to great lengths to protect youth in our juvenile justice system. Juvenile Courts have the sole authority to make the decision as to who can access, inspect, and disseminate juvenile court records. (In re Elijah S. (2005) 125 Cal.App.4th 1532) Welfare

and Institution Code section 827 ensures this confidentiality by creating a petition procedure that must be followed by both defense counsel and the prosecution.

This bill would exclude defense attorneys from persons required to seal the records in their possession after a minor is granted a sealing order. The bill's proposed amendments to Welfare and Institution Code sections 781 and 786 would allow defense to have continued and unfettered use of the juvenile's confidential records. Welfare and Institution Code section 827(g) states that sealed records under 781 and 786 may not be inspected, except as specified by 781 and 786.

Welfare and Institution Code sections 781 and 786 currently contain a petition process where the defense, as well as the prosecutor, must ask permission of the juvenile court to grant access to sealed records. This proposed bill would strike at the heart of the juvenile court's efforts to protect juveniles and their confidential records."

6) **Prior Legislation**:

a) SB 448 (Becker), Chapter 608, Statutes of 2023, prohibits the juvenile court from basing the decision to detain a minor in custody solely on the minor's county of residence.

b) AB 2629 (Santiago), Chapter 970, Statutes of 2022, requires a juvenile court, upon termination of jurisdiction, to consider and afford great weight to the presence of one or more specified mitigating circumstances, when deciding to dismiss a petition.

c) AB 2425 (Stone), Chapter 330, Statutes of 2020, prohibits the release of information by a law enforcement, social worker, or probation agency when a juvenile has participated in or completed a diversion program.

d) SB 1126 (Jones), Chapter 338, Statutes of 2020, authorizes specified sealed juvenile records to be accessed, inspected, or utilized by the probation department, the prosecuting attorney, counsel for the minor, and the court for the purpose of assessing the minor's competency in a subsequent proceeding if the issue of competency has been raised.

e) AB 1537 (Cunningham), Chapter 50, Statutes of 2019, expands a prosecutor's ability to request to access, inspect, or use specified sealed juvenile records if the prosecutor has reason to believe that the record may be necessary to meet a legal obligation to disclose favorable or exculpatory evidence to a defendant in a criminal case.

f) AB 529 (Stone), Chapter 685, Statutes of 2017, requires the sealing of records relating to dismissed or un-sustained juvenile court petitions and relating to diversion and supervision programs, as specified.

g) SB 393 (Lara), Chapter 680, Statutes of 2017, provides a process for a person to petition a court to seal records of an arrest that did not result in a conviction, as defined, with specified exceptions.

h) SB 312 (Skinner), Chapter 679, Statutes of 2017, authorizes the court to order the sealing of records for certain serious or violent offenses committed when a juvenile was 14 years of age or older, as specified.

i) AB 666 (Stone) Chapter 368, Statutes of 2015, requires records in the custody of law enforcement agencies, the probation department, or the DOJ, to also be sealed, in a case where a court has ordered a juvenile's records to be sealed, as specified

j) AB 1038 (Leno) Chapter 249, Statutes of 2014, provides for the automatic dismissal of juvenile petitions and sealing of records, as specified, in cases where a juvenile offender successfully completes probation, and authorizes the juvenile court to dismiss a delinquency petition after a person reaches the age of 21.

REGISTERED SUPPORT / OPPOSITION:

Support

ACLU California Action
Alliance for Boys and Men of Color
California Alliance for Youth and Community Justice
California Attorneys for Criminal Justice
California Coalition for Youth
California Public Defenders Association
Center on Juvenile and Criminal Justice
Communities United for Restorative Youth Justice (CURYJ)
Community Interventions
East Bay Community Law Center
Ella Baker Center for Human Rights
Freedom 4 Youth
Fresh Lifelines for Youth
Haywood Burns Institute
Milpa Collective
National Center for Youth Law
National Compadres Network
Pacific Juvenile Defender Center
Ryse Center
San Francisco Public Defender
Santa Clara County Juvenile Justice Commission
Youth Forward

Oppose

California District Attorneys Association

Analysis Prepared by: Ilan Zur

Date of Hearing: July 2, 2024
Chief Counsel: Gregory Pagan

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Kevin McCarty, Chair

SB 1202 (Newman) – As Amended June 10, 2024

SUMMARY: Requires the California Department of Corrections and Rehabilitation (CDCR) to prepare and issue reports, as specified, relating to assaults against employees at any CDCR facility. Specifically, **this bill**:

1) Requires CDCR to report quarterly, within 30 days of the end of each quarter, to all bargaining units at the department, the total number of assaults against employees.

2) Requires CDCR to report, beginning on January 1, 2025, and each year thereafter within 30 days after December 31, to the Legislature and the Chairs of the Senate Committee on Budget and Fiscal Review and the Assembly Committee on Budget, the total number of assaults against employees that occurred during the preceding calendar year.

3) Provides that the reports made by the department shall appropriately protect the confidentiality of patients, inmates, and employees and include all of the following information:

   a) The date the assault occurred;

   b) The state bargaining unit of the who was assaulted;

   c) The classification of any represented employee affected by the incident; and,

   d) The name of the facility where the incident occurred.

4) Defines the following terms:

   a) "Assault" means a physically aggressive act to staff, including hitting, pushing, kicking, or other acts directed against a staff person that could cause potential injury.

   b) "Facilities" means any correctional facility within the jurisdiction of CDCR.

EXISTING LAW:

1) Defines "assault" as an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another. (Pen. Code, § 240.)

2) Provides that assault is punishable by a fine not exceeding $1,000, by imprisonment in the county jail not exceeding six months, or by both the fine and imprisonment. (Pen. Code, §

241, subd. (a).)

3) Proscribes that when an assault is committed against the person of a custodial officer, firefighter, emergency medical technician (EMT), physician or nurse providing emergency care, lifeguard, process server, traffic officer, code enforcement, or animal control officer engaged in the performance of his or her duties, and the person committing the offense knows or reasonably should know that the victim is a custodial officer, firefighter, EMT, physician or nurse providing emergency care, lifeguard, process server, traffic officer, code enforcement officer, or animal control officer, the assault is punishable by a find not exceeding $2,000, by imprisonment in the county jail not exceeding six months, or by both fine and imprisonment. (Pen. Code § 241, subd. (c).)

4) Provides that any person that commits an assault on the person of another with force likely to produce great bodily injury shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for a term not to exceed one year, or by a fine not exceeding ten thousand dollars, or by both the fine and imprisonment. (Pen. Code, § 245, subd. (a)(4).)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "According to the Department of Justice, public employees experience workplace violence incidents at a rate three times higher than private employees. In 2023, according to data from the California Department of Corrections and Rehabilitations, there were 563 recorded assaults and more than 4,300 instances of battery against a correctional officer or non-prisoner. SB 1202 endeavors to better address these incidents and their underlying causes by requiring CDCR to report on a quarterly basis to relevant bargaining units all such incidents, along with the bargaining unit and job classification of the correctional employee who was the target of such an attack. The impetus for this bill was a horrific assault on a CDCR employee at a CDRC facility and where representatives of the affected employee were subsequently prevented from accessing relevant and timely information about these incidents to help inform their advocacy moving forward. To the extent that we expect these dedicated state employees to carry out their duties in a charged and challenging environment, the state and the Legislature should reasonably be expected to ensure proper and thorough reporting of these incidents to the bargaining units tasked with representing their interests and wellbeing."

2) **Prior Legislation**:

   a) SB 553 (Cortese), Chapter 289, Statutes of 2023 requires employers to establish, implement and maintain an effective workplace violence prevention plan that includes, among other elements, requirements to maintain incident logs, provide specified trainings, and conduct periodic reviews of the plan.

   b) SB 363 (Pan) of the 2019 Legislative Session required the Department of State Hospitals, the Department of Developmental Services, and the Department of Corrections and Rehabilitation to report monthly the total number of assaults against employees to the

bargaining unit of the affected employees. This bill was vetoed by the Governor.

REGISTERED SUPPORT / OPPOSITION:

Support

None

Opposition

None

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

Date of Hearing: July 2, 2024
Consultant: Elizabeth Potter

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Kevin McCarty, Chair

SB 1254 (Becker) – As Amended May 16, 2024

SUMMARY: Requires the California Department of Social Services (CDSS) to partner with the California Department of Corrections and Rehabilitation (CDCR), state prisons, and county jails to pre-enroll eligible applicants for the CalFresh program. Specifically, **this bill**:

1) Requires CDSS, subject to the provisions in the below paragraph, to partner with CDCR, state prisons, and county jails to allow for pre-enrollment of otherwise eligible applicants who are ineligible because of their incarceration status for the CalFresh program, to ensure that an applicant's benefits may begin as soon as possible upon reentry of the applicant into the community from state prison or county jail.

2) Requires, in the case of a given county, CDSS to implement the partnership described in the above paragraph with CDCR, state prisons, and county jails upon notification to the California Department of Health Care Services (DHCS) that the corresponding county has implemented the Justice-Involved Initiative that is developed by DHCS pursuant to California Advancing and Innovating Medi-Cal (CalAIM) provisions, providing that a qualifying inmate of a public institution shall be eligible to receive targeted Medi-Cal services for 90 days, as specified.

3) Requires, by February 1, 2026, CDSS to establish a CalFresh workgroup to create recommendations for a state reentry process incorporating all of the necessary resources for transition from state prison or county jail to reentry into the community. Requires the composition of the workgroup to consist of all of the following:

   a) Two representatives from CDSS, including one from the Disability Determination Services Division;

   b) One representative from community-based organizations;

   c) One representative from the California Health and Human Services Agency;

   d) One representative from the County Welfare Directors Association of California;

   e) Two impacted individuals who were recipients of CalFresh benefits prior to release; and,

   f) A sheriff or an individual appointed by a sheriff.

4) States that the CalFresh workgroup shall consider how best to increase CalFresh enrollment for otherwise eligible applicants for the CalFresh program to ensure that an applicant's benefits begin before the reentry of the applicant into the community from the state prison or

county jail.

5) Requires the CalFresh workgroup to consider federal programs or applicable federal waivers to reduce food insecurity for individuals leaving incarceration and to aid in the reentry process.

6) Requires the CalFresh workgroup to meet no less than quarterly.

7) Requires the CalFresh workgroup, by August 31, 2026, and annually by August 31 thereafter, to create and submit a report to CDSS and the Legislature outlining the workgroup's recommendations

8) Requires CDSS, by January 1, 2026, to seek a federal waiver, as specified, to allow for pre-enrollment of applicants prior to their release from state prison or county jail.

9) Requires CDSS, by January 1, 2026, to seek a federal waiver, as specified, to allow for a delay of verification of incarcerated individuals for up to five months.

10) Requires CDSS to seek other relevant federal waivers necessary to implement these provisions.

11) Provides that this section shall become operative on the date that CDSS notifies the Legislature that the Statewide Automated Welfare System (CalSAWs) can perform the necessary automation to implement these provisions.

EXISTING FEDERAL LAW:

1) Establishes the Supplemental Nutrition Assistance Program (SNAP) to promote the general welfare and to safeguard the health and wellbeing of the nation's population by raising the levels of nutrition among low-income households. (7 U.S.C., § 2011 et seq.)

2) Permits the federal Food and Nutrition Services (FNS) to authorize waivers to deviate from specific regulatory provisions for certain reasons, including in situations where FNS determines that the waiver would result in a more effective and efficient administration of the program, among other reasons. (7 C.F.R. § 272.3(c)(1)(ii).)

3) Prohibits certain individuals from being eligible to participate as separate households or as a member of any household for purposes of determining SNAP eligibility, including, residents of an institution, and, further, specifies that a person is considered a resident of an institution when the institution provides them with a majority of their meals (over 50 percent of three meals daily) as part of the institution's normal services. (7 C.F.R. § 273.1(b)(7)(vi).)

EXISTING LAW:

1) Establishes the CalFresh program to administer the provision of SNAP benefits to families and individuals meeting certain criteria, as specified. (Welf. & Inst. Code § 18900 *et seq.*)

2) Requires CDSS to issue an all-county letter (ACL) containing recommendations and suggested methods for county human services agencies to partner with CDCR and county jails to enroll otherwise eligible applicants for the CalFresh program, to ensure that an applicant's benefits may begin as soon as possible upon reentry of the applicant into the community from the state prison or a county jail. (Welf. & Inst. Code § 18901.35. (a)(1).)

3) Requires the ACL to include, but not be limited to, all of the following:

   a) Information on the benefits of enrolling formerly incarcerated individuals into the CalFresh program;

   b) Information on acceptable forms of identification necessary to complete an application for CalFresh benefits, including information on how to verify an applicant's eligibility for expedited service, as specified;

   c) Information on how to connect individuals released from the state prison with employment or employment opportunities, including how counties may work with the CDCR to connect individuals to employment opportunities related to any experience, training, and education that the individual has obtained, including experience, training, and education obtained while in state prison; and,

   d) Encourage counties to require county eligibility workers to regularly enter any state prison or county jail within the county to conduct interviews and assist individuals that are within 45 days of release from state prison or county jail with completing applications for CalFresh benefits. This assistance shall be for the purpose of establishing eligibility for CalFresh benefits prior to release from the institution. (Welf. & Inst. Code § 18901.35. (a)(2).)

4) Requires, if CDSS deems it necessary to maximize CalFresh enrollment outcomes or employment placement success rates for individuals reentering the community from state or prison or county jail, CDSS to submit to the United States Department of Agriculture's (USDA's) Food and Nutrition Service (FNS) a request to waive federal regulations, as specified, to allow for pre-enrollment of applicants prior to their release from the state prison or a county jail. (Welf. & Inst. Code § 18901.35. (b).)

5) Requires, notwithstanding any other law, a qualifying inmate of a public institution to be eligible to receive targeted Medi-Cal services for 90 days, or the number of days approved in the CalAIM Terms and Conditions with respect to an eligible population of qualifying inmates if different than 90 days, prior to the date they are released from a public institution, if otherwise eligible for those services under this chapter as specified. (Welf. & Inst. Code § 14184.800 (a).)

6) Requires, in an effort to expand CalFresh program outreach and retention and improve dual enrollment between the CalFresh and Medi-Cal programs, county welfare departments (CWDs) to complete all of the following:

   a) Ensure the Medi-Cal applicants applying in-person, online, or by telephone, and who also may be eligible for CalFresh, are screened and given the opportunity to apply at the same

time they are applying for Medi-Cal or submitting information for their renewal process;

b) Ensure the same staff receive Medi-Cal and CalFresh applications pursuant to the above paragraph during the Medi-Cal application, renewal, or application and renewal processes conduct the eligibility determination functions needed to determine eligibility or ineligibility to CalFresh; and,

c) Designate one or more county liaisons to establish CalFresh application referral and communication procedures on outreach activities between counties and community-based organizations facilitating Medi-Cal enrollment. (Welf. & Inst. Code § 18918.1 (a))

7) Requires that a person be paid $200 upon release from state prison, as specified. (Penal Code § 2713.1)

FISCAL EFFECT: Unknown.

COMMENTS:

1) **Author's Statement**: According to the author, "[t]he Supplemental Nutrition Assistance Program (SNAP)—called CalFresh in California —is the largest food assistance program in the nation. Under federal law, incarcerated individuals become ineligible to receive CalFresh benefits after 30 days of confinement. The USDA allows for waivers to deviate from current provisions. Twelve states have applied for waivers to allow for the pre-enrollment of incarcerated people, with programs dating as far back to 2005 in some states.

   While there is already an existing re-entry process for Medi-Cal, there are no equivalent enrollment processes for CalFresh, and various other supportive services. California has previously passed legislation for pre-enrollment of state health and human services. AB 3073 (Wicks, 2020) required the California Department of Social Services (CDSS) to issue an all-county letter with recommendations on pre-enrollment on incarcerated applicants for CalFresh. These recommendations included suggestions for collaboration between county prison, social services and jails and steps to increase CalFresh access for incarcerated people.

   Every Californian deserves the opportunity for fresh, nutritious food. SB 1254 will allow and assist incarcerated people in applying for CalFresh benefits up to 90 days before their release to better prepare them for reentry. The bill will also create a workgroup within the CDSS to begin recommendations for a statewide reentry process.

   By doing so, this bill decreases barriers to re-entry, helps address issues of food insecurity in California, and builds upon existing work in connecting individuals with state services in an effective manner."

2) **Support Services and the Formerly Incarcerated:** According to the Western Center on Law and Poverty "[s]ince few individuals leaving prison or jail have a job awaiting them immediately upon release, they would qualify for CalFresh due to their lack of income. The vast majority (80%) of incarcerated individuals are low-income (Eisen, 2014). However, despite their eligibility, formerly incarcerated individuals face particular barriers in acquiring CalFresh in the current application process that can cause them to be delayed, often for weeks, in receiving benefits at a critical time in their post-release. National studies have

found that the rates that people re-offend are the highest in the first weeks and months after release (Solomon et al., 2008). This holds true in California as well, where the majority of individuals released from prison who recidivate will do so within the first six months post-release (California Department of Corrections and Rehabilitation, 2015). A CalFresh pre-enrollment program would eliminate these burdens and delays while providing immediate support to formerly incarcerated individuals during this crucial transition period."[1]

This bill would require CDSS to work with CDCR, state prisons, and county jails to pre-enroll, otherwise qualifying, eligible incarcerated individuals to enroll in CalFresh.

3) **Double-Referral**: This bill was referred to the Assembly Committee on Public Safety. The first committee of reference, the Assembly Committee on Human Resources, provides a full analysis from the Human Resources policy perspective.

4) **Argument in Support**: According to *Nourish California,* a co-sponsor of this bill, "[t]he Supplemental Nutrition Assistance Program (SNAP)—called CalFresh in California —is the most effective food assistance program in the nation.1 However, California has historically had a low ranking on the United States Department of Agriculture's statewide ranking for eligible households to enroll and participate in SNAP/CalFresh due in part to barriers to acquiring CalFresh for all applicants. Altogether, nearly one in three eligible Californians are not connected to this 100 percent federally-funded food assistance program.

   Under federal law, incarcerated individuals become ineligible to receive CalFresh benefits after 30 days of confinement. While there is already an existing re-entry process for Medi-Cal, there are no equivalent enrollment processes for CalFresh and various other supportive services.Food insecurity is one of the most challenging hurdles that previously incarcerated individuals face upon re-entry. While there is already an existing re-entry enrollment process for Medi-Cal, CalFresh and various other supportive services have no equivalent enrollment processes.

   The FRESH Act creates this process for these programs and removes unnecessary barriers to re-entry. In doing so, it helps reduce food insecurity in California and builds upon existing work in effectively connecting individuals with state services." (internal citations omitted)

5) **Argument in Opposition**: According to the *California State Sheriff's Association*, "While we understand and appreciate the goal of easing the reentry of formerly incarcerated persons into society, this bill creates expensive challenges without funding or the guarantee that the program will be permitted by the federal government. Existing law generally prohibits incarcerated persons from receiving supplemental nutrition assistance benefits. In order for this unfunded mandate to be implemented, state officials would have to seek and receive a federal waiver and there is no assurance such would occur.

   "Further, California state and county correctional facilities are in the middle of a years-long process to implement the second part of the CalAIM justice involved initiative, which requires the provision of in-reach services to county jail inmates within 90 days of release.

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[1] Burton, Realignment: the policy opportunity for a CalFresh pre-enrollment program (Oct. 2016), p. 5, available at: https://wclp.org/wp-content/uploads/2016/10/Reducing-Hunger-Recidivism-by-Pre-Enrolling-Into-CalFresh.pdf

This complex and novel program will not be rolled out in counties any earlier than October 1, 2024 and not all counties will be ready or willing to proceed at that time. Layering on another program that will require resources currently unaccounted for, both in funding and staff capacity, could hamstring local correctional efforts, even if SB 1254's requirements do not commence until CalAIM is implemented."

6) **Related Legislation**: SB 950 (Skinner) of the 2023-2024 Legislative Session, would expand reentry services and program assistance for incarcerated persons who are in community correctional reentry centers and require CDCR to help incarcerated persons obtain support services and enrollment in eligible programs

7) **Prior Legislation**:

   a) AB 3073 (Wicks), Chapter 225, Statutes of 2020, requires CDSS to issue an ACL containing recommendations to county human services agencies to enroll formerly incarcerated individuals into CalFresh and connect them with employment or employment and training opportunities, and requires CDSS, if it deems it necessary, to submit a waiver to the United States Department of Agriculture (USDA) Food and Nutrition Service (FNS) to allow for the pre-enrollment of applicants prior to their release from state prison or county jail.

   b) AB 2308 (Stone), Chapter 607, Statutes of 2014, required that both CDCR and the Department of Motor Vehicles ensure that all individuals leaving prison have a valid state-issued identification card.

   c) AB 720 (Skinner), Chapter 646, Statutes of 2013, requires the board of supervisors in each county to designate an entity to assist certain jail inmates to apply for a health insurance affordability program, as defined, and prohibits county jail inmates who are currently enrolled in Medi-Cal from being terminated from the program due to their detention, unless required by federal law or they become otherwise ineligible, as specified.

REGISTERED SUPPORT / OPPOSITION:

Support

A New Way of Life Reentry Project
ACLU California Action
Agricultural Institute of Marin
Alchemist CDC
All Home
All Home, a Project of Tides Center
All of Us or None Bakersfield
Amelia Ann Adams Whole Life Center
Asian Americans Advancing Justice Southern California
Buen Vecino
Ca4health
California Alliance for Youth and Community Justice
California Association of Food Banks

California Catholic Conference
California Family Resource Association
California Food and Farming Network
California Immigrant Policy Center
California Innocence Coalition
California Public Defenders Association
Californians for Safety and Justice
Californians United for A Responsible Budget
Caravan 4 Justice
Center for Healthy Communities At California State University, Chico
Center on Juvenile and Criminal Justice
Ceres Community Project
Child Abuse Prevention Center and Its Affiliates Safe Kids California, Prevent Child Abuse California and The California Family Resource Association; the
Communities Actively Living Independent & Free
Communities United for Restorative Youth Justice (CURYJ)
Community Action Partnership of Orange County
Community Legal Services in East Palo Alto
Courage California
Critical Resistance, Los Angeles
Cure California
Disability Rights California
East Bay Community Law Center
Ella Baker Center for Human Rights
Equality California
Families Inspiring Reentry & Reunification 4 Everyone
Felony Murder Elimination Project
Food for People, the Food Bank for Humboldt County
Freedom 4 Youth
Fresh Approach
Glide
Grace Institute - End Child Poverty in Ca
Haywood Burns Institute
Healthright 360
Hunger Action Los Angeles INC
Initiate Justice
Initiate Justice Action
Interfaith Movement for Human Integrity
Justice in Aging
LA Defensa
Latino Coalition for A Healthy California
Lawyers' Committee for Civil Rights of The San Francisco Bay Area
Legal Aid Foundation of Los Angeles
Legal Services for Prisoners With Children
Los Angeles County District Attorney's Office
Los Angeles Regional Reentry Partnership (LARRP)
Marin Food Policy Council
Milpa Collective
Nextgen California

Nourish California
Pesticide Action Network
Prison From the Inside Out
Public Counsel
Restoring Hope California
Rising Communities
Riverside All of Us or None
Root & Rebound
Root & Rebound (UNREG)
Roots of Change
Rubicon Programs
Sacramento Food Policy Council
San Diego Hunger Coalition
San Francisco Public Defender
San Francisco-marin Food Bank
Second Harvest Food Bank of Orange County
Second Harvest of Silicon Valley
Silicon Valley De-bug
Sister Warriors Freedom Coalition
Sisters of St. Joseph of Orange Healthcare Foundation
The Praxis Project
Transitions Clinic Network
Uncommon Law
United Way of Greater Los Angeles
Universidad Popular
University of San Francisco School of Law, Racial Justice Clinic
Urban Peace Movement
Veggielution
Western Center on Law & Poverty
Young Women's Freedom Center

Oppose

California State Sheriffs' Association

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

Date of Hearing: July 2, 2024
Counsel: Ilan Zur

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Kevin McCarty, Chair

SB 1256 (Glazer) – As Amended May 16, 2024

SUMMARY: Requires a person, excluding a juvenile, convicted of specified misdemeanor solicitation of a minor offenses, where the person is more than three years older than the solicited minor, to provide a biological DNA sample to the DNA databank for law enforcement identification analysis. Specifically, **this bill**:

1) Requires any person, excluding a juvenile, to provide DNA samples (buccal swab samples, right thumbprints, and a full palm print impression of each hand, and any blood specimens or other specified biological samples required) for law enforcement identification analysis, if the following conditions are met:

   a) That person is convicted of, or pleads guilty or no contest to, on or after January 1, 2025, any of the following :

      i) Soliciting, agreeing to engage in, or engaging in any act of prostitution with the intent to receive compensation, money, or anything of value from another person.

      ii) Soliciting, agreeing to engage in, or engaging in, any act of prostitution with another person who is 18 years of age or older in exchange for the individual providing compensation, money, or anything of value to the other person.

      iii) Soliciting, or agreeing to engage in, or engaging in, any act of prostitution with another person who is a minor in exchange for the individual providing compensation, money, or anything of value to the minor.

   b) The person who was solicited was a minor at the time of the offense, and the defendant knew or should have known that the person was a minor;

   c) The person has a prior conviction for soliciting a minor;; and

   d) At the time of the offense, the defendant was more than three years older than the solicited minor, as measured from the minor's date of birth to the person's date of birth.

EXISTING LAW:

DNA Collection for Specified Crimes

1) Provides that the Department of Justice (DOJ), through its DNA Laboratory, is responsible for the management and administration of the state's DNA and Forensic Identification Database and Data Bank Program and for liaising with the Federal Bureau of Investigation

(FBI) regarding the state's participation in a national or international DNA database and data bank program such as the Combined DNA Index System (CODIS) that allows the storage and exchange of DNA records submitted by state and local forensic DNA laboratories nationwide. (Penal Code, § 295 (g).)

2) Provides that the DOJ can perform DNA analysis, other forensic identification analysis, and examination of palm prints only for identification purposes. (Penal Code § 295.1 (a) & (b).)

3) Provides that the DNA Laboratory of the DOJ shall serve as a repository for blood specimens and buccal swab and other biological samples collected, and shall analyze specimens and samples, and store, compile, correlate, compare, maintain, and use DNA and forensic identification profiles and records related to the following:

   a) Forensic casework and forensic unknowns.

   b) Known and evidentiary specimens and samples from crime scenes or criminal investigations.

   c) Missing or unidentified persons.

   d) Persons required to provide specimens, samples, and print impressions under this chapter.

   e) Legally obtained samples.

   f) Anonymous DNA records used for training, research, statistical analysis of populations, quality assurance, or quality control. (Penal Code § 295.1, subd. (c).)

4) Specifies that the Director of Corrections, or the Chief Administrative Officer of the detention facility, jail, or other facility at which the blood specimens, buccal swab samples, and thumb and palm print impressions were collected must send these DNA samples promptly to the DOJ.(Penal Code § 298.)

5) Makes it a misdemeanor to refuse to provide a required specimen. (Pen. Code, § 298.1, subd. (a).)

6) Requires any person arrested for or charged with a felony, and any person required to register as a sex offender or as an arsonist to submit buccal swab samples, a full palm print impression of each hand, and any blood specimens or other biological samples required for submission to the DNA databank. (Pen. Code, § 296, subd. (a).)

7) Provides that this does not prohibit the collection and analysis of specimens, samples, or print impressions as a condition of a plea for a non-qualifying offense. (Pen. Code, § 296, subd. (a)(5).)

8) Provides that the above requirements for submission of specimens, samples and print impressions as soon as administratively practicable shall apply to all qualifying persons regardless of sentence imposedand regardless of disposition rendered or placement made in the case of juvenile who is found to have committed any felony offense or is adjudicated to be a ward of the court, as specified. (Pen. Code, § 296, subd. (b).)

9) Provides that the above DNA submission requirements shall apply regardless of placement or confinement in any mental hospital or other public or private treatment facility, and shall include persons committed to a state hospital as a mentally disordered sex offender, any person who has a severe mental disorder, and sexually violent predators, as specified. (Pen. Code, § 296, subd. (c).)

10) Provides that the above DNA submission requirements are mandatory and apply whether or not the court advises a person, that they must provide the data bank and database specimens, samples, and print impressions as a condition of probation, parole, or any plea of guilty, no contest, or not guilty by reason of insanity, or any admission to any of the above specified offenses. (Pen. Code, § 296, subd. (d).)

11) Provides that if at any stage of court proceedings the prosecuting attorney determines that specimens, samples, and print impressions required, as specified, have not already been taken from any person, the prosecuting attorney shall request that the court order collection of the specimens, samples, and print impressions required by law. (Pen. Code, § 296, subd. (e).)

12) Provides that prior to final disposition or sentencing in the case the court shall inquire and verify that the specimens, samples, and print impressions required by this chapter have been obtained and that this fact is included in the abstract of judgment or dispositional order in the case of a juvenile. (Pen. Code, § 296, subd. (f).)

13) Provides that the failure by the court to verify specimen, sample, and print impression collection or enter these facts in the abstract of judgment or dispositional order in the case of a juvenile shall not invalidate an arrest, plea, conviction, or disposition, or otherwise relieve a person from the requirements of this chapter. (Pen. Code, § 296, subd. (f).)

14) States that whenever the DNA Laboratory of the DOJ notifies the CDCR or any law enforcement agency that a biological specimen or sample, or print impression is not usable for any reason, the person who provided the original specimen, sample, or print impression shall submit to collection of additional specimens, samples, or print impressions. CDCR or other responsible law enforcement agency shall collect additional specimens, samples, and print impressions from these persons as necessary, and transmit these specimens, samples, and print impressions to the appropriate agencies of the DOJ. (Pen. Code, 296.2, subd (a).)

15) Provides that as of January 2, 2021, there will be a three-tiered registration system for sex offender registration and a person will be required to register for at least 10 years, at least 20 years or for their lifetime depending on what crime is requiring registration. (Pen. Code, § 290.)

16) Allows the court to require sex offender registration for any offense not specifically listed in the statute if the court finds at the time of conviction or sentencing that the person committed the offense as a result of sexual compulsion or for purposes of sexual gratification. (Pen. Code, § 290.006, subd. (a).)

Misdemeanor Prostitution Offenses

1) Establishes three types of misdemeanor disorderly conduct offenses pertaining to prostitution, punishable by up to six months in county jail, a $1,000 fine, or both. Specifically, existing law:

   a) States an individual who solicits, or who agrees to engage in, or who engages in, any act of prostitution with the intent to receive compensation, money, or anything of value from another person is guilty of misdemeanor disorderly conduct (Pen. Code, § 647, subd. (b)(1).)

   b) States any individual who solicits, or who agrees to engage in, or who engages in, any act of prostitution with another person who is 18 years of age or older in exchange for the individual providing compensation, money, or anything of value to the other person is guilty of guilty of misdemeanor disorderly conduct. (Pen. Code 647, subd (b)(2).

   c) States any individual who solicits, or who agrees to engage in, or who engages in, any act of prostitution with another person who is a minor (i.e., under the age of 18) in exchange for the individual providing compensation, money, or anything of value to the minor, is guilty of misdemeanor disorderly conduct. (Pen. Code, § 647, subd. (b)(3).)

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

3) Provides that the above misdemeanor offenses do not apply to a person under 18 years of age who is alleged to have engaged in conduct to receive money or other consideration that would, if committed by an adult, constitute disorderly conduct. (Pen. Code § 647, subd. (b)(5).)

4) Provides that if any of the above disorderly conduct misdemeanors are committed, and the person who was solicited was a minor at the time of the offense, and the defendant knew or should have known that the person solicited was a minor at the time of the offense, the violation is punishable by imprisonment in a county jail for two days up to one year, or by a fine up to $10,000, or both. (Pen. Code § 647, subd. (l)(1).)

FISCAL EFFECT: Unknown.

COMMENTS:

1) **Author's Statement**: According to the author, "SB 1256 would expand DNA collection to include individuals found to have solicited, or engages in prostitution with a minor in an effort to combat the persistent issue of child sex trafficking. By requiring those convicted of these crimes to provide DNA samples, we aim to strengthen law enforcement's efforts in identifying and combatting this heinous crime. DNA has been demonstrated to be useful in combatting trafficking. The provisions in this bill build upon existing laws, such as Proposition 35 and Proposition 69, to further protect vulnerable children and enhance the integrity of our justice systems."

2) **Misdemeanor Solicitation of Prostitution**: The crime of soliciting another person to engage in prostitution is a misdemeanor punishable by up to six months in county jail, a $1,000 fine, or both. Misdemeanor solicitation applies to both sex workers offering sex acts in exchange for compensation as well as individuals offering compensation in exchange for sex acts. Penal Code section 647, subdivision (b)(1) makes it a misdemeanor to solicit, agree to engage in, or engage in an act of prostitution with intent to receive compensation. Penal Code section 647, subdivision (b)(2) makes it a misdemeanor for an individual to solicit, agree to engage in, or engage in an act of prostitution with an adult or minor in exchange for that individual providing compensation to the other person.

   The crime of soliciting another person to engage in prostitution requires proof that: 1) the defendant requested that another person engage in an act of prostitution; 2) the defendant intended to engage in an act of prostitution with the other person; and 3) the other person received the communication containing the request.[1] The crime occurs when the person has the specific intent to engage in either sexual intercourse or lewd acts in exchange for money or other consideration for the purpose of sexual arousal or gratification and communicates that intent.[2] Actual sexual conduct is not an element of the crime.

3) **Effect of this Bill:** SB 1256 would require an adult to provide DNA samples if they are: 1) convicted of, or plead guilty to, misdemeanor solicitation of prostitution; 2) the person being solicited was a minor at the time of the offense; 3) the defendant knew or should have known that the solicited person was a minor; 4) the defendant has a prior conviction of misdemeanor solicitation of a minor where the defendant knew or should have known the solicited person was a minor; and 5) the defendant was more than three years older than the solicited minor.

4) **Proposition 69**: Proposition 69, the DNA Fingerprint, Unsolved Crime and Innocence Protection Act, was passed by the voters in 2004. The proposition expanded the categories of people required to provide DNA samples for law enforcement identification analysis. Under existing law, any person arrested for, or charged with, a felony, and any person required to register as either a sex offender or arsonist is required to submit buccal swab samples, a full palm print impression of each hand and any blood specimens or other biological samples required for submission to the DNA databank.[3]

   In *People v. Robinson*, the California Supreme Court upheld the collection of DNA samples of persons convicted of any felony offenses, as required by Prop. 69.[4] In *People v. Buza*, the California Supreme Court upheld the application of Prop. 69 to persons arrested for, but not yet convicted of, a felony offense.[5]

   It is not clear if this bill is consistent with Prop 69. Regarding the Legislature's authority to amend the initiative, Proposition 69 states "The provisions of this measure may be amended by a statute that is passed by each house of the Legislature and signed by the Governor. All amendments to this measure shall be to further the measure and shall be consistent with its

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[1] See CALCRIM No. 1154.
[2] See e.g. *People v. Love* (1980) 111 Cal.App.3d Supp. 1, 13; *People v. Norris* (1978) 88 Cal.App.3d Supp. 32, 38.
[3] Law enforcement can obtain a DNA sample from a juvenile only if he or she has been found guilty of a felony or required to register as a sex offender. Pen. Code, § 290, subd. (a).)
[4] *People v. Robinson* (2010) 47 Cal.4th 1104.
[5] *People v. Buza* (2018) 4 Cal.5th 658.

purposes to enhance the use of DNA identification evidence for the purpose of accurate and expeditious crime-solving and exonerating the innocent."[6] This general intent language does not appear to place strict limits on the type of crimes DNA samples can be used for, beyond that outlined by Penal Code 296. However, seeing as Penal Code 296 has not been amended since Prop 69's was enacted, and currently only permits DNA collection for felonies and specified misdemeanors requiring registration, the legality of adding non-violent, non-registration misdemeanors to Penal Code Section 296 may need to be a matter to be resolved through litigation.

5) **Expanding DNA Collection Requirements to Include Non-Violent Misdemeanors Not Involving Sex Acts:** Currently in California, the only misdemeanors that are included are those for which a person must register as a sex offender or as an arsonist.[7] This bill would expand the type of offenses that require a person's DNA to be taken to include the misdemeanor crime of solicitation of a minor for purposes of prostitution.

   California criminal law generally imposes consequences in proportion to the level of criminal conduct for which the defendant has been convicted. For example, a conviction on a felony offense generally justifies consequences which are more serious or more intrusive on an individual's privacy and rights than a conviction on a misdemeanor. California law currently requires DNA samples to be collected in relation to felony offenses. As noted above, the only misdemeanor convictions which currently require a DNA sample are those serious misdemeanor convictions which result in registration of the defendant as a sex or arson offender – maintaining consistency with concept of proportionality underlying California criminal law.

   The crimes allowing for DNA collection pursuant to PC 296 under Proposition 69 have remained unchanged for 20 years. Permitting DNA collection for non-violent disorderly conduct misdemeanors that do not result in sex acts may open the door for law enforcement to collect DNA for many other non-violent misdemeanors. This may undermine the criminal law principle of proportionality by permitting the same level of intrusion on an individual's privacy and rights for non-violent misdemeanors, as permitted for felonies and offenses requiring sex offender registration.

   SB 1256 would permit DNA to be seized irrespective of whether any sex act occurred, and whether the solicitation to buy or purchase a sex act was initiated by a minor. A DNA sample from an individual contains a tremendous amount of private and sensitive information about that individual. This bill raises the question of whether California should allow such a significant intrusion for a non-violent misdemeanor offense.

   As noted earlier, a person *arrested* for or charged with a felony, or an *attempt* to commit a felony, and any person required to register as a sex offender, is already required to submit DNA samples to the DNA databank. Under existing law a person can be arrested and charged with a *felony* if they *attempt* to engage in unlawful sexual intercourse with a minor more than three years younger than the perpetrator.[8] As such, an adult who solicits a minor three years

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[6] DNA Samples. Collection. Dabaase Funding. Proposition 69 (2004), p. 145, available at: https://repository.uclawsf.edu/ca_ballot_props/1231
[7] Pen. Code, § 296, subd. (a).
[8] Pen. Code, § 261.5.

younger than them to provide or pay for a sex act, and attempts to engage in unlawful sexual intercourse with that minor can already be arrested for an *attempt to commit a felony*, thus permitting a DNA sample to be taken. Alternatively, if an adult solicits a minor three years younger than them, and the solicitation does in fact result in a sex act, then that adult can be charged with a felony, permitting law enforcement to take a DNA sample upon *arrest*.

Accordingly, DNA collection may already permitted for solicitation of a minor three years younger than a defendant that either results in sex acts, or rises to the level of attempted unlawful intercourse with a minor.

6) **Prior Legislative Attempts to Expand DNA Collection Under Penal Code 296.** Since Prop 69 was passed by the voters in 2004 there have been many attempts to add non-violent crimes and misdemeanors to the list of crimes where law enforcement can take DNA samples from defendants. None have been successful.

   Among others, SB 710 (Bates) of the 2019-2020 Legislative Session, would have expanded the collection of DNA to include specified misdemeanors. SB 757 (Glazer) of the 2017-2018 Legislative Session, would have required a person convicted of misdemeanor solicitation of a minor for prostitution to provide a DNA sample to the DNA databank.[9]

7) **Disproportionate Impact on Communities of Color and the LGBTQ+ Community:** Enforcement efforts against misdemeanor solicitation relating to prostitution tend to disproportionately impact members of the LGBTQ+ community and persons of color. Consider a study conducted in 2019 through the Los Angeles County Public Defender's office that compiled data from violations of a prostitution-related crime reported from the Compton Branch of the Public Defender's office. During a one-week period of time in July 2019, a total of 48 cases were reported.[10] The study found that the majority of arrests were made up of young Black women. 42.6 percent of arrests were for people aged 21-24 with the next highest rate being 23.4 percent for people aged 18-20.[11] As for race, 72.3 percent were Black with the next highest rate being 17 percent for Hispanic.[12] While this bill does narrow this bill to solicitation of minors at least three years younger than the defendant, given that people of color and the LGBTQ community are disproportionately impacted by criminal enforcement efforts pertaining to misdemeanor solicitation more generally, SB 1256 may similarly result in the disproportionate collection of DNA from those same vulnerable communities.

8) **Argument in Support**: According to the *Sacramento County Sheriff's Office*, "Human Trafficking has plagued our state and the Sacramento region for years. It is growing to unprecedented levels and is one of the fastest growing criminal enterprises. As you know, sex trafficking is a persistent and horrific problem in California and across the United States.

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[9] Other bills which also sought to authorize the taking of DNA for new misdemeanors include SB 781 (Glazer) of the 2017-2018 Legislative Session, AB 16 (Cooper) of the 2017-2018 Legislative Session, SB 1355 (Glazer) of the 2015-2016 Legislative Session, AB 390 (Cooper) of the 2015-2016 Legislative Session, AB 84 (Gatto) of the 2015-2016 Legislative Session, SB 248 (Wyland) of the 2011-2012 Legislative Session.

[10] Derek J. Demeri, "*Policing of People in the Sex Trades in Compton: Analysis of Section 653.22 Clients,*" Law Offices of the Los Angeles County Public Defender (2019).
[11] *Id.* at p. 2.
[12] *Id.*, at p. 4.

Federal prosecutions of child-only sex trafficking cases increased 17% from 2019 to 2020, and children made up 69% of victims in newly charged sex trafficking cases in 2020. Moreover, with the recent removal of Penal Code 653.22 it has been increasingly difficult to prosecute and investigate violations involving solicitation of a minor emboldening traffickers to traffic girls as young as 12 years old on our streets. Unfortunately, once these young girls enter the "life", their life expectancy is only 7-10 years. Just in the past year, there have been over 300,000 commercial sex ads in the Sacramento region alone. Additionally, with advanced technology and social media apps, law enforcement has been losing the battle in this arena. Human Traffickers religiously use their smart devices to further their criminal empire.

Providing law enforcement and prosecutors with more tools to combat the human trafficking crisis, especially of children for sexual purposes, is a worthy pursuit. SB 1256 will bring to bear the powerful resources of DNA specimen collection and testing with the goal of bringing traffickers to justice and interceding in future trafficking efforts."

9) **Argument in Opposition**: According to *ACLU California Action*, "SB 1256 [] represents a creeping assault on Californian's privacy and due process rights that could lead to more bias in the state's criminal justice system — and even false convictions. California is facing an immense budget shortfall and cannot afford an expansion of the carceral costs associated with this bill.

SB 1256 will require people to submit their DNA to law enforcement for lifetime inclusion in a DNA database, accessible to local, state, and federal law enforcement agencies across the country. These requirements will apply not only to those who are convicted of misdemeanor offenses of purchasing and engaging in commercial sex with a person under age 18, but also to those who solicit commercial sex with a person under age 18 without engaging in any sexual act. The ACLU has long fought to preserve the privacy of sensitive medical and genetic information and are compelled to do so here. While people of all races, economic backgrounds, and sexual preferences purchase commercial sex, people of color who earn low incomes, immigrants, and LGBTQ people suffer disproportionate arrests for this conduct.[13] Even after Lawrence v. Texas (the U.S. Supreme Court case finding unconstitutional a Texas law that banned homosexual adults from engaging in consensual sexual acts), police departments in California continue to regularly target and arrest men in the LGBTQ community on charges of solicitation and other offenses such as lewdness.[14]LGBTQ people in many communities are also simply more frequently stopped by police than non-LGBTQ people, thus making them more likely to be arrested for the conduct targeted by SB 1256. [15] Disproportionate enforcement is often fueled by purposeful and implicit bias.[16]

Given that people of color who earn low incomes and LGBTQ people are stopped, arrested, and convicted for the crimes targeted by SB 1256 at higher rates than higher income people,

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[13] Melissa Gira Grant, *DNA Database of Men Who Pay for Sex? The Strange Push to Make Cops Collect DNA from Suspected Johns,* Alternet (2012); Brief of the American Civil Liberties Union Foundation of Southern California, et al as Amicus Curiae In Support of Plaintiffs-Appellants, *Erotic Service Provider Legal, et al. v. George Gascon,* No. 4:15-cv-01007 (9th Cir.2016); Nan D. Hunter, et al., *The Rights of Lesbians, Gay Men, Bisexuals, and Transgender People*, New York University Press (2004).
[14] *Brief for American Civil Liberties Foundation of Southern California, supra* note 1.
[15] Dustin Gardiner, *Police Much More Likely to Stop Transgender People in California for 'Reasonable Suspicion',* San Francisco Chronicle (2022) ; Winston Luhur et al., *Policing LGBQ People,* UCLA School of Law Williams Institute (2021),.
[16] *Brief for American Civil Liberties Foundation of Southern California, supra* note 1.

whites, and non-LGBTQ people, respectively, it follows that they will also be disproportionately impacted by the negative consequences of DNA collection. Racial justice, civil liberties, and privacy advocates across the country have argued against the use of DNA databases in law enforcement given the general disparate arrest and conviction rates of people of color. [17]A report for the Council for Responsible Genetics termed the practice, "building Jim Crow's database."[18] Inclusion in the DNA database opens people up to wrongful arrests and convictions and raises very serious privacy concerns.

While SB 1256 is premised on the belief that DNA collection protects public safety, the reality is increasing the size of DNA databases actually raises the likelihood of false hits. Recent studies have confirmed that erroneous matches between DNA profiles from different people, including close relatives, are far from impossible and can lead to false arrests and convictions. This is important because in California, inclusion in the database potentially subjects people's family members to investigation, through a controversial technique called "familial DNA searching," which extends the size and reach of the California database to effectively include the parents, children, and siblings of the millions of convicted and arrested people whose DNA profiles are stored in the database. This bill would vastly increase the number of people whose privacy is compromised and who are subject to potential false arrest."

10) **Related Legislation**: AB 2957 (Gallagher) of the 2023-2024 Legislative Session, makes technical changes to when DNA submissions for specified crimes. AB 2957 was never heard.

11) **Prior Legislation**:

a) SB 710 (Bates) of the 2019-2020 Legislative Session, would have expanded the collection of DNA to include misdemeanors that used to be wobblers or felonies pre-Proposition 47, SB 710 failed passage in Senate Public Safety.

b) SB 781 (Glazer) of the 2017-2018 Legislative Session, would have required the collection of DNA from persons convicted of crimes that were made misdemeanors by Proposition 47. SB 781 was not heard in Senate Public Safety Committee.

c) SB 757 (Glazer) of the 2017-2018 Legislative Session, would have required a person convicted of misdemeanor solicitation of a minor for prostitution to register as a sex offender and to provide a DNA sample to the DNA databank. SB 757 failed passage in Assembly Public Safety.

d) AB 16 (Cooper) of the 2017-2018 Legislative Session, would have expanded existing provisions requiring adults convicted of specified misdemeanors to provide DNA samples for inclusion in the DNA database AB 16 died on Third Reading.

e) SB 1355 (Glazer) of the 2015-2016 Legislative Session, would have required the collection of DNA from persons convicted of crimes that were made misdemeanors by Proposition 47. SB 1355 died pending referral.

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[17] *Grant, supra* note 1.
[18] Harry G. Levine et al., *Drug Arrests and DNA: Building Jim Crow's Database,"* Council for Responsible Genetics Forum on Racial Justice Impacts of Forensic DNA Databanks (2008), *available at*

f) AB 390 (Cooper) of the 2015-2016 Legislative Session, would have required require DNA collection of people who commit the crimes that used to be wobblers but are now misdemeanors after the passage of Proposition 47. AB 390 died pending referral.

g) AB 84 (Gatto) of the 2015-2016 Legislative Session, would have expanded the collection of DNA samples to include persons convicted of specified misdemeanors. AB 84 died in Assembly Appropriations Committee.

h) SB 248 (Wyland) of the 2011-2012 Legislative Session, would have to require people convicted or adjudicated of specified misdemeanors to give a DNA sample. SB 248 failed passage in Senate Public Safety.

REGISTERED SUPPORT / OPPOSITION:

Support

California District Attorneys Association
California Police Chiefs Association
California State Sheriffs' Association
Los Angeles County Professional Peace Officers Association
Peace Officers Research Association of California (PORAC)
Sacramento County Sheriff Jim Cooper

Oppose

ACLU California Action
Oakland Privacy

Analysis Prepared by: Ilan Zur

Date of Hearing: July 2, 2024
Counsel: Kimberly Horiuchi

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Kevin McCarty, Chair

SB 1262 (Archuleta) – As Amended May 16, 2024

SUMMARY: Requires a supervising agency to petition a court to modify, revoke, or terminate post-release community supervision (PRCS) if a person on PRCS has violated the terms of their release for a third time and has committed a new felony or misdemeanor.

EXISTING LAW:

1) Provides that the following persons released from prison prior to, or on or after July 1, 2013, be subject to parole under the supervision of the California Department of Corrections and Rehabilitation (CDCR):

   a) A person who committed a serious felony, as specified.

   b) A person who committed a violent felony, as specified;

   c) A person serving a sentence pursuant to California's Three Strikes Law;

   d) A high risk sex offender;

   e) A mentally disordered offender;

   f) A person required to register as a sex offender and subject to a parole term exceeding three years at the time of the commission of the offense for which the person was sentenced to state prison; and,

   g) A person subject to lifetime parole at the time of the commission of the offense that resulted in a state prison sentence. (Pen. Code, § 3000.08, subds. (a) through (i).)

2) Requires all other individuals released from prison to be placed on PRCS provided by the probation department of the county to which the person is being released. (Pen. Code, §§ 3000.08, subd. (b), & 3451, subd. (a).)

3) Requires any individual paroled from state prison before October 1, 2011 to remain under the supervision of the CDCR until jurisdiction is terminated by operation of law or until parole is discharged. (Pen. Code, § 3000.09, subd. (b).)

4) Delineates conditions of PRCS, including obeying all laws, following the directives and instructions of the supervising county agency, reporting to the supervising county agency as directed by that agency, immediately informing the supervising county agency if the person is arrested or receives a citation, obtaining the permission of the supervising county agency

to travel more than 50 miles from the person's place of residence, and participating in rehabilitation programming as recommended by the supervising county agency, among others. (Pen. Code, § 3453.)

5) Authorizes intermediate sanctions, including flash incarceration, for violating the terms of PRCS. (Pen. Code, § 3454, subd. (b).)

6) Defines "flash incarceration" as a period of detention in a city or county jail due to a violation of a person's conditions of parole or PRCS. Specifies the length of the detention period can range between one and 10 consecutive days in a county jail. (Pen. Code, §§ 3000.08, subd. (e), and 3454, subd. (c).)

7) Provides that intermediate sanctions include, but are not limited to, the following:

   a) Short-term "flash" incarceration in jail for a period of not more than 10 days.

   b) Intensive community supervision.

   c) Home detention with electronic monitoring or GPS monitoring.

   d) Mandatory community service.

   e) Restorative justice programs, such as mandatory victim restitution and victim-offender reconciliation.

   f) Work, training, or education in a furlough program.

   g) Work, in lieu of confinement, in a work release program.

   h) Day reporting.

   i) Mandatory residential or nonresidential substance abuse treatment programs.

   j) Mandatory random drug testing.

   k) Mother-infant care programs.

   l) Community-based residential programs offering structure, supervision, drug treatment, alcohol treatment, literacy programming, employment counseling, psychological counseling, mental health treatment, or any combination of these and other interventions. (Pen. Code, § 3450, subd. (b)(1-8).)

8) Requires the supervising county agency to petition the court to revoke, modify, or terminate PRCS if it has determined, following application of its assessment processes, that intermediate sanctions are not appropriate. Provides that upon a finding that the person has violated the conditions of PRCS, the revocation hearing officer has authority to do all of the following:

a) Return the person to PRCS with modifications of conditions, if appropriate, including a period of incarceration in a county jail.

b) Revoke and terminate PRCS and order the person to confinement in a county jail.

c) Refer the person to a reentry court or other evidence-based program in the court's discretion. (Pen. Code, § 3455, subd. (a).)

9) Specifies that if PRCS is revoked or modified and confinement is ordered, the person may be incarcerated in the county jail for a period not to exceed 180 days for each custodial sanction. (Pen. Code, § 3455, subd. (d).)

FISCAL EFFECT: Unknown.

COMMENTS:

1) **Author's Statement**: According to the author, "

2) **Post-Release Community Supervision and Flash Incarceration:** In 2011, AB 109, also known as the Criminal Justice Realignment Act created a new form of community supervision under which certain people exiting state prison are monitored by the probation departments of each county, instead of parole.[1] This new form of supervision is called Post-Release Community Supervision (PRCS). As of October 1, 2011, people who are released from state prisons for crimes not including serious or violent sex offenses, or offenses requiring sex offender registration, are placed on PRCS under the supervision of county probation officers.

   Individuals sentenced pursuant to Penal Code section 1170, subdivision (h)[2] to county jail are not released on parole or PRCS upon serving their terms—unlike those who serve time in state prison. Once the sentence has been fully served, the defendant must be released without any restrictions or supervision. A form of supervision, however, may be imposed under existing law.

   With the creation of PRCS, the supervising agency was authorized to employ "flash incarceration" as an "intermediate sanction" for responding to both parole and PRCS violations. (See Pen. Code, §§ 3454, subd. (c), & 3000.08, subd. (e).) The Legislative Analyst's Office explained the context and reasoning behind "flash incarceration" as part of realignment:

   > "[T]he realignment legislation provided counties with some additional options for how to manage the realigned offenders. . . [T]he legislation allows county probation officers to return

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[1] Parolees are supervised by the Division of Adult Parole Operations within the California Department of Corrections and Rehabilitation. (See https://www.cdcr.ca.gov/parole/, last visited on June 16, 2024.)

[2] Penal Code section 1170, subdivision (h) requires, in part, that any person sentenced pursuant to the Realignment Act that does not have a prior serious or violent felony on their record and is not a registered sex offender, may be sentenced to county jail on a felony, rather than state prison. Upon release, the person is supervised by county probation, not state parole.

> offenders who violate the terms of their community supervision to jail for up to ten days, which is commonly referred to as "flash incarceration." The rationale for using flash incarceration is that short terms of incarceration when applied soon after the offense is identified can be more effective at deterring subsequent violations than the threat of longer terms following what can be lengthy criminal proceedings."[3]

The period of post-release community service cannot exceed three years. (Pen. Code, § 3456, subd. (a)(1).) However, a person who has been on post-release supervision for a continuous year with no violations of their conditions of post-release that result in a custodial sanction shall be discharged from supervision within 30 days. (*Ibid.*) A county agency supervising a person on community supervision may order flash incarceration without judicial authorization. (Pen. Code, § 3454, subd. (b).) ***Penal Code section 3453, subdivision (q), also provides that a person placed on such supervision must waive any right to a court hearing prior to the imposition of a period of flash incarceration.*** (See *People v. Superior Court (Ward)* (2014) 232 Cal.App.4th 345 [holding the imposition of flash incarceration is allowable as a custodial sanction and the defendant's waiver of a hearing was valid.)

The intent of intermediate sanctions, like flash incarceration, is to balance holding individuals accountable for violating the conditions of supervision while creating shorter disruptions from work, home, or programming which often results from longer-term revocations. Because flash incarceration has been used successfully by probation officers on persons supervised under PRCS, the Legislature authorized the use of flash incarceration for individuals granted probation or placed on mandatory supervision. The statute authorizing the use of flash incarceration contains a sunset provision which has been extended several times, most recently to January 1, 2028.

This bill proposes to mandate revocation or modification where a person has violated the terms and conditions of PRCS and is charged with a misdemeanor or felony. When Realignment was enacted, the intent was to provide maximum flexibility to county probation officers who carry the lion's share of the supervisory workload. Presumably, any probation officer would move to revoke or modify PRCS if a person violated three times and committed a new offense, but there may be circumstances where modification or termination are not appropriate. The intent of Realignment was to grant the supervising agency the discretion to make that recommendation based on their wealth of experience and information. To mandate such curtailment of authority in law arguably defeats the purpose of Realignment. Finally, pursuant to Proposition 30 (2012), any new mandate on county jails is subject to reimbursement by the state. In eliminating probation discretion in this case, more people will be sentenced to county jail or prison resulting in a slowly escalating return to the overcrowding crisis of the mid-2000s and billions of dollars in costs just as the state is heading into a Recession.

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[3] Legislative Analyst's Office, *The 2012–13 Budget: The 2011 Realignment of Adult Offenders—An Update* (Feb. 22, 2012), pp. 8-9, available at <https://lao.ca.gov/analysis/2021/crim_justice/2011-realignment-of-adult-offenders-022212.pdf .)

3) **Impact on County Jails:** In January 2010, a 9th Circuit three-judge panel issued a ruling ordering the State of California to reduce its prison population to 137.5% of design capacity because overcrowding was the primary reason CDCR was unable to provide inmates with constitutionally adequate healthcare. (*Coleman/Plata v. Schwarzenegger* (2010) No. Civ S-90-0520 LKK JFM P/NO. C01-1351 THE.) The United State Supreme Court upheld the decision, declaring that "without a reduction in overcrowding, there will be no efficacious remedy for the unconstitutional care of the sick and mentally ill" inmates in California's prisons. (*Brown v. Plata* (2011) 131 S.Ct. 1910, 1939; 179 L.Ed.2d 969, 999.)

   As explained above, Realignment was implemented in 2011 in response to prison overcrowding. In part, it shifted to county jails the responsibility for incarcerating lower-level offenders previously incarcerated in state prison. (See, *supra*, Pen. Code, § 1170, subd. (h).) This, however, increased the pressure on county jails to house larger populations and to make difficult decisions about how to manage their growing and more serious jail populations.

   These pressures manifest differently by county based on a number of factors including jail capacity and whether the county jail system is operating under a court-mandated population cap. Such caps have been in place in some counties long before Brown v. Plata addressed state prison overcrowding. (Sarah Lawrence, Court-Ordered Population Caps in California County Jails (Dec. 2014).)

   Recently, CalMatters published an article explaining that jails are facing increasing death rates even as the population may be declining in the short term. As the article explains, most of the people who died were pre-trial inmates – meaning they have not been convicted of a crime, but could not afford to post cash bail. Aside from natural causes, the two major causes of death for inmates in county jail were suicide, followed by overdoses, particularly fentanyl.

   The Board of State and Community Corrections ("BSCC") have repeatedly warned about failures in the county jails and refusal by locals to adhere to required state standards. Until recently, BSCC was not even notified about deaths inside the county-run lockups. Nor was the pandemic the driving factor: California in 2022 had the smallest share of deaths due to natural causes in the past four decades. A surge in overdoses drove the trend of increasing deaths. And almost every person who died was waiting to be tried. A previous CalMatters investigation found that three-quarters of those held in county jails had not been convicted or sentenced, with many awaiting trial more than three years.[4]

4) **Argument in Support**: According to the *League of California Cities*: "Existing law requires county agencies supervising the release of individuals on post-release community supervision to petition the court for revocation, modification, or termination of that community supervision if the agency determines that release to no longer be appropriate.

   This bill would expand upon this existing statute by providing specific guidelines for the revocation of post-release community supervision after a person's third violation of their terms of release in addition to any new misdemeanor or felony committed. In 2017, the tragic loss of Whittier Police Officer Keith Boyer, when a parolee murdered Officer Boyer and another individual, serves as a stark reminder for the need for reform. The loss of Officer

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[4] Duara and Kimelman, *"California jails are holding thousands fewer people but far more people are dying in them,"* Cal Matters (March 25, 2024).)

Boyer has had a dep impact on the community and highlights the need for effective management of post-release supervision.
SB 1262 (Archuleta) prioritizes accountability to prevent repeat offenders on community supervision to ensure the appropriate persons receive this type of release, all of which are a testament to the lessons learned from the tragic loss of Officer Boyer. The enhanced regulations around the revocation of community custody would ensure that only those who are actively working to successfully renter the community and are not a danger to the community are eligible to remain within that community."

5) **Argument in Opposition**: According to *Initiate Justice*: Under current law, California Penal Code § 3455 as currently written, each supervising county agency has full authority and discretion to impose intermediate sanctions (including flash incarceration) as well as to petition the court to revoke and terminate post-release community supervision if it determines that intermediate sanctions are insufficient.

   SB 1262 undermines this jurisdiction by requiring the supervising agency to impose the most severe penalty upon a third release violation, despite the fact that most probation violations are technical violations rather than new criminal offenses. These kinds of "technical violations" — for infractions as minor as missing an appointment with a supervision officer — account for over a quarter of all admissions to state and federal prisons. [5]Revocation almost always results in additional incarceration, and in people receiving more severe sentences than those not on probation or other forms of supervision would have received. Furthermore, studies show that Black people are disproportionately likely to have their probation revoked, and are over 4 times more likely than white people to be admitted to prison for a probation revocation.

   SB 1262 will lead to the disproportionate rearrests of Black and Brown people under community supervision and increased numbers of people in prison for technical violations of supervision conditions, reversing hard-earned progress in California towards de-carceration and racial equity in our justice system. We need to invest in smart, supportive re-entry solutions instead of repeating punitive approaches to community supervision that are proven to be costly, harmful, and ineffective.[6]"

6) **Related Legislation**: SB 22 (Umberg) amends Proposition 47 by requiring a person convicted of petty theft or shoplifting, if the person has 2 or more prior convictions for specified theft-related offenses, to be punished as a misdemeanor or felony, as specified. SB 22 is pending in the Assembly Judiciary Committee.

7) **Prior Legislation**:

   a) AB 1744 (Levine), Chapter 756, Statutes of 2022, extended authorization for the use of flash incarceration for individuals on probation or mandatory supervision until January 1, 2028.

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[5] Bureau of Justice Statistics. (2023.) Probation and Parole in the United States, 2021. U.S. Department of Justice.
[6] Jesse Jannetta, Justin Breaux, Helen Ho, and Jeremy Porter, Examining Racial and Ethnic Disparities in Probation Revocation (Washington, DC: Urban Institute, 2014)

b) SB 266 (Block), Chapter 706, Statutes of 2016 authorizes the use of a sanction known as "flash incarceration" for defendants granted probation or placed on mandatory supervision.

REGISTERED SUPPORT / OPPOSITION:

Support

California Contract Cities Association
California Police Chiefs Association
City of Downey
City of Huntington Park
City of La Mirada
City of Lakewood
City of Norwalk
City of Whittier
League of California Cities
League of California Cities, Los Angeles County Division

Oppose

ACLU California Action
California Alliance for Youth and Community Justice
California Attorneys for Criminal Justice
California Coalition for Women Prisoners
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
Ella Baker Center for Human Rights
Empowering Women Impacted by Incarceration
Essie Justice Group
Felony Murder Elimination Project
Freedom 4 Youth
Friends Committee on Legislation of California
Initiate Justice
Initiate Justice Action
Lawyers' Committee for Civil Rights of The San Francisco Bay Area
Legal Services for Prisoners With Children
Milpa Collective
Rubicon Programs
Silicon Valley De-bug
Youth Leadership Institute

Oppose Unless Amended

Root & Rebound

Other

California for Safety and Justice
San Francisco Public Defender
Smart Justice California, a Project of Tides Advocacy
Uncommon Law

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

Date of Hearing: July 2, 2024
Counsel: Kimberly Horiuchi

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Kevin McCarty, Chair

SB 1323 (Menjivar) – As Amended June 11, 2024

SUMMARY: Requires the court to determine whether restoration to competency is in the interests of justice when a defendant in a felony case has been deemed incompetent to stand trial (IST). Specifically, **this bill**:

1) States that if the defendant is found to be IST and is not charged with an offense that is statutorily unsuitable for mental health diversion,[1] the court shall do all of the following:

   a) Determine whether restoring the person to mental competence is in the interests of justice; and,

   b) In exercising its discretion pursuant to this clause, the court shall consider the relevant circumstances of the charged offense, the defendant's mental health condition and history of treatment, whether the defendant is likely to face incarceration if convicted, the likely length of any term of incarceration, whether the defendant has previously been found incompetent to stand trial, whether restoring the person to mental competence will enhance public safety, and any other relevant considerations.

3) States that if restoring the person to mental competence is in the interests of justice, the court shall state its reasons orally on the record and the case shall proceed with restoration of the defendant.

4) States that if restoring the mental competence of the defendant is not in the interests of justice, the court shall conduct a hearing to determine whether the defendant is eligible for mental health diversion.

5) Provides that if the court deems the defendant eligible for mental health diversion, as specified, to consider a grant diversion for a period not to exceed two years from the date the individual is accepted into diversion or the maximum term of imprisonment provided by law for the most serious offense charged in the complaint, whichever is shorter.

6) Requires the hearing to determine defendant's eligibility for mental health diversion to be held no later than 30 days after the finding of incompetence. If the hearing is delayed beyond 30 days, the court shall order the defendant released on their own recognizance pending the hearing.

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[1] Offenses specified as statutorily unsuitable for mental health diversion include: murder or voluntary manslaughter, sex registrable offenses, rape, lewd acts on a child under 14 years of age, assault with intent to commit rape, sodomy, or forcible oral copulation, rape or sexual penetration in concert with another person, continuous sexual abuse of a child, or possession or use of a weapon of mass destruction. (See Pen. Code, § 1001.36, subd. (d)(1-8).)

7) Provides that if the defendant is ineligible for diversion or if diversion is terminated unsuccessfully, the court may, after notice to the defendant, defense counsel, and prosecution, hold a hearing to determine whether to do the following:

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

   b) Refer the defendant to assisted outpatient treatment (AOT), only in a county where services are available and the agency agrees to accept responsibility for treatment of the defendant. A hearing to determine eligibility for AOT shall be held within 45 days, and if delayed beyond 45 days, the defendant shall be released on own recognizance pending the hearing. If the defendant is accepted into AOT, the charges shall be dismissed.

   c) Refer the defendant to the county conservatorship investigator of the county of commitment for possible conservatorship proceedings, only if it appears to the court or a qualified mental health expert that the defendant appears to be gravely disabled, as defined. If a petition is not filed within 30 days of the referral, the court shall order the defendant to be released on their own recognizance pending conservatorship proceedings. The charges shall be dismissed the filing of either a temporary or permanent conservatorship petition.

   d) Refer the defendant to the CARE program. A hearing to determine eligibility shall be held within 14 court days after the date on which the petition for referral is filed. If the hearing is delayed beyond 14 court days, the court shall order the defendant released on their own recognizance pending the hearing. If defendant is accepted into the CARE program, the charges shall be dismissed.

   e) Reinstate competency proceedings in which case the court shall credit any time spent in mental health diversion against the maximum term of commitment.

8) Provides that a proceeding in a criminal prosecution, as specified, shall be suspended when an inquiry into the present mental competence of the defendant has been commenced by the court.

9) Requires the court to appoint at least one licensed psychologist or psychiatrist to examine the defendant's mental condition. The court shall appoint two licensed psychologists or psychiatrists, one named by the defense and one named by the prosecution, if defense counsel informs the court that the defendant is not seeking a finding of mental competence.

10) Requires a licensed psychologist or psychiatrist to evaluate the defendant and submit a written report to the court. The report shall include the opinion of the expert regarding the following matters:

    a) A diagnosis of the defendant's mental condition, if any;

    b) Whether the defendant, as a result of a mental disorder or developmental disability, is able to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner;

c) Whether there is a substantial likelihood that the defendant will attain competency in the foreseeable future, with consideration as to whether the defendant would attain competency in response to antipsychotic medication;

d) If requested by the defense, an opinion as to whether the defendant is eligible for mental health diversion.

11) States that if neither party objects to any competency report submitted by the appointed licensed psychologist or psychiatrist, the court may determine competency of the defendant based on the report.

12) States that if either party objects and requests a hearing, the court shall hold a hearing to determine competence and to determine whether the defendant lacks capacity to make decisions regarding the administration of antipsychotic medication.

13) Clarifies that if counsel for the defendant waives the right to a jury trial, the hearing shall be heard by the court. Otherwise, a determination of the defendant's competency to stand trial shall be decided by a jury. The verdict of the jury shall be unanimous.

14) States that a court is not precluded from appointing any other qualified expert to evaluate the defendant's mental condition in addition to a licensed psychologist or psychiatrist.

15) Provides that if at any time after the finding of IST, but before the defendant begins treatment in a program or facility to promote the defendant's speedy restoration of mental competence, the court finds that there is no substantial likelihood that the defendant will attain mental competency in the foreseeable future and it appears that the defendant is gravely disabled, as defined, the court shall order the conservatorship investigator of the county of commitment of the defendant to initiate conservatorship proceedings for the defendant.

16) States that if a defendant is returned to court without attaining competency, and the prosecution elects to dismiss and refile charges, the court shall presume that the defendant is IST unless presented with relevant and credible evidence that the defendant is competent.

17) States that if the court is satisfied that it has received credible evidence that the defendant is competent, the court shall proceed with the trial on competency. Otherwise the court shall find the defendant IST.

18) Provides that if the defendant is IST after refiling of charges, the defendant may be further committed only for the balance of time remaining on the maximum term of commitment. This term applies to the aggregate of all previous commitments.

19) Provides that for IST defendants who have determined by a regional center to have a developmental disability, if the court finds that there is no substantial likelihood that the defendant will attain mental competence in the foreseeable future, the court shall proceed with determining whether the defendant should be committed pursuant to Lanterman-Petris-Short Act or as a person with a developmental disability with the State Department of Developmental Services.

20) Authorizes that prosecution to request an order from the court that the defendant be prohibited from owning or possessing a firearm until they successfully complete diversion because they are a danger to themselves or others, as specified.

21) Provides that the prosecution shall bear the burden of proving, by clear and convincing evidence, both of the following are true:

    a) The defendant poses a significant danger of causing personal injury to themselves or another by having in their custody or control, owning, purchasing, possessing, or receiving a firearm; and,

    b) The prohibition is necessary to prevent personal injury to the defendant or any other person because less restrictive alternatives either have been tried and found to be ineffective or are inadequate or inappropriate for the circumstances of the defendant.

22) Prohibits the court, if the court finds that the prosecution has not met that burden, from ordering that the person is prohibited from having, owning, purchasing, possessing, or receiving a firearm.

23) Requires the court, if it finds that the prosecution has met the burden, to order that the person is prohibited, and to inform the person that they are prohibited, from owning or controlling a firearm until they successfully complete diversion because they are a danger to themselves or others.

24) Provides that an order prohibiting possession of a firearm, as specified above, shall be in effect until the defendant has successfully completed diversion or until their firearm rights are restored.

25) Makes other technical and conforming changes.

EXISTING LAW:

1) States that a person cannot be tried or adjudged to punishment or have their probation, mandatory supervision, post-release community supervision, or parole revoked while that person is mentally incompetent. (Pen. Code, § 1367, subd. (a).)

2) Requires, when counsel has declared a doubt as to the defendant's competence, the court to hold a hearing determine whether the defendant is IST. (Pen. Code, § 1368, subd. (b).)

3) Provides that, except as provided, when an order for a hearing into the present mental competence of the defendant has been issued, all proceedings in the criminal prosecution shall be suspended until the question of whether the defendant is IST is determined. (Pen. Code, § 1368, subd. (c).)

4) Requires the court to appoint a psychiatrist or licensed psychologist, and any other expert the court may deem appropriate, to examine the defendant. (Pen. Code, § 1369, subd. (a)(1).)

5) Provides that if the defendant or defendant's counsel informs the court that the defendant is not seeking a finding of mental incompetence, the court shall appoint two psychiatrists,

licensed psychologists, or a combination thereof. One of the psychiatrists or licensed psychologists may be named by the defense and one may be named by the prosecution. (Pen. Code, § 1369, subd. (a)(1).)

6) Requires the examining psychologist or psychiatrists to evaluate: the nature of the defendant's mental disorder, if any; the defendant's ability or inability to understand the nature of the proceedings or the defendant's ability to assist counsel in conducting a defense; whether treatment with antipsychotic medication is appropriate. (Pen. Code, § 1369, subd. (a)(2)(A.)

7) Provides that if the defendant is found mentally competent, the criminal process shall resume. If the defendant has been found mentally incompetent, the trial, the hearing on the alleged violation, or the judgment shall be suspended until the person becomes mentally competent. (Pen. Code, § 1370, subd. (a).)

8) Specifies how the trial on the issue of mental competency shall proceed. (Pen. Code, § 1369.)

9) States that only a court trial is required to determine competency in a proceeding for a violation of probation, mandatory supervision, post-release community supervision, or parole. (Pen Code, § 1369, subd. (g).)

10) Permits, on an accusatory pleading alleging the commission of a misdemeanor or felony offense, the court, in its discretion, to grant pretrial mental health diversion to a defendant if the defendant satisfies the eligibility requirements and the court determines that the defendant is suitable for that diversion. (Pen. Code, § 1001.36, subd. (a).)

11) Provides that a defendant is eligible for pretrial mental health 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, borderline 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).)

12) States that a defendant may not be placed into a pretrial mental health diversion program for the following offenses:

    a) Murder or voluntary manslaughter;

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

    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; or,

h) Using a weapon of mass destruction, as specified. (Pen. Code, § 1001.36, subd. (d).)

FISCAL EFFECT: Unknown.

COMMENTS:

1) **Author's Statement**: According to the author, "SB 1323 modernizes California's current "one-size-fits all approach to competency" by promoting greater efficiency in court processes, reducing costs, and producing better long-term outcomes for individuals with serious mental illness.

   Under existing law, judges have no choice: all individuals accused of a felony who are found incompetent to stand trial must be sent for competency restoration. These individuals are funneled to our State's most restrictive and costly State hospital beds, at times waiting many months in jail prior to placement at a state hospital.

   SB 1323 aligns with the recommendations of experts at the Council of State Governments Justice Center (CSG) and the Committee on Revision of the Penal Code (CRPC) to improve state competency to stand trial procedures for those charged with felonies. It will do this by expediting treatment-based solutions for these vulnerable people who become system-involved through felony convictions due to mental illness. If a judge determines that sending the person for restoration of competency is not in the interests of justice, they can instead pursue treatment through mental health diversion, or refer the person to assisted outpatient treatment, CARE Court, or for a conservatorship.

2) **IST:** Under state and federal law, all individuals who face criminal charges must be competent to understand the nature and consequences of the charges against them and assist in their defense. If the defendant is not "competent," the criminal proceedings are suspended. 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.)

   Felony IST: If a defendant is charged with a felony, and substantial evidence of incompetence exists, the trial court cannot proceed with the case against the defendant without first holding a competency hearing. (*People v. Pennington*, *supra*, 66 Cal.2d 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, § 1369, 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.) The burden of proof is on the party seeking a finding of incompetence. (*People v. Skeirik* (1991) 229 Cal.App.3d 444, 459-460.) The defendant is presumed competent to stand trial (*Medina v. California* (1992) 505 U.S. 437), and the defendant bears the burden of proof to establish incompetence.

Therefore, defense counsel must first present evidence to support mental incompetence. However, if defense counsel does not want to offer evidence to have the defendant declared incompetent, the prosecution may. Each party may offer rebuttal evidence. Final arguments are presented to the court or jury, with the prosecution going first, followed by defense counsel. (Pen. Code, § 1369, subds. (b)-(e).)

If, after an examination and a hearing, the court finds the defendant IST, the criminal proceedings are suspended and the court shall order the defendant to be referred to the 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. (Pen. Code, § 1370, subd. (a).) A treatment facility, as defined, 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.)

Effective July 1, 2023, California law will require that a felony IST be considered for an outpatient treatment program, a community treatment program, or diversion unless the clinical or safety needs of the patient warrant treatment in a DSH facility. (Pen. Code, §1370, subd. (a)(2)(A)(ii).)[2]

> "The state treats the majority of felony ISTs in state hospitals; however, many individuals wait in county jails for many months given the limited number of DSH beds, which has resulted in a waitlist of felony ISTs who have not been admitted to DSH. The treatment provided to felony ISTs—known as 'competency restoration treatment'—differs from general mental health treatment. The objective of competency restoration treatment is to treat a felony IST until they are competent enough to face their criminal charge, rather than

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[2] Penal Code section 1370, subdivision (a)(2)(A)(ii) states: "Commencing on July 1, 2023, a defendant shall first be considered for placement in an outpatient treatment program, a community treatment program, or a diversion program, if any such program is available, unless a court, based upon the recommendation of the community program director or their designee, finds that either the clinical needs of the defendant or the risk to community safety, warrant placement in a State Department of State Hospitals facility."

> provide comprehensive treatment for an underlying mental health condition."[3]

Misdemeanor IST: This bill mostly replicates the changes made to the misdemeanor IST process in 2022. SB 317 (Stern), Chapter 599, Statutes of 2022 expanded the range of options for courts when a defendant is IST on a misdemeanor. Before 2022, an overcrowded DSH, with a two year backlog of cases, could not accommodate housing felons, let alone misdemeanants. As a result, courts allowed misdemeanor IST defendants to decompensate in county jail until the maximum period of incarceration lapses – usually a year.

SB 317 granted the courts the authority to refer a misdemeanor IST defendant to mental health diversion or other outpatient program. It also granted the courts the authority to dismiss extremely low level offenses, such as possession of drug paraphilia (i.e., pipe) or being under the influence of a controlled substance in public. Before this law was enacted, courts almost never dismissed these very low level crimes even when it is very clear the defendant was incompetent with likely no hope of restoration.

SB 317 appears to have provided a bit of direction for courts to more efficiently manage their dockets and dismiss very low level crimes and work with county behavioral health to refer the defendant to a program. While this bill does not allow for dismissal, it is similar to SB 317 in that it allows courts to re-divert felony offenses to diversion, conservatorship, or CARE courts. DSH continues to struggle with more patients than it can accommodate – therefore, a greater degree of flexibility and more county resources for services would likely provide meaningful solutions.

3) **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 resolve the case before trial. If diversion is successfully completed, the criminal charges are dismissed and the defendant may, with certain exceptions, legally respond they have never been arrested or charged for the diverted offense. (Pen. Code, §§ 1001.7, 1001.9.)

   In order to be eligible for pretrial mental health diversion, the defendant must suffer from a mental disorder that played a significant role in the commission of the charged offense, and in the opinion of a qualified mental health expert, the defendant's symptoms motivating the criminal behavior would respond to mental health treatment. (Pen. Code, § 1001.36.) The defendant must consent to diversion, waive their right to a speedy trial, and must agree to comply with treatment as a condition of diversion. (*Ibid.*) As noted above, consistent with the recommendation of the Committee on the Revision of the Penal Code, this bill would require the mental health expert evaluating the defendant on the issue of competence to also provide an opinion on eligibility for mental health diversion, thereby saving potential resources in the form of a subsequent evaluation.

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[3] See 2022-23 Budget: Analysis of the Governor's Major Behavioral Health Proposals (lao.ca.gov) Legislative Analyst's Office [as of June 12, 2024].

In addition, this bill would require the court to consider placing a defendant on mental health diversion in situations where the court determines that restoring the person to competency is not in the interests of justice. This alternative appears to be consistent with legislation implemented last year which would require, starting July 1, 2023, that a felony IST be considered for a less restrictive program than DHS, including diversion, unless the clinical or safety needs of the patient warrant treatment in a DSH facility. (See Pen. Code, § 1370, subd. (a)(2)(A)(ii).)

4) **Stiavetti v. Clendenin:** In *Stiavetti v. Clendenin* (2021) 65 Cal.App.5th 691, the court found that DSH and the Department of Developmental Services (DDS) systematically violated the due process rights of all defendants in California who had been found IST because they failed to commence substantive services designed to return those defendants to competency within 28 days of service of the transfer of responsibility document (the commitment packet for defendants committed to DSH and order of commitment for defendants committed to DDS). Effectively, DSH and DDS are so backlogged, inmates just sit in county jail for long periods of time decompensating even further. Once they reach the statutory maximum for the offense, they are just released. That is, most certainly, not the most effective way to address the mental health crisis. The court stated:

> In *In re Davis* (1973) 8 Cal.3d 798, 801 … the California Supreme Court 'adopt[ed] the rule of the *Jackson* case that no person charged with a criminal offense and committed to state hospital solely on account of his incapacity to proceed to trial may be so confined more than a reasonable period of time necessary to determine whether there is a substantial likelihood that he will recover that capacity in the foreseeable future.' Our high court also 'accept[ed] *Jackson's* premise that due process demands that the duration of commitments to state hospitals must bear some reasonable relation to the purpose which originally justified the commitment." (*Stiavetti v. Clendenin* (2021) 65 Cal.App.5th at 707-708, citing *In re Davis*, at p. 805.)

5) **Penal Code Revision Commission Recommendation:** The PCRC recommended, in 2022, "modernizing the competency to stand trial system."[4] In that recommendation, the PCRC stated:

> To better address public safety and long-term mental health treatment for people found incompetent to stand trial, judges should be required to determine whether restoration to competency is in the interests of justice for almost all cases. A judge would not make this determination for offenses that are already excluded under the existing mental health diversion statute, which includes offenses such as murder and numerous sex ofenses.230 Presumptions against restoration should apply to Penal Code section 1170(h) offenses, wobbler offenses, and

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[4] See file:///C:/Users/horiucka/Downloads/CRPC_AR2022.pdf [last visited June 18, 2024].

> certain assault and robbery offenses. These latter offenses are some of the most common for which restoration to competency is undertaken, and as noted above, approximately 70% of people restored to competency receive short sentences or the dismissal of charges, suggesting that even people charged with these offenses are a low risk to public safety. …
>
> Between 2009 and 2016, assault, theft, and robbery were the three most commonly charged offenses for people sent to the state hospital for competency restoration, comprising almost 50% of the charged ofenses.242 People admitted with these charges were also more likely to have had extensive arrest histories, suggesting the current competency restoration process does not interrupt criminal legal involvement.[5]

This bill proposes to adopt the PCRC recommendation for felony IST cases so as to avoid holding inmates in county jail because there is no room in DSH while the inmate continues to decompensate. The inmate then "maxes out" their sentence, and are then just released. Regardless of whether a charge is dismissed or not, if the plan is to ensure an IST defendant receives the care they need, simply warehousing them in a carceral setting and then releasing them does not seem effective.

6) **Argument in Support**: According to *Californians United for a Responsible Budget*: Currently, California fails to provide prompt mental health treatment for individuals with the most severe mental illnesses who are facing felony criminal charges. These are individuals who are so mentally ill that they have been deemed incompetent to stand trial.

   Judges are now mandated by law to send all of these individuals to be "restored to competency," usually at the Department of State Hospital (DSH), a process that does not treat their underlying mental illness and does not lead to long-term care. Because beds at DSH are scarce, people wait for months in restrictive jail settings, which are not equipped to provide mental health care. SB 1323 would untie the hands of judges, giving them options to place individuals in other treatment settings including mental health diversion, CARE Court, outpatient assisted treatment, and conservatorships. The bill makes other improvements to the IST process, reducing costs and increasing access to care.

7) **Argument in Opposition**: According to the *California District Attorneys Association*: According to the Department of State Hospitals, over 66% of defendants who were initially found to be incompetent were able to have their competency restored. (Incompetent to Stand Trial Solutions Workgroup – Report of Recommended Solutions November 2021. Pg. 11.) An individual's mental health status and one's competency can be fluid and can change over time. The 66% restoration rate bears this out. Oftentimes, the issue of competency is a factual issue that must be litigated, with legal findings left to the court. This factual determination and legal analysis should be a fair process dedicated to reaching the truth of the individual's without mental competency. However, SB 1323 unfairly and inappropriately allows experts to opine on legal issues such as a defendant's eligibility for diversion and to speculate whether competency and mental health treatment are even worth it for a particular individual.

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[5] See *Id.*, at p. 47.

What is more, SB 1323 unfairly tips those scales of justice by eliminating the prosecutor's ability to demand a jury trial on the issue of competency, while allowing the defendant the ability to demand a jury trial.

California has seen a rapid increase in the number of people found incompetent to stand trial in the last several years. The state has not been able to provide timely services for these individuals, and SB 1323 would result in even less services for individuals who need competency restoration and mental health treatment. SB 1323's response to this growing crisis is to authorize the denial of services for some severely mentally ill offenders at the earliest stage of the criminal proceedings by deeming them unrestorable, dismissing their case, and providing no services at all. We have seen this play out with misdemeanor IST. Since the passage of SB 317 (Stern), thousands of defendants who have been charged with a misdemeanor and declared incompetent to stand trial (IST) have had their cases dismissed with no treatment plan, only furthering the revolving door, and doing nothing to combat the mental health crisis in our communities.

8) **Related Legislation**:

   a) AB 1584 (Weber), was substantially similar to this bill and was held in the Senate Committee on Appropriations.

   b) SB 349 (Roth) provides that a doubt as to a person's competency in one case shall be presumed to exist in all felony cases pending against the defendant within that county and that a certificate of restoration for a defendant who was found incompetent to stand trial shall be presumed to apply to all felony cases pending against the defendant at the time of restoration. SB 349 was referred to, but never heard in this committee.

   c) SB 1400 (Stern) eliminates existing statutory authority for a court to dismiss a case where a misdemeanor defendant has been found incompetent to stand trial and instead require the court to determine if defendant is eligible for other programs or treatment. SB 1400 is pending in the Assembly Committee on Appropriations.

9) **Prior Legislation**:

   a) AB 1630 (Weber), of the 2021-2022 Legislative Session, would have shifted the burden of proof to the prosecution to prove a finding of competence to stand trial when a court-appointed psychiatrist or licensed psychologist indicates that the defendant is incompetent. AB 1630 was held in the Senate Appropriations Committee.

   b) SB 317 (Stern), Chapter 599, Statutes of 2021, revised the process by which a person may be found IST on a misdemeanor, including eliminating competency restoration proceedings in misdemeanor cases.

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

d) AB 1214 (Stone), Chapter 991, Statutes of 2018, revised the procedures to determine the mental competence of a juvenile charged with a crime.

REGISTERED SUPPORT / OPPOSITION:

Support

ACLU California Action
California Alliance for Youth and Community Justice
California Association of Social Rehabilitation Agencies
California Judges Association
California Peer Watch
California Public Defenders Association
Californians for Safety and Justice
Californians United for A Responsible Budget
Communities United for Restorative Youth Justice (CURYJ)
Courage California
Critical Resistance, Los Angeles
Disability Rights California
Ella Baker Center for Human Rights
Empowering Women Impacted by Incarceration
Friends Committee on Legislation of California
Initiate Justice
Initiate Justice Action
LA Defensa
Rubicon Programs
San Francisco Public Defender
Smart Justice California, a Project of Tides Advocacy
Steinberg Institute
Young Women's Freedom Center

Opposition

California District Attorneys Association
Riverside County District Attorney

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

Date of Hearing: July 2, 2024
Consultant: Elizabeth Potter

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Kevin McCarty, Chair

SB 1328 (Bradford) – As Amended June 13, 2024

SUMMARY: Clarifies and expands an existing felony pertaining to interfering with voting technology security, and updates and revises existing election record retention, preservation, and destruction requirements to provide clear guidance for electronic voting data, as specified. Specifically, **this bill**:

1) States that any person is guilty of a felony who, "interferes or attempts to interfere with" including knowingly, and without authorization, providing unauthorized access to, or breaking chain of custody to, either of the following:

   a) Certified voting technology during the lifecycle of that certified voting technology; or

   b) Any finished or unfinished ballot cards.

2) Adds that a person who knowingly, and without authorization, makes or has in their possession credentials, passwords, or access keys to a voting machine that has been adopted and will be used in elections in this state is guilty of a felony.

3) Authorizes the Secretary of State (SOS) to impose additional conditions of approval as deemed necessary by the SOS for the certification of electronic poll books, ballot manufacturers and finishers, ballot on demand (BOD) systems, voting systems, and remote accessible vote by mail (RAVBM) systems.

4) Reduces, from two business days to 24 hours, the amount of time that a ballot card manufacturer, ballot card finisher, or BOD system vendor has to notify the SOS and affected local elections officials after discovering any flaw or defect that could adversely affect the future casting or tallying of votes.

5) Adds paper cast vote records to the list of election materials required to be kept by a county elections official for 22 months for elections involving a federal office, or 6 months for all other elections.

6) Requires any copy of a magnetic or electronic storage medium, used for a ballot tabulation program or any magnetic or electronic storage medium containing election results, to be kept in a secure location, as specified.

7) Defines the term "ballot printer" to mean any company or jurisdiction that manufactures, finishes, or sells ballot cards, including test ballots, for use in an election conducted pursuant to the Elections Code, and recasts provisions of law that require a ballot printer, as defined, to be approved by the SOS before manufacturing or finishing ballot cards, or accepting or

soliciting orders for ballot cards.

8) Defines the following terms for the preservation of electronic data related to voting technology:

   a) "Ballot image" means an electronically captured or generated image of a ballot that is created on a voting device or machine, which contains a list of contests on the ballot, may contain the voter selections for those contests, and complies with the ballot layout requirements. A ballot image can be considered a cast vote record.

   b) "Certified voting technology" means any certified voting technologies certified by the SOS, including voting systems, BOD printing systems, electronic poll book systems, or adjudication systems, and the hardware, firmware, software, proprietary intellectual property they contain, any components, and any products they generate, including ballots, ballot images, reports, logs, cast vote records, or electronic data.

   c) "Chain of custody" means a process used to track the movement and control of an asset through its lifecycle by documenting each person and organization who handles an asset, the date and time it was collected or transferred, and the purpose of the transfer. A break in the chain of custody refers to a period during which control of an asset is uncertain and during which actions taken on the asset are unaccounted for or unconfirmed.

   d) "Electronic data" includes voting technology software, operating systems, databases, firmware, drivers, and logs.

   e) "End of lifecycle" means the secure clearing or wiping of the certified voting technology so that no software, firmware, or data remains on the equipment and the equipment becomes a nonfunctioning piece of hardware.

   f) "HASH" means a mathematical algorithm used to create a digital fingerprint of a software program, which is used to validate software as identical to the original.

   g) "Lifecycle" of certified voting technology means the entire lifecycle of the certified voting technology from the time of certification and trusted build creation through the end of lifecycle of the certified voting technology.

9) Requires the following data to be kept by the elections official, on electronic media, stored and unaltered, for 22 months for those elections where candidates for one or more of the following offices are voted upon: President, Vice President, United States (US) Senator, and US Representative; and for six months for all other state and local elections:

   a) All voting system electronic data.

   b) All BOD system electronic data, if applicable.

   c) All adjudication electronic data.

   d) All RAVBM system electronic data, if applicable.

   e) All electronic poll book electronic data, if applicable.

f) HASH values taken from the voting technology devices, if applicable.

g) All ballot images, if applicable.

10) Provides that if a contest is not commenced within the 22-month period or within a six-month period, or if a criminal prosecution involving fraudulent use, using the ballot tally system to mark or falsify ballots, or manipulation of the ballot tally system, is not commenced within the relevant period, the elections official shall have the backups destroyed.

11) Authorizes certified voting technology equipment and components that are at the end of lifecycle to be securely disposed of or destroyed with the written approval of the manufacturer and the SOS.

12) Requires all of the following to occur for any part or component of certified voting technology for which the chain of custody has been compromised or the security or information has been breached or attempted to be breached:

a) The chief elections official of the city, county, or special district and the SOS shall be notified within 24 hours of discovery;

b) The equipment shall be removed from service immediately and replaced if possible; and,

c) The integrity and reliability of the certified voting technology system, components, and accompanying electronic data shall be evaluated to determine whether they can be restored to their original state and reinstated.

13) Prohibits a voting system from establishing a network connection to any device not directly used and necessary for voting system functions. Prohibits communication by or with any component of the voting system by wireless or modem transmission at any time. Prohibits a component of the voting system, or any device with network connectivity to the voting system, from being connected to the internet, directly or indirectly, at any time.

14) Requires a voting system to be used in a configuration of parallel central election management systems separated by an air-gap. Provides that an "air-gap" includes all of the following:

a) A permanent central system known to be running unaltered, certified software and firmware that is used solely to define elections and program voting equipment and memory cards.

b) A physically isolated duplicate system, reformatted after every election to guard against the possibility of infection that is used solely to read memory cards containing vote results, accumulate and tabulate those results, and produce reports.

c) A separate computer dedicated solely to this purpose that is used to reformat all memory devices before they are connected to the permanent system again.

15) Defines "jurisdiction" to mean any county, city and county, city, or special district that conducts elections pursuant to the Elections Code

16) Contains an urgency clause, allowing this bill to take effect immediately upon enactment.

17) Makes technical, clarifying, and conforming changes.

EXISTING LAW:

1) Provides that the purpose of imprisonment for crime is punishment; that 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; and 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. (Pen. Code, § 1170, subd. (a)(1).)

2) Provides that when a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court. (Pen. Code, § 1170, subd. (b).)

3) Makes it a felony, punishable by two, three, or four years for anyone, who before or during an election is found guilty of the following:

   a) Tampers with, interferes with, or attempts to interfere with, the correct operation of, or willfully damages in order to prevent the use of, any voting machine, voting device, voting system, vote tabulating device, or ballot tally software program source codes;

   b) Interferes or attempts to interfere with the secrecy of voting or ballot tally software program source codes;

   c) Knowingly, and without authorization, makes or has in his or her possession a key to a voting machine that has been adopted and will be used in elections in this state; or,

   d) Willfully substitutes or attempts to substitute forged or counterfeit ballot tally software program source codes. (Elec. Code § 18564)

4) Provides that the SOS is the chief elections officer of the state, and may adopt regulations to ensure the uniform application and administration of state election laws. (Elec. Code § 10)

5) Defines a "paper cast vote record" as an auditable document that corresponds to the selection made on the voter's ballot and lists the contests on the ballot and the voter's selections for those contests. (Elec. Code § 305.5)

6) Requires, generally, electronic poll books, ballot manufacturers and finishers, BOD systems, voting systems, and RAVBM systems to be approved by the SOS before their use in an election. (Elec. Code §§ 2250, 13004.5, 19201, 19281)

7) Requires a ballot card manufacturer, ballot card finisher, or BOD system vendor to notify the SOS and affected local elections officials in writing within two business days after discovering any flaw or defect that could adversely affect the future casting or tallying of votes. (Elec. Code § 13004(d))

8) Requires an electronic poll book vendor to notify the SOS and affected local elections officials in writing within 24 hours after discovering any flaw or defect that could adversely affect the future casting or tallying of votes. (Cal. Code Regs., tit. 2, § 20161.)

9) Requires any magnetic or electronic storage medium, used for a ballot tabulation program or containing election results, to be kept in a secure location, as specified. (Elec. Code § 15209)

10) Requires specified ballots and identification envelopes to be kept by an elections official unopened and unaltered, as specified, for 22 months following a federal election, and for six months following any other state or local election. (Elec. Code §§ 17301, 17302)

11) Prohibits any part of a voting system from doing any of the following: being connected to the Internet at any time; electronically receiving or transmitting election data through an exterior communication network, including the public telephone system, if the communication originates from or terminates at a polling place, satellite location, or counting center; or, receiving or transmitting wireless communications or wireless data transfers. (Elec. Code § 19205)

FISCAL EFFECT: Unknown.

COMMENTS:

1) **Author's Statement**: According to the author, "There are current election code sections regarding the retention and preservation of election materials. SB 1328 is expanding upon the already existing law to clarify procedures and practices that are already in place. Further, this proposal provides uniform application throughout the state regarding the retention of voting technology election related materials."

2) **Current Law:** Existing law states that it is a felony, punishable by two, three, or four years in state prison for anyone who interferes with, attempts to interfere with, tampers with, knowingly, or willingly with, including but not limited to: voting machines, ballots, keys, voting tally software.

   This bill would clarify interference as "interferes or attempts to interfere with" includes knowingly, and without authorization, providing unauthorized access to, or breaking chain of custody to, either of the following: certified voting technology during the lifecycle of that certified voting technology or any finished or unfinished ballot cards.

   In addition, this bill would add that a person who knowingly, and without authorization, makes or has in their possession credentials, passwords, or access keys to a voting machine that has been adopted and will be used in elections in this state is guilty of a felony.

3) **Effect of this Bill:** This bill would also make a number of changes including the expansion of authority to include the certification of electronic poll books, ballot printers, ballot on

demand systems, voting systems, and RAVBM systems. It would also update electronic data keeping for election records. This bill was double-referred from the Assembly Committee on Elections. For a full discussion of this policy area, please see the committee analysis from the Assembly Committee on Elections.

4) **Argument in Support**: According to *Secretary of State, Shirley Weber Ph.D.,* the Sponsor of this bill, "[Senate Bill] 1328 provides that the storage, maintenance, and destruction of election materials are clear in law by updating the preservation guidelines of election materials, covering the lifecycle of voting technology. Specifically, this measure defines the parameters of the chain of custody of voting technology not yet covered in existing law.

   Senate Bill 1328 is necessary to ensure that our requirements in the state of California are clear and unambiguous around the chain of custody, retention, use, and security of voting infrastructure. This measure will enhance the already stringent voting system security protocols imposed by the Office of Voting System Technology and Assessment within the Office of the California Secretary of State."

5) **Argument in Opposition**: Shasta County argues, "While this proposed bill does provide a number of protections to the elections process, the County believes, it has two flaws:

   1) The bill grants too much authority to the Secretary of State to establish election provisions and conditions by policy as opposed to statute.

   2) The bill would seal the Cast Vote Record from release and/or review without court order.

   The County values transparency within our local elections and the availability of public records associated with our Cast Vote Records, to the greatest extent possible as allowed by state and federal law. However, this proposed bill will allow the Secretary of State to establish election provisions and conditions that encroach upon local control of voting data, limiting the public's accessibility to records that are considered invaluable to voters in Shasta County.

   The act of sealing the Cast Vote Record would be considered an inimical action to further limit a sense of transparency within our local government, and this proposed bill will place another barrier on voting information that is already sought after with the highest of public interest in our County. Even if the Cast Vote Record may be obtained with a court order, it is the goal of our County to continue to promote the public's accessibility to their voting records, allowing our residents to continue building trust in the elections process, not just in Shasta County but in the State of California as well."

6) **Related Legislation**:

   a) AB 2249 (Pellerin) of the 2023-2024 Legislative Session requires specified election records to be destroyed or recycled after the end of the required retention period, adds to the list of election records that must be retained for a specified period of time after the election, and requires an elections official to seek a court order to allow the official to inspect the inside of packages of election materials that are otherwise required to remain

sealed if such inspection is necessary to preserve materials that were damaged. AB 2249 is pending in the Senate Appropriations Committee.

b) AB 1559 (Jackson), of 2023-2024 Legislative Session would have updated and revised election record retention, preservation, and destruction procedures to provide clear guidance for electronic voting data, as specified. Additionally, AB 1559 would have clarified that it is a felony to knowingly provide unauthorized access to, or break the chain of custody to, certified voting technology and finished or unfinished ballot cards. AB 1559 was held on the Senate Appropriations Committee's suspense file.

7) **Prior Legislation**: SB 1547 (Senate Committee on Elections and Reapportionment), Chapter 920, Statutes of 1994, restructured and reorganized the Elections Code, which included the punishment of interfering and tampering with voting systems in California as a felony.

REGISTERED SUPPORT / OPPOSITION:

Support

California Secretary of State (Sponsor)
Alameda County Families Advocating for The Seriously Mentally Ill
California Association of Clerks & Election Officials
Los Angeles County District Attorney's Office

Oppose

County of Shasta

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

Date of Hearing: July 2, 2024
Counsel: Andrew Ironside

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Kevin McCarty, Chair

SB 1414 (Grove) – As Amended May 20, 2024

SUMMARY: Increases the punishment from a misdemeanor to a wobbler for solicitation of a minor where the person solicited was under 16 years of age at the time of the offense; and makes a second or subsequent offense a straight felony. Specifically, **this bill**:

1) Provides that, if a crime of solicitation is committed by a defendant who is 18 years of age or older, the person who was solicited was a minor at the time of the offense, and the defendant knew or should have known that the person who was solicited was a minor at the time of the offense, the violation is punishable by imprisonment in the county jail for not less than two days and not more than one year, or by a fine not exceeding ten thousand dollars ($10,000), or by both that fine and imprisonment, except as specified.

2) Provides that a first offense for solicitation of a minor who was under 16 years of age at the time of the offense is an alternate misdemeanor-felony punishable by up to one year in county jail or a fine of up $10,000, or imprisonment in county jail for 16 months, 2 years, or 3 years.

3) Provides that a second or subsequent offense for solicitation of a minor who was under 16 years of age at the time of the offense is a felony punishable by 16 months, 2 years, or 3 years in county jail.

4) Requires a person who is 18 years of age or older, is convicted on or after January 1, 2025, of solicitation of a minor who was under 16 years of age at the time offense, and who has a previous conviction for the same offense, to register as sex offender if the person was more than 10 years older than the solicited minor, as measured from the minor's date of birth to the person's date of birth, and the conviction is the only one requiring the person to register.

5) Provides that the court is not precluded from requiring a person to register as a sex offender if the person is not otherwise required to register under the provision above.

EXISTING LAW:

1) Makes it a misdemeanor to solicit anyone to engage in or engage in lewd or dissolute conduct in any public place or in any place open to the public or exposed to public view. (Pen. Code, § 647, subd. (a).)

2) Makes it a misdemeanor to solicit, agree to engage in, or engage in any act of prostitution with the intent to receive compensation, money, or anything of value from another person. This act is punishable by (Pen. Code, § 647, subd. (b)(1).)

3) Makes it a misdemeanor to solicit, agree to engage in, or engage in, any act of prostitution with another person who is 18 years of age or older in exchange for the individual providing compensation, money, or anything of value to the other person. (Pen. Code § 647, subd. (b)(2).)

4) Makes it a misdemeanor to solicit, or agree to engage in, or engage in, any act of prostitution with another person who is a minor in exchange for the individual providing compensation, money, or anything of value to the minor. (Pen. Code § 647, subd. (b)(3).)

5) Provides that if the crime of solicitation of a minor is committed and the defendant knew or should have known that the person solicited was a minor at the time of the offense, the violation is punishable by imprisonment in a county jail for a minimum of two days and not more than one year, or by a fine not $10,000, or by both that fine and imprisonment. (Pen. Code § 647, subd. (l)(1).)

6) Authorizes a court, in unusual cases, when the interests of justice are best served, to reduce or eliminate the mandatory two days of imprisonment in a county jail required under Penal Code section 647, subd. (l)(1). If the court reduces or eliminates the mandatory two days' imprisonment, the court shall specify the reason on the record. (Pen. Code, § 647, subd. (l)(2).)

7) Requires persons convicted of specified crimes to annually register as a sex offender for a minimum term of ten or twenty years, or life. (Pen. Code, § 290.)

FISCAL EFFECT: Unknown.

COMMENTS:

1) **Author's Statement**: According to the author, "California consistently ranks number one in the nation in the number of human trafficking cases reported to the National Human Trafficking Hotline.

   "Children, tragically, are a large portion of sex trafficking victims in the United States and are undoubtedly one of the most vulnerable populations. Most trafficking victims are brought into this dark underworld as children and they grow-up in this abusive system. When it comes to the exploitation of children, the individuals purchasing sex from them are no less culpable than the trafficker who is selling them.

   "The legislature clearly sent a message last year when we passed SB 14. We admitted that sex trafficking of children is a serious crime that is prevalent in California and deserves a serious punishment.

   "We cannot address one side of the issue, while ignoring the other. It takes two criminals to commit the crime of human trafficking: a buyer and a seller.

   "Under existing law, a person who solicits, or engages in commercial sex with a minor is guilty of a misdemeanor only, which means the punishment for purchasing a child for sex can be as minor as paying a fine. Individuals that purchase, or attempt to purchase sex from children should be charged with a felony and sent to prison. In order to stop the supply of

children into sexual exploitation, we must stop the demand.

"We cannot sit idly by while children are bought and sold in California like pieces of meat in an underground grocery store. We must do everything in our power to stop the horrific abuses that are being perpetuated on our children every day. We must make it unpalatable to purchase sex from children in the state of California. Not one more child should have to suffer at the hands of those who seek to exploit and harm them.>

2) **Solicitation of a Minor**: Existing law provides that the penalty for solicitation of a minor, who the person knew or should have known was a minor, is a minimum of two days imprisonment in county jail and up to one year in county jail and/or a fine of not more than $10,000. Existing law also provides that the court may, in unusual circumstance eliminate the mandatory two days in jail. (Pen. Code, § 647, subd. (l).) Where there is no showing that the defendant knew or should have known the person was a minor, the offense is punishable by up to six months in the county jail and/or a fine up to $1,000. (Pen. Code, § 647, subd. (b)(3).)

   This bill would instead make solicitation of a minor a wobbler for a first offense when the solicited minor was under 16 years of age at the time of the offense—punishable by either a year in county jail and a fine of up to $10,000, or up to three years in county jail. A second offense would be a straight felony punishable by up to 3 years in county jail, except as discussed below.

   A number of other crimes, including crimes with felony penalties, already exist relating to solicitation of a minor. Soliciting (arranging a meeting with) a minor for lewd purposes is punishable as a misdemeanor, or as a state prison felony under some circumstances (if the defendant goes to the arranged meeting or is required to register as a sex offender). (Pen. Code, § 288.4.) To be guilty of this offense the defendant must believe the person is a minor. (*Ibid.*) Contacting a minor with the intent to commit a specified sex offense is punishable in state prison. (Pen. Code, § 288.3.) To be guilty of this offense, the defendant must have known or should have known the person is a minor. (*Ibid.*) "Sexting" a minor is a wobbler punishable as a misdemeanor or state prison felony. (Pen. Code, § 288.2.) To be guilty of this offense, the defendant must have known, or should have known, or believed that the person is a minor. (*Ibid.*) Luring or attempting to lure a minor under the age of 14 is punishable as an infraction or misdemeanor. (Pen. Code, § 272, subd. (b)(1).) To be guilty of this offense, the defendant must have known or reasonably should have known that the minor is under 14 years of age. (*Ibid.*)

   Statutory rape is punishable as a misdemeanor or a county jail felony depending on the difference in age between the defendant and the victim. (Pen. Code, § 261.5.) Good faith reasonable belief that that minor was an adult is a defense to the crime. (*People v. Hernandez* (1964) 61 Cal. 2d 529.) Lewd acts with a minor 14 or 15 years of age and under is punishable as a misdemeanor in some circumstances or a state prison felony. (Pen. Code, § 288.) Due to the younger age of the intended victims in this offense, mistake of fact regarding the minor's age is not a defense. (*People v. Paz* (2000) 80 Cal. App. 4th 293.)

3) **History of Sex Offender Registration**: California was the first state to require sex offender registration in 1947. The stated purpose for sex offender registration is to deter offenders from committing future crimes, provide law enforcement with an additional investigative

tool, and increase public protection. [*Wright vs. Superior Court* (1997) 15 Cal.4th 521, 526; Alissa Pleau (2007) *Review of Selected 2007 California Legislation: Closing a Loophole in California's Sex Offender Registration Laws*, 38 McGeorge L. Rev. 276, 277; *Hatton vs. Bonner* (2004) 365 F. 3rd 955, 961.] California's sex offender registration law historically required lifetime registration by persons convicted of specified sex crimes. (Pen. Code, § 290 subd. (a).)

In 1996, California enacted "Megan's Law" allowing the public to access an address list of registered sex offenders. Before 2003, members of the public could only obtain the information on the Megan's Law list by calling a "900" number or visiting certain designated law enforcement agencies and reviewing a CD-ROM. However, in 2003, California required the Department of Justice (DOJ) to put the Megan's Law list of offenders on a public access website with the offender's address, photo and list of offenses. (See Pen. Code, § 290.46, subd. (a).) For some offenders with less serious offenses, only their ZIP code is listed. Now, a citizen can enter their address and see if there are registered sex offenders living in the community or even next door.

In 2017, California modified its sex registry to a three-tiered registration system based on seriousness of the crime, risk of sexual reoffending, and criminal history. (SB 384 (Wiener), chapter 541, statutes of 2017.) The recommendation to move to a tiered system came from the California Sex Offender Management Board's 2010 recommendations report. (See https://casomb.org/docs/CASOMB%20Report%20Jan%202010_Final%20Report.pdf (Jan. 2010), p. 50 [as of Apr. 8, 2024].) According to the committee's analysis for the bill which started off as SB 421 (Wiener) of that same year:

> Based on a survey of several municipal law enforcement agencies in California, it is estimated that local law enforcement agencies spend between 60-66% of their resources dedicated for sex offender supervision on monthly or annual registration paperwork because of the large numbers of registered sex offenders on our registry. If we can remove low risk offenders from the registry it will free up law enforcement officers to monitor the high risk offenders living in our communities. Law enforcement cannot protect the community effectively when they are in the office doing monthly or annual paperwork for low risk offenders, when they could be out in the community monitoring high risk offenders. Furthermore, the public is overwhelmed by the number of offenders displayed online in each neighborhood and do not know which offenders are considered low risk and which offenders are considered high risk and therefore truly dangerous.

(Sen. Com. on Public Safety, Analysis of Senate Bill No. 421 (2017-18 Reg. Sess.) as amended Apr. 17, 2017, p. 9.) A tier one offender is someone who is required to register for a misdemeanor sex offense or a felony conviction that is not a serious or violent felony. Tier one requires a person to register for a minimum of 10 years. (Pen. Code, § 290, subd. (d)(1).) A tier two offender is a person who is required to register for a felony that is defined as a serious or violent felony or other specified sex offenses, unless the person is otherwise required to register under tier three. Tier two requires a person to register for a minimum of 20 years. (Pen. Code, § 290, subd. (d)(2).) A tier three offender is a person who is convicted a specified offense or under the one-strike sex law, or is designated as a sexually violent

predator or habitual sex offender, in addition to other qualifying offenses and circumstances. (Pen. Code, § 290, subd. (d)(3).)

Sex offenders are required to register annually within five working days of their birthday. (Pen. Code, § 290 subd. (b).) If the offender has no fixed address, they are required to register every 30 days. (Pen. Code, § 290.011 subd. (a).) A person is also required to notify law enforcement of any change of address within five days of moving. (Pen. Code, § 290.013.) A person who fails to register as a sex offender within the period required by law is guilty of a felony punishable by 16 months, 2 or 3 years. (Pen. Code, § 290.018 subd. (b).) A person who changes their name is required to inform law enforcement within 5 working days. (Pen. Code, § 290.14, subd. (a).) A person who is required to register their Internet identifiers who adds or changes an Internet identifier is required to report this change within 30 working days of the change. (Pen. Code, § 290.14, subd. (b).)

The minimum time period for completion of the required registration period in tier one or tier two begins on the date of the person's release from incarceration or other commitment on the registerable offense. The time period is tolled during any period of subsequent incarceration or commitment, except that arrests not resulting in conviction, adjudication or revocation of supervision shall not toll the registration period. The minimum time period shall be extended by one year for each misdemeanor conviction of failing to register under this act, and by three years for each felony conviction of failing to register under this act, without regard to the actual time served in custody for the conviction (Pen. Code, § 290, subd. (e).)

The registration statute requires all persons convicted of a listed crime to register annually within five days of their birthday. (Pen. Code, § 290.012 subd. (a).) Although most registerable offenses are felonies, there some alternate felony/misdemeanor penalties and a few straight misdemeanors. (*See* (Pen. Code, § 243.4 (sexual battery); (Pen. Code, § 266c (obtaining sexual consent by fraud); (Pen. Code, §§ 311.1, 311.2, subd. (c), 311.4, 311.11 (child pornography); (Pen. Code § 647.6 (annoying or molesting a child); and, (Pen. Code, § 314, (1)(2) (indecent exposure).) Certain offenses where the act was engaged in voluntarily, albeit without consent because minors cannot legally consent, only require sex offender registration when there is more than a 10-year age gap between the defendant and the minor. (Pen. Code, § 290, subd. (c)(2).)

A court may also order a person not otherwise required to register as a sex offender if they find that the person committed the offense as a result of sexual compulsion or for the purposes of sexual gratification. (Pen. Code, § 290.006.)

This bill requires a person who is 18 years of age or older who is convicted of solicitation of a minor who was under 16 years of age at the time offense, and who has a previous conviction for the same offense, to register as sex offender if the person was more than 10 years older than the solicited minor. This bill also provides that a second or subsequent offense for solicitation of a minor who was under 16 years of age at the time of the offense is punishable as a felony by imprisonment pursuant to subdivision (h) of Section 1170. That section provides for a punishment of 16 months, 2 years, or 3 years in county jail (Pen. Code, § 1170, subd. (h)(2)), except that the term is served in state prison if the felony requires sex offender registration (Pen. Code, § 1170, subd. (h)(3)). Thus, a person who is required to register as a sex offender for second or subsequent conviction for solicitation of a minor where the minor was under 16 years old at the time of the offense, and where the defendant

was more than 10 years older than the solicited minor, would serve the term of incarceration in state prison.

4) **Argument in Support**: According to *Sacramento County Sheriff's Office*, "I'm writing in support of SB 1414 (Grove) which increases the punishment for solicitation of a minor under the age of 16.

   "Specifically, SB 1414 will increase the penalty when an adult knew or should have known that the person solicited was a minor, from a misdemeanor to a felony-misdemeanor wobbler on a first offense and makes a second or subsequent offense a straight felony. The bill will also ensure that an adult who is convicted on or after January 1, 2025, of soliciting a minor when the defendant knew or should have known the person solicited was a minor, and who has a prior conviction for a solicitation of a minor, shall be required to register as a sex offender if the adult defendant was more than 10 years older than the solicited minor.

   "Human Trafficking has plagued our state and the Sacramento region for years. It is growing to unprecedented levels and is one of the fastest growing criminal enterprises. With the recent removal of Penal Code 653.22 it has been increasingly difficult to prosecute and investigate violations involving solicitation of a minor emboldening traffickers to traffic girls as young as 12 years old on our streets. Once these young girls enter the "life", their life expectancy is only 7-10 years. Just in the past year, there have been over 300,000 commercial sex ads in the Sacramento region alone. Additionally, with advanced technology and social media apps, law enforcement has been losing the battle in this arena. Human Traffickers religiously use their smart devices to further their criminal empire. This bill would give law enforcement a crucial tool to help investigate and stop these unspeakable acts.

   "Protecting our children should be the Legislature's highest priority. SB 1414 does just that, it levels the playing field so that law enforcement can go after these evil predators."

5) **Argument in Opposition**: According to the *Ella Baker Center for Human Rights*, "SB 1414 will provide for an alternative felony or misdemeanor, at the prosecutor's discretion, for a first conviction for soliciting a minor under the age of 16 for sex. The conviction is based on speech, the offer of anything of value in exchange for a sex act. A second conviction would be a felony, punishable by up to three years in jail.

   "The bill does not require physical contact or sexual contact with the minor victim. There are already felony crimes associated with actual lewd or sexual contact with a minor.

   "For the act of "solicitation," that is talking about sex in exchange for something of value, there are current penalties of up to six month in jail, with concomitant loss of employment and shaming by family and community. These are adequate to deter solicitation of any person, adult or minor, for sex in exchange for something of value, but only if the person believes they are likely to be caught and charged. A lack of enforcement of existing law is a more urgent policy problem than is the months or years in a jail or prison cell. Research has consistently shown that the threat or reality of longer sentences does not deter crime – only the fear of apprehension has a proven deterrent effect.

"Further, there is evidence that early childhood education, afterschool programs, and access to meaningful employment reduces the likelihood of any engagement in criminal behavior. Investments in safer communities and economic opportunity work to make us safer – stiff sentences and cold cells do not.

"Based in Oakland, the Ella Baker Center for Human Rights works to advance racial and economic justice to ensure dignity and opportunity for low-income people and people of color. The Ella Baker Center opposes SB 1414 because it stands against punitive measures that perpetuate systemic injustices, emphasizing instead the need for community-based solutions to ensure the safety and dignity of marginalized individuals, particularly those impacted by racial and economic disparities.

"While we share the goal of protecting minors from exploitation and abuse, we believe that SB 1414 takes an overly punitive approach that fails to address the root causes of these issues. By imposing harsher penalties, including felony sentences and longer periods of sex offender registration, this bill will disproportionately impact marginalized communities, particularly Black and Brown individuals who are already disproportionately targeted by the criminal justice system.

"Research has shown that punitive measures do little to prevent crime or protect communities. Instead, they perpetuate cycles of incarceration and marginalization, exacerbating the very problems they are meant to address. Rather than investing in punitive measures, we should be investing in community-based solutions that address the underlying systemic issues driving exploitation and support survivors in healing and rebuilding their lives.

"Furthermore, SB 1414 fails to take into account the complex realities of sex work and exploitation, including the fact that many individuals engaged in sex work are themselves survivors of exploitation, trafficking, or economic hardship. By criminalizing these individuals without addressing the structural inequalities that push them into vulnerable situations, this bill will only further marginalize and stigmatize already vulnerable populations."

6) **Related Legislation**:

   a) AB 2034 (Rodriguez), would re-enact, with some changes, the crime of loitering for the purpose of engaging in a prostitution offense which, before it was repealed, criminalized standing or loitering in public in order to engage in sex for compensation. AB 2034 is pending hearing in this committee. AB 2034 was held in committee.

   b) AB 2382 (B. Rubio), would increase the punishment for a second or subsequent conviction for soliciting a minor to engage in prostitution from a misdemeanor to a felony punishable in county jail for 16 months, 2 years, or 3 years. AB 2382 was held in suspense in the Assembly Appropriations Committee.

   c) AB 2419 (Gipson), would 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 sex trafficking of a person under 18 years of age, as specified, has occurred or is

occurring. AB 2419 will be heard today in the Senate Public Safety Committee.

d) AB 2924 (Petrie-Norris) would repeal the authorization for a person under 18 years of age to be issued a marriage license or to establish a domestic partnership, thereby prohibiting a person under 18 years of age from being issued a marriage license or from establishing a domestic partnership. The hearing on AB 2924 was canceled at the request of the author.

e) SB 1128 (Portantino), would require sex offender registration if the defendant is 18 or older, engages in an act of unlawful sexual intercourse with a minor, and the minor is more than three years younger than the defendant; or if the defendant is 21 or older, engages in an act of unlawful sexual intercourse with a minor, and the minor is under 16; but that a person is not required to register, if, at the time of the offense, they are not more than 10 years older than the minor. SB 1128 will be heard in this committee today.

f) SB 1219 (Seyarto), would make it a misdemeanor for an individual to operate a motor vehicle in any public place and repeatedly beckon to, contact, or attempt to contact or stop pedestrians or other motorists, or impede traffic, with the intent to solicit prostitution. SB 1219 was held in suspense in the Senate Appropriations Committee.

7) **Prior Legislation**:

a) AB 1970 (Boerner Horvath), of the 2021-2022 Legislative Session, would have increased the penalty for misdemeanor solicitation of a minor, making it alternatively punishable as a felony by 16 months, two, or three years in the state prison regardless of whether the defendant knew or should have known the person was a minor. AB 1970 was held in this committee.

b) AB 1193 (B. Rubio), of the 2021-2022 Legislative Session, was substantially similar to AB 1970. The hearing on AB 1193 was cancelled by the author.

c) AB 892 (Choi), of the 2021-2022 Legislative Session, would have required a person convicted of misdemeanor solicitation of a minor for prostitution to register as a sex offender if the defendant knew or should have known that the person who was solicited was a minor at the time of the offense. AB 892 failed passage in this committee.

d) AB 2862 (B. Rubio), of the 2019-2020 Legislative Session, was substantially similar to AB 1970. AB 2862 was held in this committee.

e) AB 663 (Cunningham), of the 2019-2020 Legislative Session, would have increased the maximum fine for solicitation of an adult for purposes of prostitution from a maximum of $1,000 to a maximum of $2,000. AB 663 was held in suspense in the Senate Appropriations Committee.

f) SB 303 (Morrell), of the 2017-2018 Legislative Session, would have increased the penalty solicitation of a minor from a misdemeanor to an alternate misdemeanor-felony. SB 303 was held in the Senate Public Safety Committee.

g) SB 982 (Huff), of the 2013-2014 Legislative Session, would have provided that soliciting an act of prostitution from a minor, or engaging in an act of prostitution with a minor, is an alternate felony-misdemeanor for a first conviction and a straight felony for a repeated conviction. SB 982 was held in suspense in the Senate Appropriations Committee.

REGISTERED SUPPORT / OPPOSITION:

Support

Arcadia Police Officers' Association
Bakersfield Crisis Pregnancy Center, INC.
Bilateral Safety Corridor Coalition
Breaking the Chains
Bridge Network
Burbank Police Officers' Association
Califonia City Police
California Association of Highway Patrolmen
California Baptist for Biblical Values
California Catholic Conference
California Coalition of School Safety Professionals
California Commission on Sexual Exploitation
California District Attorneys Association
California Family Council
California Narcotic Officers' Association
California Police Chiefs Association
California Reserve Peace Officers Association
California State Sheriffs' Association
Chief Probation Officers' of California (CPOC)
Childhelp
Church Without Walls
City of Porterville
City of Taft
City of Taft Police Department
City of Tehachapi
Claremont Police Officers Association
Community Action Partnership of Kern
Compadres Connect
Concerned Women for America
Connect 2 Change
Cooliage Triangle
Corona Police Officers Association
County of Kern
County of San Luis Obispo
Crime Victims United of California
Culver City Police Officers' Association
David G. Valadao, US Representative
Deputy Sheriffs' Association of Monterey County
Empowerment (dess Perkins Foundation)
Exodus Cry

Fieldstead and Company, INC.
Forgotten Children INC.
Fresno County District Attorney Lisa A. Smittcamp
Fresno Police Department
Fullerton Police Officers' Association
Garden Pathways
Global Hope 365
Greater Bakersfield Chamber of Commerce
Greater Bakersfield Republican Assembly
Helping US
Individual
Interfaith Statewide Coalition
Journey Out
Kern County Fire Chief
Kern County Probation Department
Kern County Sheriff's Office
Kern County Supervisor Jeff Flores
Kern High School District
Lighthouse Baptist Church
Los Angeles School Police Management Association
Los Angeles School Police Officers Association
Love Never Fails
Lucerne Valley Economic Development Association (LVEDA)
Magdalene Hope, INC.
Multiple Individuals
Murrieta Police Officers' Association
My Friend's House Assembly of God Church
National Center on Sexual Exploitation (NCOSE)
Newport Beach Police Association
Novato Police Officers Association
Orange County Sheriff's Department
Palos Verdes Police Officers Association
Peace Officers Research Association of California (PORAC)
People's Association of Justice Advocates
People's Association of Justice Advocates
Perk Advocacy
Placer County Deputy Sheriffs' Assocation
Pomona Police Officers' Association
Private Individual
Project Rescue
Pulse of The Central Coast
Quon Louey
Real Impact Oceanside
Real Impact.
Republican National Hispanic Assembly of California (rnha Ca)
Riverside Police Officers Association
Riverside Sheriffs' Association
Sacramento County Sheriff Jim Cooper
San Bernardino County

San Bernardino County Sheriff's Department
San Diego City Attorney's Office
San Francisco Police Officers Association
Santa Ana Police Officers Association
Santa Barbara Women's Political Committee
Smart Justice California, a Project of Tides Advocacy
Soroptimist International of North San Diego
Sower Education Group - Rachel Thomas
Table Mountain Rancheria
The American Council for Evangelicals
The Foundation United
Tulare County Probation Department
Tulare County Sheriff
Tulare District Attorney
Tulare; County of
Upland Police Officers Association
Visalia Police Department
Visit Fresno County
Women's Center-high Desert, INC.
Women's Liberation Front
Zoe International

6 Private Individuals

Opposition

ACLU California Action
California Attorneys for Criminal Justice
California Public Defenders Association
Californians for Safety and Justice
Californians United for A Responsible Budget
Ella Baker Center for Human Rights
Felony Murder Elimination Project
Initiate Justice
Initiate Justice Action
Legal Services for Prisoner With Children
Pacific Juvenile Defender Center
Rubicon Programs
San Francisco Public Defender
Santa Cruz Barrios Unidos
Young Women's Freedom Center

1 Private Individual

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

Date of Hearing: July 2, 2024
Counsel: Andrew Ironside

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Kevin McCarty, Chair

SB 1502 (Ashby) – As Amended June 6, 2024

SUMMARY: Makes xylazine, also known as "tranq," a Schedule III drug under California's Uniform Controlled Substances Act (UCSA). Specifically, **this bill**:

1) Makes xylazine, including its salts, isomers, and salts of its isomers and any substance that contains xylazine, a Schedule III controlled substance under the USCA.

2) Provides that, if an animal drug containing xylazine that has been approved under the federal Food, Drug and Cosmetic Act is not available for sale in California, this subdivision does not apply to a substance that is intended to be used to compound an animal drug pursuant to the federal Food and Drug Administration's industry guidance on compounding animal drugs from bulk drug substances, or an animal drug compound containing xylazine that is compounded pursuant to this guidance.

3) Provides that compounding an animal drug shall not be deemed unprofessional conduct, as specified.

EXISTING LAW:

1) Lists controlled substances in five "schedules" - intended to list drugs in decreasing order of harm and increasing medical utility or safety - and provides penalties for possession of and commerce in controlled substances. Schedule I includes the most serious and heavily controlled substances, with Schedule V being the least serious and most lightly controlled substances. (Health & Saf. Code, §§ 11054-11058.)

2) Makes possession of a non-narcotic Schedule III controlled substance a misdemeanor subject to imprisonment in county jail for up to one year. (Health & Saf., § 11377, subd. (a).)

3) Makes possession of a non-narcotic Schedule III controlled substance a felony subject to 16 months, 2 years, or 3 years in county jail where the person has one or more prior convictions for an offense classified as a violent felony or one that requires registration as a sex offender. (Health & Saf., § 11377, subd. (a).)

4) Makes possession for sale of a non-narcotic Schedule III substance a felony subject to imprisonment in county jail for 16 months, 2 years or 3 years. (Health & Saf., § 11378.)

5) Makes trafficking of a non-narcotic Schedule III substance a felony subject to imprisonment in county jail for 2, 3, or 4 years. (Health & Saf., § 11379.)

6) Makes manufacturing, producing, or preparing a non-narcotic Schedule III controlled substance either directly or indirectly by chemical extraction or independently by means of

chemical synthesis a felony punishable by imprisonment in county jail for 3, 5, or 7 years and a fine of up to $50,000. (Health & Saf., § 11379.6, subd. (a).)

7) Makes offering to manufacturing, producing, or preparing a non-narcotic Schedule III controlled substance either directly or indirectly by chemical extraction or independently by means of chemical synthesis a felony punishable by imprisonment in county jail for 3, 4, or 5 years. (Health & Saf., § 11379.6, subd. (e).)

FISCAL EFFECT: Unknown.

COMMENTS:

1) **Author's Statement**: According to the author, "California is in the midst of an opioid crisis, with over seven thousand deaths attributed to opioid overdose in our state in 2021 alone. This crisis is exacerbated by a growing trend of mixing fentanyl with xylazine, making it the deadliest drug threat in the United States. According to a DEA report, xylazine-related deaths have drastically increased nationwide, more than tripling from 2020 to 2021.

   "Commonly referred to as 'tranq' or the 'zombie drug,' xylazine is a potent veterinary sedative that is increasingly being trafficked into our country. Xylazine is unsafe for human use and can cause severe wounds and necrosis, potentially leading to amputation or fatal overdose. Unlike opioid overdoses, a xylazine overdose cannot be reversed with naloxone. In fact, there is no drug approved to reverse the effects of xylazine use in humans.

   "To combat this growing threat, SB 1502 will classify xylazine as a Schedule III substance, enabling the DEA to restrict access to this medication. It is crucial that we protect Californians from the negative impacts of Xylazine, and SB 1502 ensures the health and safety of our communities by regulating its availability and preventing misuse."

2) **Xylazine:** According to CDPH, xylazine (also known as "tranq") is a non-opioid animal tranquilizer that has been connected to an increasing number of overdose deaths nationwide. Some people who use drugs intentionally take fentanyl or other drug mixed with xylazine; in other circumstances, drug sellers cut fentanyl or heroin with xylazine to extend product's effect without disclosing the adulterant. (https://www.cdph.ca.gov/Programs/CCDPHP/sapb/Pages/Xylazine.aspx)

   The extent to which xylazine has proliferated in California drug markets is unclear. In 2022, the Drug Enforcement Administration (DEA) reported that its identification of xylazine-positive overdose deaths in the western United States increased by 750% in recent years, from four such deaths in 2020 to 34 in 2021. (https://www.dea.gov/sites/default/files/2022-12/The Growing Threat of Xylazine and its Mixture with Illicit Drugs.pdf) However, the DEA also noted comprehensive data on xylazine-related deaths is not available because xylazine is not routinely included in postmortem testing or data reporting in all jurisdictions. (*Ibid.*) In April 2023, based in part on the DEA's report, the White House Office of National Drug Control Policy designated fentanyl mixed with xylazine as an emerging threat, recognizing its "growing role in overdose deaths in every region in the United States." (https://www.whitehouse.gov/ondcp/briefing-room/2023/04/12/biden-harris-administration-designates-fentanyl-combined-with-xylazine-as-an-emerging-threat-to-the-united-states/ - :~:text=Xylazine%20is%20a%20non%2Dopioid,region%20of%20the%20United%20States.)

On the other hand, in November 2023 in a letter to California health care facilities, CDPH described xylazine as "present" in California, but noted that the drug had not penetrated the state's drug supply as extensively as it has in other regions. (https://www.cdph.ca.gov/Programs/CCDPHP/sapb/Pages/Xylazine.aspx)

3) **The California Uniform Controlled Substances Act**: In 1970, Congress passed the Comprehensive Drug Abuse Prevention and Control Act, which established a framework for federal regulation of controlled substances. Title II of the act is the Controlled Substances Act (CSA), which placed controlled substances in one of five "schedules."

> The schedule on which a controlled substance is placed determines the level of restriction imposed on its production, distribution, and possession, as well as the penalties applicable to any improper handling of the substance… [W]hen DEA places substances under control by regulation, the agency assigns each controlled substance to a schedule based on its medical utility and its potential for abuse and dependence.

(The Controlled Substances ACT (CSA): A Legal Overview for the 118th Congress, Congressional Research Service (Jan. 19, 2023) p. 2 <https://crsreports.congress.gov/product/pdf/r/r45948> [last visited Mar. 28, 2024].)

Substances are added to or removed from schedules through agency action or by legislation. (*Id.* at p. 9.)

State laws generally follow the federal scheduling decisions, and "they are relatively uniform across jurisdictions because almost all states have adopted a version of a model statute called the Uniform Controlled Substances Act (UCSA)." (*Id.* at 4.) California adopted the UCSA in 1972. (Stats. 1972, ch. 1407, § 3.)

Congress has not yet placed xylazine on a schedule under the Controlled Substances Act. There are currently two bills pending in Congress that would make xylazine a Schedule III substance. (H.R. No. 1839, 118th Cong., 1st Sess. (2023) & Sen. No. 993, 118th Cong., 1st Sess. (2023).) According to information author's office provided to this committee, this bill is based on H.R. No. 1839.

California generally has aligned its Uniform Controlled Substances Act (UCSA) with the federal government's scheduling decisions. (See *People v. Ward* (2008) 167 Cal.App.4th 252, 259 ["In the California Uniform Controlled Substances Act, California adopted the five schedules of controlled substances used in federal law and in the Uniform Controlled Substances Act"]; *Williamson v. Bd. Of Medical Quality Assurance* (1990) 271 Cal.App.3d 1343, 1352, fn. 1. ["Effective January 1, 1985, Schedules I through V of the California Uniform Controlled Substances Act were revised so as to generally parallel the five schedules contained in the Federal Controlled Substances Act."].) As such, this bill would make xylazine a Schedule III drug under UCSA contingent on the federal government adding xylazine to Schedule III of the federal CSA.

Because this bill is based on a federal bill, and because California generally aligns the UCSA with the federal CSA, the author should consider amending this bill to make placement of xylazine in Schedule III of the USCA contingent on xylazine's placement in Schedule III of

the federal CSA. AB 3029 (Bains), a bill substantially similar to this one, did precisely that.

4) **Argument in Support**: According to *California Veterinary Medical Association*, "Xylazine's importance in veterinary medicine cannot be understated as it is easily one of the top 10 most critical medications in livestock, equine, and wildlife veterinary medicine, providing sedation and pain control to animals. The drug is also used by animal control officers in order to subdue wild animals and to provide veterinary care to exotic animals in zoos in California.

   "According to the Veterinary Medical Board, there is no evidence of diversion of xylazine from veterinarians in California. Rather the drug is reportedly being trafficked in from Australia and China and is making its way into the hands of drug dealers for wholly illicit purposes. SB 1502 places guardrails around the continued application of the drug in the veterinary medicine space, while creating a blanket prohibition on its use for non-veterinary medicine purposes."

5) **Argument in Opposition**: According to the *Drug Policy Alliance*, "By placing the substance on Schedule III of the Controlled Substances Act (CSA), SB 1502 will criminalize xylazine, including simple possession. We are concerned that by placing xylazine on the CSA, the state is setting a dangerous precedent.

   1. This provision will inadvertently create research restrictions at a time when we need *more* research to understand xylazine's effects on humans.
   2. Placing xylazine on the CSA will result in the disproportionate prosecution and sentencing of people struggling with substance use, including people who may not know xylazine is in their drug supply.

   Rather than punitive responses to drug use, the state should invest in xylazine research to find medical solutions to xylazine harm. It should also scale-up evidence-based public health interventions and harm reduction services for people who use drugs.

   Science and Research Must Lead the Way

   We are concerned that with this component in the bill, California will preemptively be placing xylazine on the CSA before scientific studies have been completed. Experts agree that there is a need for *further* research to better understand overdose risk and response, pathophysiology, patterns of xylazine use, clinical treatment and withdrawal management, wound treatment and management, harm reduction response, regulation, and potential racial disparities in drug enforcement, among other research topics.

   Preliminary research on xylazine shows that xylazine is in fact an agonist at kappa opioid receptors.2 Several notable kappa opioid agonists FDA-approved for human use include: pentazocine (Schedule IV), butorphanol (Schedule IV), and nalbuphine (not scheduled). Given the range in scheduling for similar drugs, it is unclear how one could justify placing it as Schedule III without further research.

   We call attention to dexmedetomidine which is nearly identical to xylazine, and is unscheduled. Dexmedetomidine is widely used as a medicine in hospital intensive care units and for treating mental health disorders. Scheduling dexmedetomidine would be massively

disruptive, but by establishing the precedent with xylazine scheduling, this disruption is almost inevitable.

We all want our loved ones and communities to be safe, but scheduling xylazine does not prevent overdose deaths. For example, a ban on xylazine in Florida illustrates that criminalizing the substance does not reduce overdose deaths. Florida placed xylazine on Schedule I of the state CSA in 2018.3 In 2018, there were 3,727 opioid overdose deaths in Florida; in 2021 that number had grown to 6,442.

There are a number of potential criminal justice implications of scheduling that do not account for the realities of when and why people use xylazine.

1. **Most people who use drugs are not actively seeking xylazine** because they prefer heroin or other opioid drugs for their effects. Criminalization will impact many people who do not know they possess the substance and who were not seeking it out.
2. **Xylazine is predominantly found in conjunction with fentanyl, for which severe criminal penalties already exist.** It is estimated that 99.5% of xylazine-involved deaths substances that are already criminalized.
3. Further, we have strong concerns that **criminalizing xylazine will disproportionately impact people struggling with substance use** and those involved at the lowest level of the drug distribution chain- who need help and access to health services. The majority of people at the lowest drug distribution level report using drugs (87.5%) and 43.1% meet the criteria for substance use disorder. Imposing severe penalties on these individuals without addressing the root causes of problematic drug use perpetuates social disparities.
4. Moreover, **sending people with substance use disorder into the criminal justice system makes them more vulnerable to overdose.** Data shows that people recently released from incarceration are twenty-seven times more likely to experience an overdose in their first two weeks of release than the general public.
5. **Criminalizing xylazine will not keep people safe.** Historical evidence shows that prohibiting substances does not reduce overdose rates. Instead, it creates a dangerous cycle that exposes people who use drugs to newer and potentially more dangerous alternatives from unknown sources. In fact, this trend gave rise to xylazine through the criminalization of various opioids. As restrictions were placed on prescription opioids, people turned to the underground heroin supply. Subsequent crackdowns on heroin prompted suppliers to produce fentanyl, and harsh fentanyl penalties fueled an explosion of fentanyl analogs. Now, xylazine is appearing as a consequence of thecrackdown on fentanyl, and it follows that **criminalizing xylazine will only lead to the emergence of other - potentially more potent substances - in the illicit drug supply.**

We know that supply-side strategies fail to keep our communities safe. This is precisely why California must address demand by investing in evidence-based public health interventions. Relying on a criminal approach will not yield different results for xylazine.

Policy Solutions

To prevent overdoses and mitigate the harms of the illicit drug supply, the state must

prioritize science-based decision-making and research, as well as harm reduction strategies and comprehensive public health approaches to the overdose epidemic. **Instead of hastily criminalizing xylazine as a controlled substance, lawmakers should focus on allowing the implementation of overdose prevention services, Good Samaritan Laws, access to methadone, buprenorphine, and naloxone, and evidence-based drug education and treatment.**

Additionally, efforts should be made to study and collect data on the presence and distribution of xylazine, expand access to xylazine test strips. Other solutions include:

- **Research:** Investing in work to scientifically understand xylazine and its effects, including into medications to treat xylazine withdrawal.
- **Drug Checking:** Providing services that help people identify whether their drugs contain xylazine, including in real-time situations.
- **Education:** Training healthcare professionals to recognize and treat xylazine skin wounds and other harms.
- **Overdose Prevention:** Teaching first responders and community members how to care for a xylazine-fentanyl overdose, and researching overdose-reversing medication for xylazine.
- **Harm Reduction:** Making sure that people who use drugs have access to harm reduction services, including overdose prevention centers. Connecting at-risk people with support systems, rather than arresting them.

6) **Related Legislation**:

a) AB 3029 (Bains) would make xylazine, also known as "tranq," a Schedule III drug under California's UCSA, contingent on the federal government adding xylazine to Schedule III of the federal CSA. AB 3029 is pending a hearing in the Senate Public Safety Committee.

b) AB 1859 (Alanis), would require coroners to report to the State Department of Public Health (DPH) and to the Overdose Detection Mapping Application Program (ODMAP) whether an autopsy revealed the presence of xylazine at the time of a person's death. AB 1859 is currently pending in the Assembly Appropriations Committee.

c) AB 2018 (Rodriguez), would remove fenfluramine as a controlled substance under the UCSA. AB 2018 is pending a vote by the Assembly.

d) AB 2871 (Maienschein), would authorize a county to establish an interagency overdose fatality review team to assist local agencies in identifying and reviewing overdose fatalities. AB 2871 is pending hearing in the Assembly Health Committee.

e) AB 3073 (Haney), would, among other things, require the State Department of Public Health to develop protocols for implementing wastewater surveillance for high-risk substances, including xylazine. AB 3073 is pending hearing in the Assembly Committee on Environmental Safety and Toxic Materials.

7) **Prior Legislation**:

a) AB 1399 (Friedman), Chapter 475, Statutes of 2023, prohibited, among other things, a veterinarian from ordering, prescribing, or making available xylazine unless the veterinarian has performed an in-person physical examination of the animal patient or make medically appropriate and timely visits to the premises where the animal patient is kept.

REGISTERED SUPPORT / OPPOSITION:

Support

Arcadia Police Officers' Association
Burbank Police Officers' Association
California Coalition of School Safety Professionals
California Narcotic Officers' Association
California Reserve Peace Officers Association
California Veterinary Medical Association
Chief Probation Officers' of California (CPOC)
City of Laguna Niguel
City of Norwalk
City of San Diego
City of San Jose
Claremont Police Officers Association
Corona Police Officers Association
Culver City Police Officers' Association
Deputy Sheriffs' Association of Monterey County
Fullerton Police Officers' Association
League of California Cities
Los Angeles School Police Management Association
Los Angeles School Police Officers Association
Mayor Todd Gloria, City of San Diego
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
The Veterinary Medical Board
Upland Police Officers Association

Opposition

ACLU California Action
Drug Policy Alliance

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

Date of Hearing: July 2, 2024
Counsel: Sandy Uribe / Andrew Ironside

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Kevin McCarty, Chair

SB 89 (Ochoa Bogh) – As Amended April 13, 2023

VOTE ONLY

SUMMARY: Expands the crime of stalking to include making a credible threat with the intent to place a person in reasonable fear for the safety of their pet, service animal, emotional support animal, or horse.

EXISTING LAW:

1) States that any person who willfully, maliciously, and repeatedly follows or willfully and maliciously harasses another person and who makes a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of their immediate family is guilty of stalking. (Pen. Code, § 646.9, subd. (a).)

2) Punishes stalking by imprisonment in county jail for not more than one year, or by imprisonment in the state prison. (Pen. Code, § 646.9, subd. (a.).)

3) Provides that a person who commits stalking while there is a temporary restraining order, injunction, or any other court order in effect prohibiting stalking behavior against the same party shall be punished by imprisonment in the state prison for 2, 3, or 4 years. (Pen. Code, § 646.9, subd. (b).)

4) Provides that a person who commits stalking after having been convicted of domestic violence, violation of a protective order, or of criminal threats shall be punished by imprisonment in the state prison for 2, 3 or 5 years. (Pen. Code, § 646.9, subd. (c)(1).)

5) Provides that a person who commits stalking after previously having been convicted of felony stalking shall be punished by imprisonment in the state prison for 2, 3, or 5 years. (Pen. Code, § 646.9, subd. (c)(2).)

6) Authorizes the sentencing court to order a person convicted of felony stalking to register as a sex offender. (Pen. Code, § 646.9, subd. (d).)

7) Requires the sentencing court to consider issuing a restraining order valid for up to 10 years when a defendant is convicted of stalking, regardless of whether the defendant is placed on probation or sentenced to state prison or county jail. (Pen. Code, § 646.9, subd. (k).)

8) Defines the following terms as it relates to the elements of the crime of stalking:

   a) "Harass" means "engages in a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, torments, or terrorizes the person, and that

serves no legitimate purpose." (Pen. Code, § 646.9, subd. (e).)

b) "Course of conduct" means "two or more acts occurring over a period of time, however short, evidencing a continuity of purpose." Constitutionally protected activity is not included within the meaning of "course of conduct." (Pen. Code, § 646.9, subd. (f).)

c) "Credible threat" means "a verbal or written threat, including that performed through the use of an electronic communication device, or a threat implied by a pattern of conduct or a combination of verbal, written, or electronically communicated statements and conduct, made with the intent to place the person that is the target of the threat in reasonable fear for his or her safety or the safety of his or her family, and made with the apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for his or her safety or the safety of his or her family. It is not necessary to prove that the defendant had the intent to actually carry out the threat. The present incarceration of a person making the threat shall not be a bar to prosecution under this section." Constitutionally protected activity is not included within the meaning of "credible threat." (Pen. Code, § 646.9, subd. (g).)

d) "Immediate family" means "any spouse, parent, child, any person related by consanguinity or affinity within the second degree, or any other person who regularly resides in the household, or who, within the prior six months, regularly resided in the household." (Pen. Code, § 646.9, subd. (l).)

9) Provides that a person who maliciously and intentionally maims, mutilates, tortures, or wounds a living animal, or maliciously and intentionally kills an animal, is guilty of animal cruelty. (Pen. Code, § 597, subd. (a).)

10) Punishes a violation of animal cruelty as a felony with imprisonment in the county jail under realignment, or by a fine of not more than $20,000, or by both; or alternatively, as a misdemeanor with imprisonment in a county jail for not more than one year, or by a fine of not more than $20,000, or by both. (Pen. Code, § 597, subd. (d).)

FISCAL EFFECT:

COMMENTS:

1) **Author's Statement**: According to the author, "According to the Bureau of Justice Statistics Special Report: Stalking Victimization in the US, perpetrators of stalking tend to damage their victim's property, even going as far as to target the victim's loved ones, including pets. One National Crime Victimization Survey estimated that four in 10 stalkers threaten a "victim or the victim's family, friends, co-workers, or family pet," with 87,020 threats to harm a pet being reported.

   "Humans and animals form strong bonds that induce strong feelings of affection and connection, which can make a pet an easy target for threats and physical harm. California's law ignores how powerful a threat or injury to a beloved pet can be. Not updating state statute to conform to federal anti-stalking law leaves victims and their pets vulnerable to threats and attacks by a stalker. It is critical that California's anti-stalking law is updated in

order to better protect victims and their pets."

2) **Elements Required for Stalking Prosecutions**: Stalking is generally understood as repeated threatening behavior that is intended to place the subject of the stalking in reasonable fear for their safety or the safety of their family. In order to convict a person under the current stalking statute, Penal Code section 646.9, the prosecutor must prove the following:

   a) The defendant willfully and maliciously harassed or willfully, maliciously, and repeatedly followed another person; and,

   b) The defendant made a credible threat with the intent to place the other person in reasonable fear for their safety, or for the safety of their immediate family. (See CALCRIM No. 1301; see also *People v. Falck* (1997) 52 Cal.App.4th 287, 297-298.)

   Stalking requires either repeated following or harassment which necessarily includes multiple acts. (*People v. Jantz* (2006) 137 Cal.App.4th 1283, 1292-1293; *People v. Heilman* (1994) 25 Cal.App.4th 391, 400) "Repeated . . . simply means the perpetrator must follow the victim more than one time. The word adds to the restraint police officers must exercise, since it is not until a perpetrator follows a victim more than once that the conduct rises to a criminal level." (*People v. Heilman, supra*, 25 Cal.App.4th at 400.)

   This bill would expand the offense stalking to include situations where the person threatens the safety of another's pet, service animal, emotional support animal, or horse. The background provided by the author notes that the federal stalking statute protects the pet, service animal, emotional support animal, or horse of that person. (18 USCS § 2261A.)

   There are many instances where California law is not coextensive with federal law. Moreover, existing state law does provide protections to animals under animal cruelty laws. Expanding the stalking statute to pets and other animals creates a slippery slope for significant expansion of other crimes such as criminal threats and domestic violence.

   Finally, as noted above, the crime of stalking is based on a continuous course of conduct involving multiple acts, not a single incident. (See also *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1198; *People v. Jantz* (2006) 137 Cal.App.4th 1283, 1292-1293.) A prosecutor can already argue that any person would reasonably fear for their *own safety* (as opposed to that just of their pet) if the perpetrator was threating a person's pet in addition to committing other harassing or threatening behavior against that person. As such, this bill is unnecessary.

3) **Recent Relevant Supreme Court Case Law**: On June 27, 2023, the United States Supreme Court decided *Counterman v. Colorado* (2023) 600 U.S. __ [2023 U.S. LEXIS 2788], a case deciding what constitutes a "true threat" and what test should be applied to determine if a statement or conduct rises to the level of a true threat. The issue arose in the context of a conviction for the crime of stalking. The Colorado statute makes it unlawful to, in pertinent part, to directly, or indirectly through another person, knowingly either: make a credible threat to another person and, in connection with the threat, repeatedly follow, approach, contact or place under surveillance that person … or, make a credible threat to another person and, in connection with the threat, repeatedly make any form of communication with that person … regardless of whether a conversation ensues. (CRS 18-3-602, subd. (1).)

In *Counterman*, *supra*, the defendant's stalking conviction was based on hundreds of messages sent to the victim over Facebook. Counterman never met the victim and she never responded to any of his messages. While some of the messages were benign, others suggested Counterman might be surveilling the victim, and others expressed anger and threats of harm. The conviction was based solely on the repeated Facebook communications. (2023 U.S. LEXIS 2788, *6-7.) Counterman argued that the conviction should be overturned because the statements were not true threats and so were protected under the First Amendment. (*Id.* at *8.)

The Supreme Court noted that the Colorado courts had used an objective, reasonable person standard to determine if Counterman had made a threat. (2023 U.S. LEXIS 2788, *8.) The question before the Court was "whether the First Amendment still requires proof that the defendant had some subjective understanding of the threatening nature of his statements." (*Id.* at *5.) The Court answered the question in the affirmative. (*Id.* at *9.) The Court reasoned that reliance on an objective standard would sometimes result in self-censorship because people would be worried about how their statements would be perceived. (*Id.* at *12-15.) To prove this subjective understanding, the Court further held that a mental state of recklessness is sufficient. In the threats context, recklessness means "that a speaker is aware 'that others could regard his statements as' threatening violence and 'delivers them anyway.'" (*Id.* at *18.)

While the Supreme Court overturned Counterman's conviction, it did not overturn the Colorado stalking statute. Rather, what is affected going forward is the evidence prosecutors must prove to establish a conviction under the statute. Under the new U.S. Supreme Court precedent, going forward prosecutors will have to show that the defendant knew that others could perceive a statement made threatened violence and yet the defendant uttered it anyway.

As in Colorado, California courts have applied an objective reasonable-person standard to determine if statements constitute a credible threat. The California stalking statute itself notes that the person that is the target of the threat must have reasonable fear for their safety. (Pen. Code, § 646.9, subd. (g).) However, under California law, prosecutors also have had to prove subjective mens rea for stalking based on threats, namely that "the defendant made a credible threat *with the intent* to place the other person in reasonable fear for their safety, or for the safety of their immediate family." (See CALCRIM No. 1301; see also *People v. McCray* (1997) 58 Cal.App.4th 159, 172 ["The crimes with which appellant was charged required proof of his intent to place Michelle in fear for her safety or that of her family…. (§ 646.9, subd. (a))."].)

4) **Argument in Support**: According to *Crime Victims United of California*, "Stalking is a crime of power and control. Victims of stalking live in fear. The victim endures unspeakable harassment, threats, and is literally terrorized. Perpetrators of this crime often threaten their loved ones, including their pets. This leaves the victim to live in fear, not only for their safety but the safety of loved ones and precious pets.

"Unfortunately, California law does not recognize terrorizing a victim about their pet as a crime or form of stalking. Federal law does and brings the ability of victims who are threatened with harm to their animals to be able to hold their preparators accountable.

"It is critical to the safety and security of stalking victims that penal code section 646.9 be amended to include victims' pets. SB 89 would do that providing much need protection to the victims of stalking. It is widely known that animal cruelty is "the link" to more violent behavior. By adding this critical section and conforming state law to Federal law, broader protection for crime victims can be provided."

5) **Argument in Opposition**: According to the *American Civil Liberties Union California Action*, "[W]e must respectfully oppose SB 89, which would greatly expand the definition of "stalking," a crime that carries with it a punishment of between one and five years incarceration in prison, as well as potential immigration consequences.

   "SB 89 is an emotional expression of the outrage society feels when a person acts to intimidate and harass another, but it takes the wrong policy approach. Existing law already provides protections to animals under animal cruelty laws at the State and Federal level. In 2016, AB 494 amended Code of Civil Procedure 527.6 (civil harassment), Welfare and Institutions Code sections 213.5 (juvenile), and 15657.03 (elder and dependent adult abuse) to permit a court to issue a protective order for animals to keep a person away from them, and restrain from conduct including making threats. California also allows domestic violence protective orders to include pets. In addition, Federal law includes the crime of stalking and actions that make the victim fear that the stalker will hurt the victim's pet, service or emotional support animal, or horse (18 U.S.C. § 2261A (2019)).

   "For these reasons, we must respectfully oppose SB 89."

6) **Related Legislation**:

   a) AB 56 (Lackey) would expand eligibility for victim compensation to include emotional injuries from specified felony crimes including stalking. AB 56 is pending hearing in the Senate Appropriations Committee.

   b) AB 829 (Waldron) would require a court to consider ordering a defendant who has been granted probation after conviction of specified animal abuse crimes to undergo a mental health evaluation, and requires the defendant to complete mandatory counseling as directed by the court, if the evaluator deems it necessary. AB 829 is pending in the Senate Appropriations Committee.

7) **Prior Legislation**:

   a) AB 1982 (Ting), of the 2013-2014 Legislative Session, would have modified the crime of stalking from one requiring specific intent on the part of the perpetrator to one of general intent and would have included a domesticated pet within the definition of immediate family for purposes of the crime of stalking. AB 1982 was held in the Assembly Appropriations Committee.

   b) SB 1320 (Kuehl), Chapter 832, Statutes of 2002, revised California's stalking statute to, among other things, specify that constitutionally protected activities are not included with the meaning of "credible threat."

SB 2184 (Royce), Chapter 1527, Statutes of 1990, enacted California's stalking statute.

REGISTERED SUPPORT / OPPOSITION:

Support

American Association of University Women (AAUW) San Jose
American Association of University Women - California
American Kennel Club, INC.
American Society for The Prevention of Cruelty to Animals
California District Attorneys Association
California Police Chiefs Association
Crime Victims Alliance
Crime Victims United
Los Angeles County District Attorney's Office
Peace Officers Research Association of California (PORAC)
Riverside County District Attorney
Social Compassion in Legislation

Oppose

ACLU California Action
California Attorneys for Criminal Justice
San Francisco Public Defender

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

Date of Hearing: July 2, 2024
Counsel: Cheryl Anderson / Andrew Ironside

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Kevin McCarty, Chair

SB 226 (Alvarado-Gil) – As Amended June 13, 2023

As Proposed to be Amended in Committee

VOTE ONLY

SUMMARY: Adds a substance containing fentanyl to the list of controlled substances for which possession of those substances while armed with a loaded and operable firearm is a felony punishable in state prison by two, three, or four years. Specifically, **this bill**:

1) Adds a substance containing fentanyl to the list of controlled substances for which possession of those substances while armed with a loaded and operable firearm is a felony punishable in state prison by two, three, or four years.

2) Provides that, where the substance possessed is one containing fentanyl, the person shall have knowledge that the specific controlled substance possessed is fentanyl.

3) States that this prohibition does not apply to any person lawfully possessing fentanyl, including with a valid prescription.

EXISTING LAW:

1) Makes it unlawful to possess several specified controlled substances, including heroin, cocaine, cocaine base, opium, hydrocodone, and fentanyl. Provides that the punishment is imprisonment in the county jail for not more than one year unless the person has one or more prior convictions for a serious or violent felony, as specified, or for an offense requiring sex offender registration, in which case it is punishable as a felony. (Health & Saf. Code, § 11350, subd. (a).)

2) Makes it unlawful to possess several specified controlled substances, including methamphetamine, amphetamine, phencyclidine (PCP), and gamma hydroxybutyric acid (GHB). Provides that the punishment is imprisonment in the county jail for not more than one year unless the person has one or more prior convictions for a serious or violent felony, as specified, or for an offense requiring sex offender registration, in which case it is punishable as a felony. (Health & Saf. Code, § 11377, subd. (a).)

3) Makes it unlawful for a person to possess for sale, or purchase for purpose of sale, several specified controlled substances, including heroin, cocaine, cocaine base, opium, and fentanyl. Provides that the punishment is imprisonment in the county jail for two, three, or four years. (Health & Saf. Code, §§ 11351, 11351.5.)

4) Makes it unlawful for a person to transport, import, sell, furnish, administer, or give away, or offer or attempt to transport, import, sell, furnish, administer, or give away several specified controlled substances, including cocaine, cocaine base, heroin, and fentanyl. Provides that the punishment is imprisonment in the county jail for three, four, or five years. Provides that the punishment for transporting those specified controlled substances within the state between noncontiguous counties is imprisonment in the county jail for three, six, or nine years. (Health & Saf. Code, § 11352.)

5) Makes it unlawful to possess for sale several specified controlled substances, including methamphetamine, amphetamine, and GHB. Provides that the punishment is imprisonment in the county jail for 16 months, two years, or three years. (Health & Saf. Code, § 11378.)

6) Makes it unlawful to possess for sale PCP. Provides that the punishment is imprisonment in the county jail for three, four, or five years. (Health & Saf. Code, § 11378.5.)

7) Makes it unlawful for a person to transport, import into this state, sell, furnish, administer, or give away, or offer to transport, import into this state, sell, furnish, administer, or give away, or attempt to import into this state or transport specified controlled substances, including methamphetamine, amphetamine, and GHB. Provides that the punishment is imprisonment in the county jail for two, three, or four years. Provides that the punishment for transporting those specified controlled substances within the state between noncontiguous counties is imprisonment in the county jail for three, six, or nine years. (Health & Saf. Code, § 11379.)

8) Makes it unlawful for a person to transport, import into this state, sell, furnish, administer, or give away, or offer to transport, import into this state, sell, furnish, administer, or give away, or attempt to import into this state or transport PCP. Provides that the punishment is imprisonment in the county jail for three, four, or five years. Provides that the punishment for transporting those specified controlled substances within the state between noncontiguous counties is imprisonment in the county jail for three, six, or nine years. (Health & Saf. Code, § 11379.5.)

9) Provides, notwithstanding any other provision of law, that every person who unlawfully possesses any amount of a substance containing cocaine base, a substance containing cocaine, a substance containing heroin, a substance containing methamphetamine, a crystalline substance containing phencyclidine, a liquid substance containing phencyclidine, plant material containing phencyclidine, or a hand-rolled cigarette treated with phencyclidine while armed with a loaded, operable firearm is guilty of a felony punishable by imprisonment in the state prison for two, three, or four years. (Health & Saf. Code, § 11370.1, subd. (a).)

10) Defines "armed with" to mean having available for immediate offensive or defensive use. (Health & Saf. Code, § 11370.1, subd. (a).)

11) Provides that any person who is convicted of the above offense is ineligible for diversion or deferred entry of judgment, as described. (Health & Saf. Code, § 11370.1, subd. (b).)

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

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

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

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

14) Regulates firearms, the possession of firearms, and the carrying of firearms. (Pen. Code §§ 23500 et seq.)

15) Provides for an additional year of punishment for a person who is armed with a firearm in the commission or attempted commission of a felony, unless being armed is an element of the offense. (Pen. Code, § 12022, subd. (a)(1).)

FISCAL EFFECT: Unknown.

COMMENTS:

1) **Author's Statement**: According to the author, "Existing law currently outlaws the possession of certain controlled substances such as fentanyl, heroin, and methamphetamine as a misdemeanor. Existing law (HS 11370.1) also outlaws the simple possession of certain drugs while also possessing a loaded, operable firearm and classifies this conduct as a felony.

   "However, the drugs mentioned in HS 11370.1 (cocaine, crack cocaine, heroin, methamphetamine, and PCP) do not include fentanyl by name. Therefore, questions have arisen among law enforcement and the courts as to whether possession of fentanyl while simultaneously possessing a loaded, operable firearm is punishable by law under HS 11370.1 in California.

   "Treating fentanyl possession with a gun differently under the law from those possessing methamphetamine, PCP, cocaine, crack cocaine, and heroin with a gun does not serve public safety, nor does it make sense given the potency and danger of fentanyl as compared with heroin in particular.

   "SB 226 would clarify that possession of a loaded, operable firearm while simultaneously possessing fentanyl is indeed a felony punishable to the same extent as the same conduct involving methamphetamine, heroin, PCP, cocaine, and crack cocaine."

2) **Possession of a Controlled Substance While Armed**: Under current law, possession of specified controlled substances, including heroin and fentanyl, is generally a misdemeanor. (See Health & Saf. Code, §§ 11377 & 11350.) However, possession of any amount of a substance containing cocaine base, cocaine, heroin, methamphetamine, or PCP while armed

with a loaded, operable firearm is a felony punishable by imprisonment in the state prison for two, three, or four years. (Health & Saf. Code, § 11370.1, subd. (a).)

Notably, this law does not require that the firearm be unlawfully possessed or that the person otherwise be engaged in unlawful activity related to the firearm. In other words, a person in lawful possession of a loaded, operable firearm who is also in possession of one of the specified controlled substances can be charged with a felony. Moreover, the person is considered armed with the firearm even if it is not on their person. They do not even need to know that it is loaded and operable, just that it is in a readily accessible place. (See CALCRIM No. 2303; *People v. White* (2016) 243 Cal.App.4th 1354, 1362.)

The controlled substance need only be a "usable amount." A "usable amount" is defined as "a quantity that is enough to be used by someone as a controlled substance. Useless traces [or debris] are not usable amounts. On the other hand, a usable amount does not have to be enough, in either amount or strength, to affect the user." (See CALCRIM No. 2303.)

Though these specific controlled substances are singled out in statute for enhanced punishment if the person has an accessible firearm that may be lawfully possessed, there is no requirement that the person know which specific controlled substance they actually possess. They need only know the substance's nature or character as a controlled substance. (*People v. Palaschak* (1995) 9 Cal.4th 1236, 1242; *People v. Horn* (1960) 187 Cal.App.2d 68, 74-75; CALCRIM No. 2303.)

This bill would add a substance containing fentanyl to the list of controlled substances in this statute. What this bill does is punish the personal possession of fentanyl if there is a firearm accessible. Possession for sales, sales, and distribution of fentanyl is already a felony under current law. A person who possesses these substances for purposes of sales is guilty of a felony punishable in the county jail by two, three, or four years. (Health & Saf. Code, § 11351.) If the person is armed with a firearm, an additional year may be added. (Pen. Code, § 12022, subd. (a)(1).) If a person transports, sells, furnishes, administers, or gives away, fentanyl, the punishment is three, six, or nine years in state prison. (Health & Saf. Code, § 11352.) Again, if the person is armed, an additional year may be added. (Pen. Code, § 12022, subd. (a)(1).)

Moreover, because fentanyl is frequently mixed with other drugs without the knowledge of the user, the person may not even know they possess fentanyl. (https://www.npr.org/sections/health-shots/2018/03/29/597717402/fentanyl-laced-cocaine-becoming-a-deadly-problem-among-drug-users.) And unless fentanyl is the only drug possessed, possession of a controlled substance is covered by other laws – e.g., possession of cocaine, heroin, methamphetamine, etc. (Health & Saf. Code, §§ 11370.1 [possession while armed with a firearm] 11350 [possession of cocaine or heroin] & 11377 [possession of methamphetamine].)

3) **Harsher Sentences Unlikely to Reduce Drug Use or Deter Criminal Conduct:** Ample research on the impact of increasing penalties for drug offenses on criminal behavior has called into question the effectiveness of such measures. In a report examining the relationship between prison terms and drug misuse, PEW Charitable Trusts found "[n]o relationship between drug imprisonment rates and states' drug problems," finding that "higher rates of drug imprisonment did not translate into lower rates of drug use, arrests, or overdose deaths."

(https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2018/03/more-imprisonment-does-not-reduce-state-drug-problems; see https://www.ccjrc.org/wp-content/uploads/2016/02/Correctional_and_Sentencing_Reform_for_Drug_Offenders.pdf)

This may be because of the limited deterrent effect of harsher sentences generally. According the U.S. Department of Justice, "Laws and policies designed to deter crime by focusing mainly on increasing the severity of punishment are ineffective partly because criminals know little about the sanctions for specific crimes. More severe punishments do not 'chasten' individuals convicted of crimes, and prisons may exacerbate recidivism." (https://nij.ojp.gov/topics/articles/five-things-about-deterrence)

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

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

Will applying enhanced punishment to a person who possess this controlled substance for personal use, while having access to what may be a lawfully possessed firearm, reduce the amount drugs on California streets or reduce the threat of injury from a firearm? The evidence to date suggests that it will not.

4) **Practical Considerations:** The criminal offense this bill would amend currently applies only to *unlawful* possession of specified controlled substances. Under current law, it is unlawful to possess these specified controlled substances "unless upon the written prescription of a physician, dentist, podiatrist, or veterinarian licensed to practice in this state," as specified. (See Health & Saf. Code, §§ 11377 & 11350.) In other words, it is not a criminal offense to possess any of the specified controlled substances if possession is pursuant to a valid prescription.

   This bill would add fentanyl to this list of specified controlled substances subject to increased punishment. It would also state that it is not a crime to lawfully possess fentanyl, including with a valid prescription. This language is both confusing and unnecessary because it restates what the law already is but only as to fentanyl.

4) **Argument in Support**: According to the *California District Attorneys Association,* the sponsor of this bill, "While fentanyl has occasionally been seen on the streets since the 1970s, the use of this illicit substance has exploded since 2016, resulting in untold numbers of deaths and contributing to the opioid crisis, which has increased homelessness, destroyed families, and wrecked the futures of many of our young people. Because the drug is so highly addictive, a user might need multiple pills per day to avoid experiencing the excruciating symptoms of withdrawal.

   "As a valuable commodity on the streets fetching up to $20 per pill, a possessor of fentanyl who also carries a loaded, operable firearm to protect their 'stash' presents a significant

public safety threat. Gun violence is a large concern in this state generally, but coupling the opioid epidemic with firearms presents a powder keg of risk.

"SB 226 remedies the inconsistency in treatment between heroin, which is already explicitly listed in HS 11370.1 as a drug for which simultaneous firearm possession is outlawed, and fentanyl, which is up to 50 times stronger than heroin and yet is not explicitly mentioned in that statute. SB 226 thereby protects California's public in a tangible way, while providing the courts with clarity on this important issue."

5) **Argument in Opposition**: According to the *California Public Defenders Association*: "Much like SB 1070 from last session, SB 226 relies on outdated War on Drugs mentality and would end up creating more harm than it would prevent. Relying on ever increasing penalties for drug offenses has been extensively researched, and we can therefore make some educated predictions about the outcome of bills like SB 226: it would not reduce the distribution of fentanyl, nor would it prevent overdoses; it would reduce neither the supply of drugs or the demand for them; and worse, it could actually discourage effective methods of dealing with the opioid crisis. One study found that states that increase their incarceration rates do not experience a decrease in drug use. When a drug seller is incarcerated, the supply of drugs is not reduced nor is the drug market impacted. Because the drug market is driven by demand rather than supply, research indicates that an incarcerated seller will simply be replaced by another individual to fill the market demand.

   "Importantly, the code section that SB 226 seeks to broaden does not require that a firearm be used in any way. Mere presence of the firearm is enough for a conviction, even if the firearm is legally owned and properly and safely stored.

   "Many of the people who will be incarcerated by this bill will be addicts themselves. A Bureau of Justice report found that 70% of people incarcerated for drug trafficking in state prisons used drugs prior to the offense. These individuals often distribute drugs, not for profit, but as a way to support their own substance use disorder. Often, these "traffickers" are not high-level members of any organized drug distribution scheme but are rather furnishing narcotics to friends and family members.

   "The imposition of harsh penalties for distribution could undermine California's Good Samaritan law, which encourages people to contact emergency services in case of an overdose. The threat of police involvement and harsh prison sentences may make an individual hesitant to call emergency services or run from the scene rather than help the victim.

   "The War on Drugs has had a devastating impact on communities across California. The unintended consequences of using jails and prisons to deal with a public health issue will take decades to unravel. Rather than diminishing the harms of drug misuse, criminalizing people who sell and use drugs amplifies the risk of fatal overdoses and diseases, increases stigma and marginalization, and drives people away from needed treatment, health, and harm reduction services. Why should California now apply that sort of ineffective and outmoded strategy to yet another controlled substance?

   "California voters have signaled, again and again, their preference for using a health approach to drug offenses, and their desire to unwind the failed War on Drugs. Reversing

course and increasing criminal penalties not only flies in the face of multiple statewide elections, but it is also simply bad policy. Societal harms associated with drugs are not alleviated by ever longer prison sentences. Rather, these increased penalties impose their own harm, devastating vulnerable communities, particularly communities of color. For of these reasons, SB 226 would take California in the wrong direction. (Footnotes omitted.)"

6) **Related Legislation**:

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

   b) AB 2045 (Hoover), would increase the penalty for the crime of inducing a minor to sell or possess any controlled substance within 1,000 feet of a school crime as it relates to fentanyl to 5, 8, or 11 years and makes the 1,000 enhancement applicable to offenses involving fentanyl. AB 2045 was held in suspense in the Assembly Appropriations Committee.

   c) AB 2336 (Villapudua), of the 2023-2024 Legislative Session, would have added a substance containing a heroin analog, a substance containing fentanyl, and a substance containing a fentanyl analog to the list of controlled substances for which possession of those substances while armed with a loaded and operable firearm is a felony punishable in state prison by two, three, or four years. As to fentanyl, AB 675 would have also required knowledge that the specific controlled substance possessed was fentanyl. AB 2336 was held in the Assembly Appropriations Committee.

   d) AB 2341 (V. Fong), would prohibit the granting of credits to any inmate serving a sentence for a fentanyl-related offense, as specified. The hearing AB 2341 was canceled at the request of the author.

7) **Prior Legislation**:

   a) AB 675 (Soria), of the 2023-2024 Legislative Session, was substantially similar to AB 2336. AB 675 was held in the Assembly Appropriations Committee.

   b) SB 1070 (Melendez), of the 2021-2022 Legislative Session, would have added oxycodone and fentanyl to the list of controlled substances for which possession of those substances while armed with a loaded and operable firearm is a felony. Hearing on SB 1070 in the Senate Public Safety Committee was canceled at the request of the author.

REGISTERED SUPPORT / OPPOSITION:

Support

Arcadia Police Officers' Association
Brooke Jenkins, San Francisco District Attorney
Burbank Police Officers' Association
California Association of Highway Patrolmen
California Coalition of School Safety Professionals
California District Attorneys Association
California Police Chiefs Association
California Reserve Peace Officers Association
California State Sheriffs' Association
City of Laguna Niguel
City of Turlock
Claremont Police Officers Association
Corona Police Officers Association
Crime Victims Alliance
Culver City Police Officers' Association
Deputy Sheriffs' Association of Monterey County
Fullerton Police Officers' Association
League of California Cities
Los Angeles School Police Officers Association
Murrieta Police Officers' Association
Newport Beach Police Association
Novato Police Officers Association
Palos Verdes Police Officers Association
Peace Officers Research Association of California (PORAC)
Placer County Deputy Sheriffs' Assocation
Pomona Police Officers' Association
Riverside Police Officers Association
Riverside Sheriffs' Association
San Bernardino County
San Bernardino; County of
San Diegans Against Crime
San Diego Deputy District Attorneys Association
San Joaquin County District Attorney's Office
Santa Ana Police Officers Association
Take a Stand Stanislaus
Upland Police Officers Association
Ventura County Office of The District Attorney

1 Private Individual

Opposition

ACLU California Action
California Attorneys for Criminal Justice
California Public Defenders Association
Drug Policy Alliance
Ella Baker Center for Human Rights

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

Amended Mock-up for 2023-2024 SB-226 (Alvarado-Gil (S))

Mock-up based on Version Number 97 - Amended Assembly 6/13/23
Submitted by: Staff Name, Office Name

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

SECTION 1. Section 11370.1 of the Health and Safety Code is amended to read:

11370.1. (a) **(1)** Notwithstanding Section 11350 or 11377 or any other provision of law, **and except as provided in subdivision (2),** a person who unlawfully possesses any amount of a substance containing cocaine base, a substance containing cocaine, a substance containing heroin, a substance containing methamphetamine, a substance containing fentanyl, a crystalline substance containing phencyclidine, a liquid substance containing phencyclidine, plant material containing phencyclidine, or a hand-rolled cigarette treated with phencyclidine while armed with a loaded, operable firearm is guilty of a felony punishable by imprisonment in the state prison for two, three, or four years.

(2) Where the substance possessed pursuant to paragraph (1) is one containing fentanyl, the person shall have knowledge that the specific controlled substance possessed is fentanyl.

(b) Subdivision (a) does not apply to any person lawfully possessing fentanyl, including with a valid prescription.

(c) As used in subdivision (a), "armed with" means having available for immediate offensive or defensive use.

(d) Any person who is convicted under this section shall be ineligible for diversion or deferred entry of judgment under Chapter 2.5 (commencing with Section 1000) of Title 6 of Part 2 of the Penal Code.

SEC. 2. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.

Staff name
Office name
06/28/2024