California State Assembly

PUBLIC SAFETY

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AGENDA

Tuesday, April 11, 2023
9 a.m. -- State Capitol, Room 126

PART II Analyses

AB 1133 (Schiavo) through AB 1746 (Hoover)

Date of Hearing: April 11, 2023
Counsel: Mureed Rasool

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Reginald Byron Jones-Sawyer, Sr., Chair

AB 1133 (Schiavo) – As Amended March 16, 2023

As Proposed to be Amended in Committee

SUMMARY: Requires the Department of Justice (DOJ) to develop a standardized curriculum regulating the licensing process to carry a concealed weapon (CCW). Specifically, **this bill**:

1) Removes the requirement that CCW licensing authorities publish for the general public, the standards for the required live fire shooting exercises.

2) Requires the DOJ to develop, update, maintain, and publish standardized curricula for all CCW license courses, including original-issue and renewals.

3) Requires the DOJ to develop and maintain a library of standardized test questions for use in populating standardized CCW tests.

4) Requires the DOJ to develop, evaluate, maintain, and publish ethical and professional standards for CCW instructors.

5) Provides that CCW instructors must have a certification by the DOJ in order to provide a CCW course training.

6) Removes the authorization CCW licensing authorities have to require, as part of process for obtaining a CCW license, a community college course certified by the Commission on Peace Officer Standards and Training (POST).

7) Requires that DOJ develop, update, and maintain a public web portal that provides free access to documents containing CCW informational materials, sample test questions, and the ethical and professional standards required of certified CCW instructors.

8) States that a CCW applicant must register on the DOJ web portal and take a written examination from the web portal.

9) States that the written examination for CCW applicants shall consist of no less than 30, and no more than 50 questions, which must be scored automatically on DOJ's web portal and immediately made available to the applicant and the applicant's instructor.

10) Removes the exemption for certified CCW course instructors had from needing to take a CCW course in order to obtain a CCW license renewal.

11) States that a passing score for the written examination must be no less than 80% correct.

12) Provides that a CCW applicant who fails the written examination may retake it within a 30-day period. If the applicant fails it again within that time period, the applicant must wait 60 days before any subsequent test can be taken. If an applicant fails four times within a one-year period following their first attempt, the applicant must wait one year before taking the examination again.

13) Requires applicants taking the written examination to pay a reasonable fee to the DOJ and states that the fees must be used to service, maintain, and administer the web portal for the written examination.

14) Requires CCW instructors to keep records, for no less than five years, of each applicant who has participated in their CCW course. The records shall contain the following information:

    a) Applicant's California driver's license number;

    b) Date of birth;

    c) Residential address;

    d) Address where firearms are registered;

    e) Type of class taken;

    f) Whether original-issue or renewal issue training was conducted;

    g) The make, model, and serial number of each firearm the applicant intended to use as their CCW firearm;

    h) The score of the written examination;

    i) The score of the range qualification exam; and,

    j) Whether a certificate of completion was issued to the applicant.

15) Requires a CCW instructor, for each applicant receiving a certificate of completion, to provide a sworn statement, stating that the applicant successfully met the curriculum requirements, passed the written examination, and passed the range qualifications. The sworn statement must be signed by the instructor and made part of the certificate of completion. Failure to do so will result in a revocation of the instructor's certification. A knowing or willingly false sworn statement is punishable as an infraction.

16) Requires all CCW applicants to submit to the issuing agency a certificate of completion, as provided by a CCW instructor. Also requires applicants to attach to their application a receipt and test score from the written examination.

17) Provides that all CCW licensing authorities must retain electronic or paper copies of an applicant's certificate of completion for a minimum of five years.

18) Removes a prohibition that prevents CCW applicants from being charged a training course fee prior to a determination of good cause.

19) States that CCW licensing authorities must refer applicants only to instructors certified by the DOJ.

20) Delays implementation of the standardized curricula, written examination, and instructor certification until January 1, 2026.

EXISTING LAW:

1) Prohibits the possession of firearms in most public areas, with specified exceptions. (Pen. Code, §§ 25300 *et seq*.)

2) Exempts persons with CCW licenses from the laws prohibiting possessing a firearm in a public area. (Pen. Code, § 25655.)

3) States that the sheriff of a county may issue a CCW license upon proof of an applicant's good moral character, good cause for the license, completion of a specified training course, and certain residency requirements. (Pen. Code, § 26150.)

4) States that the head of a city or county's police department may issue a CCW license upon proof of an applicant's good moral character, good cause for the license, completion of a specified training course, and certain residency requirements. (Pen. Code, § 26155.)

5) Provides that any sheriff or police chief may issue a specified CCW license to one of their peace officers upon proof of an applicant's good moral character, good cause for the license, and proof of peace officer status. The sheriff or police chief may consider the applicant's peace officer status for the purpose of issuing a license. (Pen. Code, § 26170.)

6) Requires every licensing authority issuing CCW licenses to publish and make available written policies summarizing CCW licensing requirements. (Pen. Code, § 26160.)

7) Provides that new CCW applicants must take a course of training accepted by the licensing authority that meets the following minimum criteria:

   a) Be no less than 8 hours and no more than 16 hours in length;

   b) Include instruction on firearm safety, firearm handling, shooting technique, and laws regarding permissible use of a firearm; and,

   c) Live-fire shooting exercises that include demonstration by the applicant of safe handling and shooting proficiency with each firearm the applicant is applying to be licensed for. (Pen. Code, § 26165, subd. (a).)

8) Provides that CCW applicants seeking to renew their license may take a course no less than four hours in length that covers instruction on, among other things, firearm safety, handling, shooting technique, and a live-fire shooting exercise, as specified. (Pen. Code, § 26165, subd. (d).)

9) States that a CCW licensing authority must create and make publicly available the standards it uses for live-fire shooting exercises. Such standards must include the minimum number of rounds to be fired and the minimum passing scores from specified firing distances. (Pen. Code, § 26165, subd. (b).)

10) Authorizes a CCW licensing authority to require a POST-certified community college course, for a maximum duration of up to 24 hours, if the requirement applies uniformly to all CCW applicants without exception. (Pen. Code, § 26165, subd. (c).)

11) Requires that the DOJ develop a standard, uniform CCW license to be used throughout the state and requires that the license bear the licensee's name, occupation, residence, business address, age, height, weight, eye color, hair color, reason for desiring CCW, description of the specific firearm authorized under the CCW license which includes the manufacturer name, serial number, and caliber of the firearm. (Pen. Code, § 26175.)

12) Requires an applicant to submit fingerprints to the DOJ before a CCW license can be issued; however, does not require submission of fingerprints in cases where an applicant has previously applied for a CCW license, or if a current licensee has previously forwarded their fingerprints to the DOJ. (Pen. Code, § 26185.)

13) Requires a licensing authority to report to the DOJ the reasons for issuing, revoking, denying, modifying or denying a modification to a CCW license, and requires the DOJ to record and tabulate such information by county and licensing authority. (Pen. Code, § 26225.)

14) Provides that a CCW license can be valid for any period of time not exceeding two years from the date of the license for most individuals. (Pen. Code, § 26220.)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "Mass shootings have become a common occurrence in this country. It is beneficial to our public's safety to have less firearms on the streets. AB 1133 will better educate those who want to carry in public and keep our community safer from the unaware. I am proud to champion this bill for it is a small stepping stone, on a bigger path, to a safer California."

2) **Firearm Safety Training**: The impact that firearm safety training can have on outcomes depends on the actual content of the programs, the efficacy of the programs in conveying relevant information, and whether it causes gun owners to modify their behavior in accordance with the training. (Research and Development (RAND) Corporation. *The Effects of Firearm Safety Training Requirements*. (Updated Jan. 10, 2023) <https://www.rand.org/research/gun-policy/analysis/firearm-safety-training-requirements.html> [as of Apr. 6, 2023].) Advocates of these policies say that regulations

ensure a minimum competency for safe gun use, similar to how drivers' tests are used to determine whether someone is able to safely drive a car. (*Ibid.*) Opponents of such laws suggest that they create unwarranted costs and barriers, and that the right to own a firearm should not be conditional on training. (*Ibid.*) According to RAND, further research is needed to determine whether firearm safety training courses lead to individuals being able to better use their weapons for self-defense or whether courses sufficiently prepare gun owners for a defensive situation. (*Ibid.*)

That said, Everytown For Gun Safety has pointed out one self-defense experiment involving a firearm simulator, where participants with lower levels of firearm training and experience performed worse than those with higher levels of training. (Everytown. *Gun Owner Safety Training*. <https://www.everytown.org/solutions/safety-training/> [as of Apr. 6, 2023].) And most people agree that high safety standards are critical in issuing concealed carry permits. (*Ibid.*) Furthermore, common sense suggests that those who have higher levels of training for a certain situation will tend to react in accordance with their training.

Currently, state law requires CCW applicants to undergo a training course that among other things, includes firearm safety, handling, shooting technique, laws on permissible use of a firearm, and live-fire shooting exercises. (Pen. Code, § 26165.) Aside from those minimum requirements, the course may be any that is acceptable to the licensing authority and there is no substantial state guideline as to what those courses should look like. (*Id.*) This bill would require the DOJ to establish a statewide standardized curricula for what needs to be taught and tested in a CCW course. This bill would also require CCW instructors be certified by the DOJ and create a uniform standard that CCW instructors would need to abide by in order to keep their certification. By doing so, this bill seeks to ensure the effectiveness of CCW courses by regulating their content.

3) **Argument in Support**: None received.

4) **Argument in Opposition**: According to the *California State Sheriffs' Association*, "This bill is a solution in search of a problem. Existing law sets minimum lengths for CCW courses (not less than eight hours, but shall not be required to exceed 16 hours in length); requires courses to include instruction on firearm safety, firearm handling, shooting technique, and laws regarding the permissible use of a firearm; and requires the course to include live-fire shooting exercises on a firing range and to include a demonstration by the applicant of safe handling of, and shooting proficiency with, each firearm that the applicant is applying to be licensed to carry. Existing law also requires a licensing authority to establish, and make available to the public, the standards it uses when issuing licenses with regards to the required live-fire shooting exercises, including, but not limited to, a minimum number of rounds to be fired and minimum passing scores from specified firing distances.

We have not been made aware of any issues that necessitate this bill. Statute already establishes a fairly standard set of criteria, and we are not familiar with any indication that the existing training requirements are resulting in poorly trained licensees or incidents that result from insufficient training. We believe this bill will be overly burdensome toward little discernible benefit, while creating costs and workload for DOJ for which they are unlikely to be funded."

5) **Related Legislation**: SB 2 (Portantino) would, among other things, require CCW courses to include components on mental health, a written examination requirement, and would require CCW instructors to be certified by the DOJ. SB 2 is set to be heard on April 10 in the Senate Appropriations Committee.

6) **Prior Legislation**:

   a) SB 918 (Portantino) of the 2021-2022 Legislative Session, was substantially similar to SB 2. SB 918 failed passage on the Assembly floor.

   b) AB 2103 (Gloria) Chapter 752, Statutes of 2018, among other things, established a minimum of 8 hours for a CCW course, required instruction on firearm safety and handling, and required a live-fire shooting exercise.

   c) AB 1563 (Donnelly) of the 2013-2014 Legislative Session, among other things, would have required the DOJ to issue a license to carry a concealed firearm. AB 1563 failed passage in the Assembly Public Safety Committee.

REGISTERED SUPPORT / OPPOSITION:

Support

None received.

Opposition

California State Sheriffs' Association
Gun Owners of California, INC.

Analysis Prepared by: Mureed Rasool / PUB. S. / (916) 319-3744

Amended Mock-up for 2023-2024 AB-1133 (Schiavo (A))

Mock-up based on Version Number 98 - Amended Assembly 3/16/23
Submitted by: Mureed Rasool, Assembly Public Safety Committee

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

SECTION 1. Section 26165 of the Penal Code is amended to read:

26165. (a) For new license applicants, the course of training for issuance of a license under Section 26150 or 26155 may be any course acceptable to the licensing authority that meets all of the following criteria:

(1) The course shall be no less than eight hours, but shall not be required to exceed 16 hours in length.

(2) The course shall include instruction on firearm safety, firearm handling, shooting technique, and laws regarding the permissible use of a firearm.

(3) The course shall include live-fire shooting exercises on a firing range and shall include a demonstration by the applicant of safe handling of, and shooting proficiency with, each firearm that the applicant is applying to be licensed to carry.

(b) For license renewal applicants, the course of training may be any course acceptable to the licensing authority, shall be no less than four hours, and shall satisfy the requirements of paragraphs (2) and (3) of subdivision (a).

~~(b)~~ **(c)** The Department of Justice shall develop, evaluate, update, maintain, and publish standardized curricula for original-issue and renewal-issue instruction for a license to carry a pistol, revolver, or other firearm capable of being concealed upon the person, and shall develop, evaluate, update, maintain, and publish, where appropriate, test questions, written examinations, and testing formats for use in evaluating applicant class performance.

~~(c)~~ **(d)** The department shall develop and maintain a library of standardized test questions, which shall be used to populate standardized tests to be taken by applicants, such that many possible combinations of test questions are available for each written examination.

~~(d)~~ **(e)**The department shall develop, evaluate, update, maintain, and publish ethical and professional standards, which all concealed carry instructors certified by the department shall follow in order to remain certified.

~~(e)~~ **(f)** The department shall develop, update, maintain, and publish a web portal, accessible to the general public, which shall make available, at no cost, downloadable-format documents containing a concealed carry knowledge handbook, other informational materials, sample test questions, and the ethical and professional standards applying to concealed carry instructors certified by the department.

~~(f)~~ **(g)** Any resident of this state making an application to carry a concealed firearm shall register on the state-maintained web portal, described in subdivision (e), and shall take a written examination offered and administered by the web portal.

~~(g)~~ **(h)** The written examination made available to applicants for a license to carry a pistol, revolver, or other firearm capable of being concealed upon the person on the state-maintained web portal shall consist of no fewer than 30 questions, and no more than 50 questions, and shall be automatically scored on the web portal, with that score immediately being made available to the applicant and the applicant's certified instructor.

~~(h)~~ **(i)**A passing score of the written examination shall be no less than 80 percent correct answers of all questions on the examination. If the applicant fails the written examination, the applicant may retake the examination a maximum of one more time within a 30-day period. If the applicant fails the examination two times within a 30-day period, the applicant shall wait 60 days from the time of the last attempt at passing the examination to retake the examination a third time. Each subsequent failure shall require an additional 60-day waiting period between retaking written examinations. If an applicant fails the examination four times within one year following their first attempt, the applicant shall wait until one year following their first attempt before taking the examination again.

~~(i)~~ **(j)**Applicants taking the written examination on the state-maintained web portal shall pay a reasonable fee to the department. Funds collected by the department from fees paid by applicants for taking online written examinations shall be used, upon appropriation by the Legislature, in the service, maintenance, and administration of the web portal specified in subdivision (e).

~~(j)~~ **(k)**Each concealed carry instructor certified by the department shall keep and maintain records, for a period of no less than five years, of each applicant who has received instruction from the certified instructor, and the records shall contain, at a minimum, the applicant's identity, California driver's license number, date of birth, residential address, address where firearms are registered, type of class taken, whether original-issue, renewal-issue, or other training was offered, the make, model, and serial number of each firearm the applicant intended to apply to their permit, the applicant's written test score, the applicant's range qualification score, and whether the certified instructor issued a certificate of completion to the applicant.

~~(k)~~ **(l)**Each concealed carry instructor certified by the department shall, for each applicant who receives a certificate of completion for any class taken by the certified instructor, provide a sworn statement verifying~~, upon penalty of perjury,~~ that the applicant has successfully met the curriculum requirements, successfully passed the written examination, and successfully passed the range qualification. The sworn statement shall be signed by the certified instructor, and shall be made part of the certificate of completion. **Any instructor knowingly or willingly making a false sworn statement is punishable as an infraction.** If the above requirements are not met, the instructor may be subject to revocation of their **certification** ~~license~~.

~~(l)~~ **(m)** Each original-issue and renewal-issue applicant shall submit to their issuing agency, upon application for a permit, a certificate of completion bearing a sworn written statement from the concealed carry instructor certified by the department, bearing the instructor's signature, stating that the applicant has successfully passed the written examination and successfully passed the range qualification. The application to the issuing agency shall include a receipt and test score from the state-maintained web portal where the applicant took the written examination.

~~(m)~~ **(n)**Each issuing authority shall retain an electronic or paper copy of the applicant's certificate of completion, for a minimum of five years.

~~(n)~~ **(o)** Each issuing authority shall direct and refer all applicants only to those concealed carry instructors certified by the department meeting the ethical and professional standards as determined by the department, and who provide, at a minimum, the entire standardized curriculum and written examination, as determined by the department.

(p) Subdivisions (c) through (o) of this section shall become operative on January 1, 2026.

SEC. 2. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution for certain costs that may be incurred by a local agency or school district because, in that regard, this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.

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

Date of Hearing: April 11, 2023
Counsel: Cheryl Anderson

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Reginald Byron Jones-Sawyer, Sr., Chair

AB 1214 (Maienschein) – As Amended April 4, 2023

SUMMARY: Allows defendants to appear by remote technology for certain criminal proceedings that do not involve the presentation of testimonial evidence and provides procedural and technological guidelines for the use of remote technology. Specifies this does not authorize the use of remote technology in court or jury trials. Specifically, **this bill**:

1) Prohibits the use of remote technology for a court or jury trial in all misdemeanor and felony cases.

2) Expands the use of remote technology to allow a defendant in a misdemeanor case, whether in or out of custody, to appear by remote technology, with their agreement and the court's consent, for any proceedings in which no testimonial evidence is taken, as provided.

3) Expands the use of remote technology to allow a defendant in a felony case, to appear by remote technology, if they request and with leave of court, for specified proceedings in which no testimonial evidence is taken – bail hearing, resentencing if the defendant is incarcerated, and motions and hearings, as provided.

4) Provides that a defendant may consent to appear remotely for noncritical portions of criminal proceedings when no testimonial evidence is taken.

5) Requires the waiver of a defendant's personal appearance in a felony matter to include that the defendant knowingly, intelligently, and voluntarily waives the right to be present at the hearing or other proceeding.

6) Provides that if the accused is physically present in court, their counsel, the prosecution, and the judicial officer shall be present in the courtroom.

7) States that when the court conducts a criminal proceeding that will be reported by an official reporter or official reporter pro tempore, the reporter shall be physically present in the same room as the judicial officer.

8) States that when a court interpreter is used in a criminal proceeding, the court interpreter shall be physically present in the same room as the judicial officer.

9) Provides that the court shall require any person who participates remotely in a criminal proceedings to observe proper courtroom decorum, including, but not limited to, observing the same dress code and behavior as would be observed if physically in the courtroom and avoiding any extraneous noise or distractions.

10) Prohibits the court from permitting a prosecuting attorney, defense counsel, the accused, or a witness to appear or to participate in a criminal proceeding through the use of remote technology, and shall continue any criminal proceeding being conducted with the use of remote technology, if any of the following conditions exist and cannot be resolved:

    a) The court does not have the technology necessary to conduct the proceeding remotely;

    b) Although the court has the requisite technology, the quality of the technology or audibility at a proceeding prevents the effective management or resolution of the proceeding;

    c) The quality of the technology or audibility at a proceeding inhibits the court reporter's ability to accurately prepare and certify a transcript of the proceeding;

    d) The court reporter is unable to capture the verbatim record and certify a transcript of any proceeding that is conducted remotely, in whole or in part, to the same extent and in the same manner as if it were not conducted remotely;

    e) A confidential remote proceeding has been infiltrated or otherwise interrupted by unauthorized parties;

    f) The quality of the technology or audibility at a proceeding inhibits the accused's ability to understand or participate in the proceeding;

    g) The quality of the technology or audibility at a proceeding inhibits defense counsel from being able to provide effective representation to the accused; or

    h) The quality of the technology or audibility at a proceeding inhibits a court interpreter's ability to provide language access, including the ability to communicate and translate directly with the accused and the court during the proceeding.

11) Requires the Judicial Council to adopt minimum standards for the courtroom technology necessary to permit remote participation in criminal proceedings. Such standards shall include, but not be limited to, hard-wired internet connections for the judicial officer and court reporter, monitors, dedicated cameras, speakers, and microphones so the judicial officer, court reporter, and court interpreter can appropriately see and hear remote participants, as well as to ensure that remote participants can appropriately see and hear the judicial officer and other courtroom participants.

12) Requires the Judicial Council to adopt other rules and standards as are necessary to implement these policies and provisions.

13) States that a superior court that uses remote technology for criminal proceedings shall post on its internet website a continuing invitation for interested parties, including attorneys, court reporters, and court interpreters, to provide written feedback to the superior court on the use of remote technology in criminal proceedings. Superior courts shall forward copies of the written feedback to the Judicial Council on at least a quarterly basis. The Judicial Council shall compile the written feedback received by the superior courts and provide a copy of the

written feedback to the chairs of the Senate and Assembly Committees on Judiciary and Senate and Assembly Committees on Public Safety, semiannually, commencing July 1, 2024.

14) Defines "remote technology" as meaning by two-way electronic audio-video communication.

15) Sunsets these provisions on January 1, 2026.

16) Prohibits the trial court from retaliating or threatening to retaliate against an official reporter or official reporter pro tempore who notifies the judicial officer that technology or audibility issues are impeding the creation of the verbatim records of a proceeding that includes participation through remote technology.

EXISTING LAW OPERATIVE ON JANUARY 1, 2024:

1) States that in all cases in which the accused is charged with a misdemeanor only, the accused may appear by counsel only, except as provided. If the accused agrees, the initial court appearance, arraignment, and plea may be by video, as provided. (Pen. Code, § 977, subds. (a) & (c).)

2) Provides that if the accused is charged with a misdemeanor offense involving domestic violence the accused shall be present for arraignment and sentencing, and at any time during the proceedings when ordered by the court for the purpose of being informed of the conditions of a protective order. (Pen. Code, § 977, subd. (a)(2).)

3) Provides that if the accused is charged with a misdemeanor offense involving driving under the influence, in an appropriate case, the court may order a defendant to be present for arraignment, at the time of plea, or at sentencing. (Pen. Code, § 977, subd. (a)(3).)

4) States that in all cases in which a felony is charged, except as provided, the accused shall be present at the arraignment, at the time of plea, during the preliminary hearing, during those portions of the trial when evidence is taken before the trier of fact, and at the time of the imposition of sentence. The accused shall be personally present at all other proceedings unless the accused, with leave of court, executes in open court, a written waiver of their right to be personally present. If the accused agrees, the initial court appearance, arraignment, and plea may be by video, as provided. (Pen. Code, § 977, subds. (b)(1) & (c).)

5) Specifies that the accused's executed waiver of their right to be personally present must be with the approval of counsel and filed with the court. However, the court may specifically direct the defendant to be personally present at any particular proceeding or portion thereof. (Pen. Code, § 977, subd. (b)(2).)

6) Provides that the court may permit the initial court appearance and arraignment of defendants held in any state, county, or local facility within the county on felony or misdemeanor charges, except for those defendants who were indicted by a grand jury, to be conducted by two-way electronic audiovideo communication between the defendant and the courtroom in lieu of the physical presence of the defendant in the courtroom. (Pen. Code, § 977, subd. (c)(1).)

7) Provides that if an in-custody defendant is represented by counsel, the attorney shall be present with the defendant at the initial court appearance and arraignment, and may enter a plea during the arraignment. . (Pen. Code, § 977, subd. (c)(1).)

8) Provides, however, if the defendant is represented by counsel at an arraignment on an information in a felony case, and if the defendant does not plead guilty or nolo contendere to any charge, the attorney shall be present with the defendant. Or if the attorney is not present with the defendant, the attorney shall be present in court during the hearing. (Pen. Code, § 977, subd. (c)(1).)

9) Entitles an in-custody defendant to enter their plea while physically present in the courtroom, if they request to do so. If the defendant decides not to exercise the right to be physically present in the courtroom, they shall execute a written waiver of that right.

10) Allows a judge to order an in-custody defendant's personal appearance in court for the initial court appearance and arraignment. In a misdemeanor case, a judge may accept a plea of guilty or no contest from a defendant who is not physically in the courtroom. In a felony case, a judge may accept a plea of guilty or no contest from a defendant who is not physically in the courtroom if the parties stipulate thereto. (Pen. Code, § 977, subd. (c)(1).)

11) Provides that a defendant who does not wish to be personally present for noncritical portions of the trial when no testimonial evidence is taken may make an oral waiver in open court prior to the proceeding or may submit a written request to the court, which the court may grant in its discretion. (Pen. Code, § 977, subd. (c)(2)(A).)

12) Authorizes the court, when a defendant has waived the right to be personally present, to require a defendant held in any correctional facility within the county on felony or misdemeanor charges to be present by two-way electronic audiovideo communication.for noncritical portions of the trial when no testimonial evidence is taken, including, but not limited to: confirmation of the preliminary hearing, status conferences, trial readiness conferences, discovery motions, receipt of records, the setting of the trial date, a motion to vacate the trial date, and motions in limine, (Pen. Code, § 977, subd. (c)(2)(A).)

13) Provides that if an in-custody defendant is represented by counsel, the attorney is not required to be personally present with the defendant for noncritical portions of the trial, if the audiovideo conferencing system or other technology allows for private communication between the defendant and the attorney prior to and during the noncritical portion of trial. Any private communication shall be confidential and privileged. (Pen. Code, § 977, subd. (c)(2)(A).)

14) States that the provisions related to video appearance do not expand or limit the right of a defendant to be personally present with their counsel at a particular proceeding as required by the California Constitution. (Pen. Code, § 977, subd. (c)(2)(B).)

15) Permits the court to allow a defendant to appear by counsel at a trial, hearing, or other proceeding, with or without a written waiver, if the court finds by clear and convincing evidence, all of the following:

a) The defendant is in custody and refusing, without good cause, to appear in court for that particular trial, hearing, or other proceeding;
b) The defendant has been informed of their right and obligation to be personally present in court;
c) The defendant has been informed that the trial, hearing, or other proceeding will proceed without their personal presence;
d) The defendant has been informed that they have the right to remain silent during the trial, hearing, or other proceeding;
e) The defendant has been informed that their absence without good cause will constitute a voluntary waiver of any constitutional or statutory right to confront any witnesses against them or to testify on their own behalf; and,
f) The defendant has been informed whether or not defense counsel will be present. (Pen. Code, § 977, subd. (d)(1).)

16) Requires the court to state the reasons for its findings on the record and cause those findings and reasons to be entered into the minutes. (Pen. Code, § 977, subd. (d)(2).)
17) Provides that if the trial, hearing, or other proceeding lasts more than one day, the court is required to make the findings required by this provision anew for each day that the defendant is absent. (Pen. Code, § 977, subd. (d)(3).)
18) States that these provisions do not apply to any trial, hearing, or other proceeding in which the defendant was personally present in court at the commencement of the trial, hearing, or other proceeding. (Pen. Code, § 977, subd. (d)(4).)

FISCAL EFFECT:

Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "Over the past three years, much has been learned about what is minimally necessary to maintain the integrity of the California judicial system. AB 1214 would establish thoughtful and technological guidelines to protect defendants, ensure interpreters and court reporters can meet their statutory duties, require judges to be physically present, and to restrict certain types of adult criminal proceedings from being conducted remotely."

2) **Defendant's Constitutional Right to be Present at Trial**: A criminal defendant has a constitutional right to be present at trial and at other critical proceedings in the case. That right arises under various provisions of law, including the Due Process Clause of the Fourteenth Amendment of the federal Constitution and under article I, section 15, of the California Constitution. (*People v. Jennings* (2010) 50 Cal.4th 616, 681–682 [due process right to be present arises at stages that are "'critical'" to the trial's outcome and if defendant's presence would contribute to the procedure's fairness]; *People v. Butler* (2009) 46 Cal.4th 847, 861 ["'state constitutional right to be present at trial is generally coextensive with the federal due process right'"].)

   Courts have found that in felony cases the right to be present applies at the following stages: arraignment; plea; preliminary hearing; jury selection (except court discussions with counsel regarding juror hardship excusals or sidebars for brief discussions); those portions of the trial when evidence is taken before the trier of fact; verdict; judgment; imposition of sentence, including any modification of an erroneously imposed sentence or sentencing following

revocation of probation; communications between the judge and a juror; and defense counsel's removal or withdraw. (4 California Criminal Defense Practice § 80.03 (2022).)

7) **Current Laws Regarding Use of Remote Technology in Criminal Cases:** Notwithstanding the right to be present, "[t]he use of video conferencing and other electronic communication technology has been found to be permissible in certain circumstances and for certain proceedings in both criminal and civil cases. In general, the use of such technology is subject to constitutional considerations … and proper security and reliability of the technology with guidelines for the use established by rules of court." (*People v. Sekhon* (2018) 26 Cal.App.5th Supp. 26, 29.)

In spring of 2020, the Judicial Council adopted emergency rules in response to COVID-19. Pursuant to these rules, courts were allowed to conduct criminal proceedings remotely (i.e., by video, audio, or telephonic means), as long as the defendant consented to the remote appearance. These rules sunsetted on June 30, 2022. (Cal. Rules of Court, appen. I, emergency rule 3(a).)

AB 199 (Budget Committee), Chapter 57, Statutes of 2022, extended remote court hearings with specified limitations, including but not limited to, requiring the consent of the defendant and limiting remote hearings to noncritical portions of a felony trial. These provisions are set to sunset on January 1, 2024. (Pen. Code, § 977, as amended by Stats. 2022, Ch. 57, Sec. 12.)

Prior to the emergency rules and AB 199, with the exception of appearances that could be waived, defendants in criminal cases generally appeared in person, with the option of remote appearances limited to in-custody defendants. Beginning January 1, 2024, these provisions of law would be restored. This bill would amend the law that will go into effect on January 1, 2024, and as existed prior to AB 199 and the emergency rules.

This bill would expressly prohibit the use of remote technology in court or jury trials in both misdemeanor and felony cases. That being said, it would expand the use of remote technology to allow a defendant in a misdemeanor case, whether in or out of custody, to appear by remote technology, with their agreement and the court's consent, for any other proceedings in which no testimonial evidence is taken. It would expand the use of remote technology to allow a defendant in a felony case to appear by remote technology, if they request and with leave of court, for specified proceedings in which no testimonial evidence is taken – bail hearing, resentencing if the defendant is incarcerated, and motions and hearings. However, both of these provisions state that the specified remote testimony is allowed, as provided in another provision of the bill. That provision provides that a defendant in a misdemeanor or felony case may consent to appear remotely for *noncritical* portions of criminal proceedings when no testimonial evidence is taken. One could argue this limits the remote proceedings allowed, as specified above, to those in which no testimonial evidence is taken, as well as being noncritical in nature. This author may wish to clarify this.

This bill would further require the defendant's counsel, the prosecution, and the judge to be present in the courtroom if the defendant is physically present. It would also strengthen the law regarding waiver of a defendant's personal presence by expressly requiring it be knowing, intelligent, and voluntary.

Additionally, this bill would prohibit remote proceedings if specified technological or

equipment insufficiencies are present and, for example, prevent the court reporter from being able to create a verbatim transcript or inhibit defense counsel's ability to provide effective representation.

This bill would require the Judicial Council to adopt minimum standards for the courtroom technology necessary to permit remote participation in criminal proceedings and would authorize the Judicial Council to adopt rules and standards necessary to implement these provisions. This bill would require a superior court using remote technology for criminal proceedings to post on its internet website a means for interested parties, including attorneys, court reporters, and court interpreters, to provide feedback regarding the use of remote technology and would require the superior court to send feedback to the Judicial Council on a quarterly basis. This bill would require the Judicial Council, commencing July 1, 2024, to compile the written feedback and provide a copy to the chairs of the Senate and Assembly Committees on Judiciary and Senate and Assembly Committees on Public Safety, semiannually.

This bill would add back a prohibition, similar to one that was in AB 199, against retaliation or threats of retaliation against court reporters.

3) **Argument in Support**: According to the *Service Employees International Union (SEIU),* a co-sponsor of this bill, "Court proceedings are the foundation of our legal system, and while the option for remote offers convenience, the technological limitations require meaningful safeguards to ensure the highest standards for our justice system. For short appearances, remote proceedings can offer convenience. However, the same is not true for trials or proceedings where testimonial evidence is given or where attorney arguments are made – it is critical that everything said in these proceedings be captured by a court reporter and included in the transcript. These types of proceedings must be held in person. Remote proceedings are frequently interrupted by the same disconnections, glitches, and microphone issues interrupting remote meetings. But the serious nature of criminal proceedings, where one word can strip someone's liberty, require thoughtful guidelines to protect the accused and ensure justice is served.

"The existing laws authorizing criminal remote proceedings fail to address remote technology's limitations. The digital divide disproportionately impacts indigent youth, families, and communities of color, which means remote proceedings are least accessible to the same population that is more often convicted and with harsher sentences. The law requires that courts allow defendants to be physically present. However, some courts are not providing this option. Access to remote technology is inequitable, and not everyone has the space to safely and privately participate in remote proceedings. A party should not be prejudiced by lack of access or inability to use technology effectively.

"Many courts have failed to install or provide the necessary equipment for remote proceedings, despite receiving $33.2 million for this purpose. Some courts installed limited equipment but have not provided court reporters with headphones, speakers, or monitors. This is especially troubling because they are solely responsible for ensuring the accuracy of the transcripts for appeals. An inaccurate or incomplete transcript can deny someone justice or strip them of their liberty.

"Lastly, there have been documented incidents of unknown parties infiltrating remote

proceedings and using the chat function to masquerade as lawyers or court employees requesting fees from unsuspecting litigants. This raises serious issues regarding the security of these proceedings and those participating in them. In addition, confidential and privileged conversations between attorneys and clients are also at risk if proceedings are not secure.

4) **Argument in Opposition**: According to *Judicial Council of California*, "...The limits on testimonial evidence will restrict—and potentially significantly so—the ability of defendants to choose the option to appear remotely (new PEN 977.4). Further, the limits on "testimonial evidence" are vague and it is unclear whether the bill is addressing "sworn" testimony versus testimony that is not under oath. It would appear to also apply to written declarations, which are under oath and hence testimonial. Further, the council believes that the limits on remote witness testimony would disadvantage defendants. For example, these limits on the ability of a defendant to choose the remote option for testimony could disadvantage a defendant when:

   o Expert testimony is required by national experts to prove racial discrimination under the Racial Justice Act who would not otherwise be available or whose in person appearance would be cost prohibitive.
   o Testimony of behavioral health experts, who are notably in short supply, is necessary to the defendant's case and the option of remote appearances will assist the defendant.
   o A defendant requests resentencing – where they can submit declarations and testify on their own behalf as well as submit testimony from character witnesses. If the defendant must appear, then they must travel from prison to the county jail, and risk losing their current job, programming and housing

   "These examples underscore that the remote option is an access to justice issue for defendants that should remain an option for them, when appropriate....

   "Requiring that optional remote hearings hinge on the accused's "requests" (thereby prohibiting anyone from asking the accused if they would like the option of appearing remotely) interferes with the individual's access to justice and substantially modifies Penal Code 977(a), which has permitted a defendant charged with misdemeanors to appear by video for arraignment and plea, with their agreement, since 1993....

   "The Judicial Council supports the ultimate goal of AB 1214 to extend authorization for remote criminal proceedings as the council has seen the many benefits of giving individuals the *option* to participate remotely in criminal proceedings. The remote option helps preserve access to justice for many Californians and vulnerable court users when they would otherwise lose time from work, childcare, and other obligations and would incur travel and parking costs for short hearings and appearances. It also preserves equal access to justice and increases the efficiency of court services by continuing to allow courts the flexibility to require in-person court proceedings when it is more appropriate...." (Footnote omitted.)

5) **Related Legislation**:

   a) SB 22 (Umberg) authorizes the use of remote technology in juvenile justice and specified civil and criminal commitment proceedings, but not misdemeanor and felony criminal proceedings, and contains an urgency clause. SB 22 is pending in the Senate

Appropriations Committee.

6) **Prior Legislation:**

a) AB 199 (Committee on Budget), Chapter 57, Statutes of 2022, extended remote court hearings until January 1, 2024 with specified limitations, including but not limited to, requiring consent of the defendant and limiting remote hearings to noncritical portions of a felony trial.

b) AB 1790 (Cervantes), of the 2021-2022 Legislative Session, would have authorized an alleged stalking victim to testify contemporaneously by remote technology, under specified circumstances, if the defendant is representing themselves pro per.

c) AB 700 (Cunningham), Chapter 196, Statutes of 2021, allowed a defendant who is in custody to appear by counsel in criminal proceedings, with or without a written waiver, if the court makes specified findings on the record by clear and convincing evidence.

d) AB 2397 (Frazier), Chapter 167, Statutes of 2014, expanded the appearances that can be made via two-way video conferences between a defendant housed in a county jail and a courtroom to include specified noncritical trial appearances, if the defendant does not wish to be personally present.

e) AB 2102 (Lieu), of the 2009-2010 Legislative Session, would have specified that a defendant may appear in court by video conferencing in specified cases when the defendant consents so long as the matter does not involve the taking of testimony. AB 2102 was passed by the Assembly but was never heard in the Senate Public Safety Committee.

f) AB 2174 (Villines), Chapter 744, Statutes of 2006, provided that the court may order a person charged with a misdemeanor driving under the influence offense to be personally present at arraignment, plea, or sentencing.

g) AB 678 (Gaines), Chapter 747, Statues of 2007, as relevant here, made a series of technical conforming amendments to numerous code sections including as related to waiver of personal appearance through counsel.

REGISTERED SUPPORT / OPPOSITION:

Support

California Public Defenders Association (CPDA) (Co-Sponsor)
California State Council of Service Employees International Union (seiu California) (Co-Sponsor)
Afscme
American Federation of State, County and Municipal Employees, Afl-cio
California Labor Federation, Afl-cio
California School Employees Association

Orange County Employees Association

Opposition

Judicial Council of California

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

Date of Hearing: April 11, 2023
Counsel: Andrew Ironside

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Reginald Byron Jones-Sawyer, Sr., Chair

AB 1260 (Joe Patterson) – As Amended April 6, 2023

SUMMARY: Requires the California Department of Corrections and Rehabilitation (CDCR) to disclose information about changes to an incarcerated person's sentence resulting credits earned or changes to the good conduct credit to the district attorney and local law enforcement agencies. Specifically, **this bill**:

1) Requires CDCR to make an initial determination of the minimum eligible parole date for an incarcerated person based on the sentence of the court, any credits awarded, and the good conduct credit rate established under Proposition 57.

2) Requires CDCR to make a determination of the new release date if, after the initial determination by the department, the department additionally awards to, denies to, or revokes from an incarcerated person the credits, or makes a change in the good conduct credit rate under Proposition 57 and the award denial, revocation, or change would result in an incarcerated person's minimum eligible parole date changing more than six months.

3) Requires CDCR to notify the district attorney and law enforcement in the county in which the incarcerated person was convicted and the county in which the incarcerated person is expected to be released, if the county in which the incarcerated person is expected to be released in known by CDCR, of all of the following:

    a) The length of the sentence imposed by the court;

    b) The amount of time the sentence was changed by each category of credit awarded or by a change in the good conduct credit rate established under Proposition 57;

    c) The percentage of the length of the sentence that the incarcerated person is expected to serve compared to the original sentence; and,

    d) The expected minimum eligible parole date.

4) Requires CDCR, when a person is scheduled to be paroled or placed on post release community supervision but no later than 30 days prior to the scheduled parole date of the incarcerated person, to send to the local law enforcement agencies and the district attorney in both the county in which the incarcerated person was convicted and in which the incarcerated person is schedule to be released information regarding the incarcerated person's term of imprisonment, including all of the following:

    a) The length of the sentence imposed;

b) The amount of time the sentence was changed by each category of credit awarded, denied, or lost, or by changes in the good conduct credit rate, as specified; and,

c) The percentage of the length of the sentence that the incarcerated person has served compared to the original sentence.

EXISTING LAW:

1) Provides that a sentence resulting in imprisonment in state prison, as specified, shall include a period of parole supervision or postrelease community supervision, subject to limited exceptions. (Pen. Code, § 3000, subd. (a)(1).)

2) Establishes postrelease community supervision for persons released from prison after October 1, 2011, or persons who have been deemed to have served their entire term prior to their conviction, unless otherwise prohibited by law. (Pen. Code, § 3450, et seq.)

3) Requires county probation departments to implement postrelease community supervision. (Pen. Code, § 3451, subd. (c)(1).)

4) Provides for a term of parole not to exceed three to five years, as specified, unless the person was convicted of a specified sex offense. (Pen. Code, § 3000, subd. (b).)

5) Requires CDCR to meet with each incarcerated person at least 30 days prior to the incarcerated person's good time release date and shall provide, under guidelines specified by the parole authority or the department, whichever is applicable, the conditions of parole and the length of parole up to the maximum period of time provided by law. (Pen. Code, § 3000, subd. (b)(7).)

6) Provides that the Board of Parole Hearings (BPH) has the power to grant parole to prisoners imprisoned in the state prisons. (Pen. Code, § 3040.)

7) Requires the Board of Parole Hearings (BPH), at least 30 days before it meets to review or consider the parole suitability of any incarcerated person sentenced to a life sentence, to send written notice thereof to the defendant's trial attorney, the district attorney of the county in which the offense was committed, the law enforcement agency that investigated the case, and, if the incarcerated person was convicted of the murder of a peace officer, the law enforcement agency that employed the peace officer at the time of the murder. (Pen. Code, § 3042, subd. (a).)

8) Requires BPH to record all of those hearings and transcribe recordings of those hearings within 30 days of any hearing. (Pen. Code, § 3042, subd. (b).)

9) Requires BPH transcripts, including the transcripts of all prior hearings, to be retained and made available to the public no later than 30 days from the date of the hearing. (Pen. Code, § 3042, subd. (b).)

10) Prohibits an incarcerated person from being released on parole until 60 days from the date of the hearing have elapsed. (Pen. Code, § 3042, subd. (b).)

11) Authorizes the Secretary of CDCR to grant up to 12 additional months of reduction of the sentence to a prisoner who has performed a heroic act in a life-threatening situation, or who has provided exceptional assistance in maintaining the safety and security of a prison. (Pen. Code, § 2935.)

12) Requires CDCR to release to local law enforcement agencies regarding a paroled incarcerated person or an incarcerated person placed on postrelease community supervision all of the following information:

    a) Last, first, and middle names;

    b) Birth date;

    c) Sex, race, height, weight, and hair and eye color;

    d) Date of parole or placement on postrelease community supervision;

    e) Registration status, if the incarcerated person is required to register as a result of a controlled substance, sex, or arson offense;

    f) California Criminal Information Number, FBI number, social security number, and driver's license number;

    g) County of commitment;

    h) A description of scars, marks, and tattoos on the incarcerated person;

    i) Offense or offenses for which the incarcerated person was convicted that resulted in parole or postrelease community supervision in this instance;

    j) Address;

    k) Contact officer and unit;

    l) A digitized image of the photograph and at least a single digit fingerprint of the parolee; and,

    m) A geographic coordinate for the incarcerated person's residence location for use with a Geographical Information System (GIS) or comparable computer program. (Pen. Code, § 3003, subd. (e)(1).)

13) Provides that all people are by nature free and independent and have inalienable rights, including privacy. (Cal. Const., Art. I, § 1.)

14) Provides that the people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny. (Cal. Const., Art. I, § 3, subd. (b)(1).)

15) Declares that the Legislature, mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state. (Gov. Code, § 7921.000.)

16) Provides that the inalienable right to privacy under the California Constitution may exempt certain records, or portions thereof, from disclosure under the California Public Records Act. (Gov. Code, § 7930.000.)

17) Provides that Penal Code sections 11076 and 13202 may operate to exempt criminal offender record information, or portions thereof, from disclosure. (Gov. Code, § 7930.130.)

18) Defines "criminal offender record information" as records and data compiled by criminal justice agencies for purposes of identifying criminal offenders and of maintaining as to each such offender a summary of arrests, pretrial proceedings, the nature and disposition of criminal charges, sentencing, incarceration, rehabilitation, and release. (Pen. Code, § 13102.)

19) Requires an agency to justify withholding any record by demonstrating that the record in question is exempt under express provisions of California Public Records Acts (CPRA), or that on the facts of a particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record. (Gov. Code, § 7922.000.)

20) Provides that the right of access to criminal offender record information does not authorize access of any person or public agency to such information unless such access is otherwise authorized by law. (Gov. Code, § 13201.)

21) Provides that every public agency or bona fide research institution concerned with the prevention or control of crime, the quality of criminal justice, or the custody or correction of offenders may be provided with criminal offender record information, including criminal court records, as required for the performance of its duties, including the conduct of research. (Gov. Code, § 13202.)

22) Provides that criminal offender record information shall be disseminated, whether directly or through any intermediary, only to such agencies as are, or may subsequently be, authorized access to such records by statutes. (Pen. Code, § 11076.)

23) Provides that an incarcerated person, unless otherwise precluded, is eligible to receive good conduct, rehabilitation, and/or education credits to advance the incarcerated person's release date if sentenced to a determinate term or to advance an incarcerated person's initial parole hearing date if sentenced to an indeterminate term with the possibility of parole. (Pen. Code, §§ 2931, 2933 & 2933.05; see also 15 CCR § 3043.4, et seq.)

24) Provides that, in addition to other specified limitations, the only incarcerated person or parolee data which may be released without a valid written authorization from the incarcerated person or parolee to the media or to the public includes that incarcerated person's or parolee's:

    a) Name;

b) Age;

c) Race and/or ethnicity;

d) Birthplace;

e) County of last legal residence;

f) Commitment offense;

g) Date of admission to CDCR and CDCR number;

h) Facility assignments and a general description of behavior;

i) Patient health condition given in short and general terms that do not communicate specific medical information about the individual, such as good, fair, serious, critical, treated and released, or undetermined;

j) Manner of death as natural, homicide, suicide, accidental, or executed; and,

k) Sentencing and release actions, including month and year of current parole eligibility date. (15 CCR § 3261.2(e)(1)-(11).)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "Proposition 57 gave incredible latitude to CDCR when it comes to 'good conduct' credits. By regulation, CDCR is able to change they way it calculates 'good conduct' credits and provides them with immense flexibility on releasing inmates. In some instances, inmates are released from prison to the surprise of District Attorneys and victims. This is what happened with a recent mass shooting and murder in Sacramento, right around the corner from the Capitol.

   "Despite a website outlining current regulations pertaining to the calculation of credits, District Attorneys have told my office that they are unable to replicate CDCR's calculations and CDCR will not disclose to DAs or victims how 'good conduct' credits are awarded in individual cases.

   "DAs, victims and policy makers deserve to know how these credits are being calculated. While an argument could be made that this information should be available via a public records request, AB 1260 is narrowly tailored to provide this information to the people who have a right to know."

2) **Public Disclosure of CDCR Release Credits**: On November 8, 2016, Californians voted on whether to increase rehabilitation services and decrease the state's prison population by approving Proposition 57. Known as The Public Safety and Rehabilitation Act of 2016, Proposition 57 proposed, among other things, to authorize CDCR to award sentence credits for rehabilitation, good behavior, and education. It would require CDCR to pass regulations

to that effect. (https://vig.cdn.sos.ca.gov/2016/general/en/pdf/complete-vig.pdf.) Voters approved Proposition 57 by a margin of nearly 30 points. (https://ballotpedia.org/California_Proposition_57,_Parole_for_Non-Violent_Criminals_and_Juvenile_Court_Trial_Requirements_(2016).) And, as required, CDCR has since issued regulations to effectuate the proposition's purpose. (Cal. Const., Art. I, § 32, subd. (b); 15 CCR § 3043, *et seq.*)

This bill would require CDCR to provide law enforcement agencies and district attorneys information related to release credits earned by incarcerated persons. Proponents claim this bill is "narrowly tailored to provide this information to the people who have a right to know." Notably, however, this bill would not prohibit law enforcement or district attorneys from disclosing information received from CDCR. Without such a prohibition, this bill could result in public disclosure of information that likely is protected under the CPRA.

The CPRA provides that every person or entity in California has a right to access information concerning the conduct of the people's business. (Gov. Code, §7921.000; Cal. Const., Art. I, § 3, subd. (b)(1).) Despite the public's fundamental right to access public records, the California Constitution also provides people have inalienable rights, including the right to pursue and obtain privacy. (Cal. Const., Art. I, § 1.) The CPRA provides that the inalienable right to privacy under California Constitution may exempt certain records, or portions thereof, from disclosure under the Act. (Gov. Code, §7930.000.) It specifically states that Penal Code sections 11076 and 13202 may operate to exempt criminal offender record information, or portions thereof, from disclosure. (Gov. Code, § 7930.130.)

If an agency rejects a public records request, the CPRA requires the agency to justify withholding any record by demonstrating that the record in question is exempt under express provisions of CPRA, or that on the facts of a particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record. (Civ. Code, § 7922.000.) Any person may challenge an agency's rejection of a CPRA request by instituting proceedings for injunctive or declarative relief, or for a writ of mandate, in any court of competent jurisdiction, to enforce that person's right to inspect or receive a copy of any public record or class of public records. (Gov. Code, § 7923.)

CDCR has issued regulations governing the disclosure of information relating to an incarcerated person. Specifically, CDCR regulations state, "[T]he only inmate or parolee data which may be released without a valid written authorization from the inmate or parolee to the media or to the public" includes their name, age, race and/or ethnicity, birthplace, count of last legal residence, commitment offense, date of admission, facility assignment, a general description of behavior, a short and general description of an inmate's health or manner of death, and the month and year of their release. (15 CCR § 3261.2(e)(1)-(11).)

CDCR does not currently provide release credit information on persons in its care. The CPRA exempts from disclosure criminal offender record information except to specified entities in the performance of their duties. (Pen. Code, § 13202.) This bill would require CDCR to release such information to law enforcement and district attorneys without any limitation on subsequent dissemination of that information, possibly circumventing current protections under the CPRA.

3) **Institutional Safety at CDCR Facilities:** This bill would require disclosure to law enforcement and district attorneys information on the amount of time an incarcerated person's sentence has changed based on each category of credits awarded. This bill provides no exceptions to or restrictions on disclosure, and disclosure is required before that person's release date has even been set.

   CDCR provides for five categories of credit—Good Conduct Credit, Milestone Completion Credits, Rehabilitative Achievement Credits, Educational Merit Credits, and Extraordinary Conduct Credits. An incarcerated person may receive "up to twelve months of Extraordinary Conduct Credit" for "provid[ing] exceptional assistance in maintaining the safety and security of a prison." (Pen. Code, § 2935; 15 CCR § 3043.6, subd. (a).) Disclosure that an incarcerated person assisted corrections staff may put that person at risk from other incarcerated persons, particularly if the provided information resulted in consequences for other incarcerated persons. Given the ongoing efforts by CDCR to manage security threat groups ("gangs") and other security threats within its institutions, there may be reason for concern that such disclosure would threaten institutional safety and the safety of the people in CDCR's care. Similarly, it could also put the individual in immediate risk from persons who are not incarcerated, such as members of rival gangs, once they are released from prison.

   Exempting disclosure of Extraordinary Conduct Credits earned by an incarcerated person would not eliminate the threat to the individual or the institution. Requiring disclosure for those who have not received Extraordinary Conduct Credits but not for those who have would serve only to highlight who had received such credit. Similarly, exempting disclosure of only the information pertaining to such credits would result in a discrepancy between the credits earned and the release date, highlighting that the incarcerated person had received credits for conduct exempted from disclosure. In either case, the omission of the credits would serve only to highlight that the credits had been earned in service to CDCR.

   If earning credits might threaten their personal safety, will incarcerated persons be disincentivized to "provide exceptional assistance in maintaining the safety and security of a prison"?

4) **Argument in Support**: According to the *California District Attorneys Association*: "With policies and procedures promulgated since the passage of Proposition 57, CDCR has increased the rate at which inmates are awarded good conduct and other credits. These increased credits often result in significant changes to an inmate's minimum eligible parole date and the release of an inmate. District attorneys, local law enforcement, crime victims and survivors are uninformed of these changes and subsequent releases.

   "AB 1260 will require CDCR to notify the district attorney and local law enforcement in the county in which the inmate was convicted, and the county in which the inmate is expected to be released, if CDCR awards additional credits, revokes credits, or changes the rate of accrual of good conduct credits when the minimum eligible parole date changes by more than 6 months. In this way, this bill will increase transparency in the awarding of credits and the calculation of the minimum eligible parole dates by CDCR, and provide critical notice to the affected district attorneys and local law enforcement."

5) **Argument in Opposition**: According to the *Transformative In-Person Workgroup*, "Approved overwhelmingly by voters in 2016, Prop 57 granted CDCR the authority to set

credit earning rates for people who are incarcerated in California State Prisons. This was clearly spelled out in the voter guide by both supporters and opponents. A full list of the five types of credits that CDCR offers as a result of Prop 57 is already posted on their website, and includes a helpful FAQ. Despite this, in recent years a small subset of policymakers remain opposed to the voters'will, and the authority voters have granted CDCR. Repeatedly, an effort has been made to politicize CDCR's shift towards providing more rehabilitative programming for people who are preparing to reenter society, and to use credit earning to incentivize robust participation among the incarcerated population.

"CDCR operates the largest correctional system in the United States and one of the largest in the world. Requiring CDCR to calculate and publish records could be very expensive and could further inflate CDCR's budget. It already costs $106,000 per year to incarcerate someone in state prison for one year, and only 3.4% of that annual cost goes to providing rehabilitation programs to incarcerated persons.

"To be clear, there is no secret release program of incarcerated persons in California. There may be a misunderstanding of how the Department awards credits and how earlier releases are earned through completion of meaningful rehabilitation programs that create better neighbors and safer communities, but that is entirely distinct from what this bill proposes. Again, a simple viewing of the Department's website about Prop 57 goes a long way to understanding this issue. While it's complex, it's not impossible to understand."

6) **Related Legislation**:

   a) AB 15 (Dixon), would have provided that CDCR records pertaining to an incarcerated persons release date and what an incarcerated person did to earn release credits are public records subject to disclosure under the CPRA. AB 15 failed passage in this committee, but was granted reconsideration.

   b) SB 359 (Umberg), would require CDCR to compile data related to credits awarded to incarcerated persons under Proposition 57 and the relationship between the award of each category of credits and the recidivism rates of incarcerated persons who received those credits and to report its findings to the Assembly and Senate Public Safety Committees. SB 359 is pending referral in the Senate Rules Committee.

7) **Prior Legislation**: SB 345 (Bradford), of the 2017-2018 Legislative Session, would have required CDCR, among others, to the extent not prohibited by the CPRA, to conspicuously post on their Internet website, in a searchable manner, all current standards, policies, practices, operating procedures, and education and training materials. Governor Brown vetoed SB 345.

REGISTERED SUPPORT / OPPOSITION:

Support

(EM)power + Resilience Project
California District Attorneys Association
California State Sheriffs' Association

Peace Officers Research Association of California (PORAC)
Placer County District Attorney's Office

Opposition

California Public Defenders Association (CPDA)
Initiate Justice
Initiate Justice Action
The Transformative In-prison Workgroup
Uncommon Law

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

Date of Hearing: April 11, 2023
Chief Counsel: Sandy Uribe

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Reginald Byron Jones-Sawyer, Sr., Chair

AB 1261 (Santiago) – As Amended April 3, 2023

SUMMARY: Codifies the procedures for a noncitizen qualified criminal informant to obtain certification from a certifying entity for purposes of obtaining an S-Visa. Specifically, **this bill**:

1) Authorizes a certifying entity to certify Form I-854 for a qualified criminal informant to obtain an S-Visa.

2) Requires the certifying official to fully complete and sign the Form I-854 certification and to include specific details regarding the qualified criminal informant's helpfulness, including the nature of the crime investigated or prosecuted and a detailed description of the qualified criminal informant's helpfulness or likely helpfulness to the detection or investigation or prosecution of the criminal activity.

3) Provides that a certifying official may only withdraw the certification if the qualified criminal informant refuses to provide information and assistance when reasonably requested.

4) Provides that an informant's criminal history information, immigration history, gang membership, or a belief that a declaration will not be approved by United States Citizenship and Immigration Services are not grounds for a certifying entity to refuse to certify a Form I-854 certification.

5) States that a qualified informant does not have to be present in the United States for certification.

6) Prohibits a certifying official from disclosing the immigration status of the qualified criminal informant for whom Form I-854 certification has been completed, except to comply with federal law or legal process, or if authorized by the informant.

7) Defines a "certifying entity" as any of the following: a state or local law enforcement agency; a prosecutor; a judge; any other authority that has responsibility for the detection or investigation or prosecution of a qualifying crime or criminal activity; and, agencies that have criminal detection or investigative jurisdiction in their respective areas of expertise, including, but not limited to, child protective services, the Civil Rights Department, and the Department of Industrial Relations.

8) Defines a "certifying official" as any of the following: the head of the certifying entity; a person in a supervisory role who has been specifically designated by the head of the certifying entity to issue Form I-854 certifications on behalf of that agency; a judge; or any other certifying official defined under specified federal regulations.

9) Defines "qualified criminal informant" as an individual who meets the following requirements:

   a) The informant must have reliable information about an important aspect of a crime or pending commission of a crime;

   b) The informant must be willing to share that information with United States law enforcement officials or become a witness in court; and,

   c) The informant's presence in the United States is important and leads to the successful investigation or prosecution of that crime.

10) Provides that a victim who submits a Form I-918 Supplement B certification to obtain a U-Visa, or who submits a Form I-914 Supplement B certification to obtain a T-Visa, to a certifying entity does not have to be present in the United States at time of filing and may apply for certification while outside of the country.

11) Requires a certifying entity who does not certify a Form I-918, or Form I-914, Supplement B certification, to provide a written explanation for the denial of the applicable certification.

12) Specifies that apprehension of the suspect who committed the qualifying crime is not required for the victim to request and obtain the Form I-914, or Form I-918, Supplement B certification.

13) Provides that a victim's criminal history information, immigration history, gang membership, or a belief that a declaration will not be approved by United States Citizenship and Immigration Services are not grounds for a certifying entity to refuse to certify the certification.

14) Allows certifying entities to certify a Form I-918, or Form I-914, Supplement B certification, not only for direct victims, but also "indirect victims," and "bystander or witness victims," as defined.

EXISTING FEDERAL LAW:

1) Allows a noncitizen who has been a victim of a crime to receive a U-visa if the Secretary of Homeland Security determines the following:

   a) The petitioner has suffered substantial physical or mental abuse as a result of having been a victim of criminal activity as described;

   b) The petitioner, of if the petitioner is under 16 years of age, the petitioner's parent, possesses information concerning the criminal activity;

   c) The petitioner, or if the petitioner is under 16 years of age, the petitioner's parent, has been helpful, is being helpful, or is likely to be helpful to a Federal, State, or local law enforcement official, to a Federal, State, or local prosecutor, to a Federal or State judge, to the Service, or to other Federal, State, or local authorities investigating or prosecuting

criminal activity as described;

d) The criminal activity violated the laws of the United States or occurred in the United States (including in Indian country and military installations) or the territories and possessions of the United States; and,

e) The criminal activity is that involving one or more of the following or any similar activity in violation of Federal, State, or local criminal law: rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; stalking; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; fraud in foreign labor contracting; or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes. (8 U.S.C. § 1101 (a)(15)(U).)

2) Allows a noncitizen to receive a T-visa if the Secretary of Homeland Security determines the following:

a) The person is or was a victim of a severe form of trafficking in persons (which may include sex or labor trafficking), as defined by federal law;

b) The person is in the United States, American Samoa, the Commonwealth of the Northern Mariana Islands or at a U.S. port of entry due to trafficking;

c) The person has complied with any reasonable request from a law enforcement agency for assistance in the investigation or prosecution of human trafficking; and,

d) The person would suffer extreme hardship involving unusual and severe harm if removed from the United States. (8 U.S.C. § 1101 (a)(15)(T).)

3) Allows an noncitizen to receive an S-Visa if the Attorney General determines:

a) The person is in possession of critical reliable information concerning a criminal organization or enterprise;

b) The person is willing to supply or has supplied such information to Federal or State law enforcement authorities or a Federal or State court; and,

c) The Attorney General determines the persons' presence in the country is essential to the success of an authorized criminal investigation or the successful prosecution of an individual involved in the criminal organization or enterprise. (8 U.S.C. § 1101 (a)(15)(S).)

4) Allows a noncitizen to receive an S-Visa if the Secretary of State and the Attorney General jointly determine that:

a) The person is in possession of critical reliable information concerning a terrorist organization, enterprise, or operation;

b) The person is willing to supply or has supplied such information to Federal law enforcement authorities or a Federal court;

c) The person will be, or has been, placed in danger as a result of providing such information; and,

d) The person is eligible to receive a reward under specified provisions of federal law. (8 U.S.C. § 1101 (a)(15)(S).)

EXISTING STATE LAW:

1) Requires certifying agencies, upon the request of a noncitizen victim of crime or their family member, or licensed attorney representing the victim, to certify victim helpfulness on the applicable form so that they may apply for a U-visa. (Pen. Code, § 679.10, subd. (g).)

2) Creates a rebuttable presumption that a noncitizen victim is helpful, has been helpful, or is likely to be helpful, if the victim has not refused or failed to provide information and assistance reasonably requested by law enforcement. (Pen. Code, § 679.10, subd. (h).)

3) Mandates certifying entities to complete the certification within 30 days of the request, except in cases where the applicant is in immigration removal proceedings, in which case the certification must be completed within 7 days of the request. (Pen. Code, § 679.10, subd. (j).)

4) Requires certifying agencies, upon the request of a noncitizen human-trafficking victim, their family member, or licensed attorney representing the victim, to certify victim helpfulness on the applicable form so that they may apply for a T-visa. (Pen. Code, § 679.11, subd. (f).)

5) Creates a rebuttable presumption that a noncitizen human-trafficking victim is helpful, has been helpful, or is likely to be helpful, if the victim has not refused or failed to provide information and assistance reasonably requested by law enforcement. (Pen. Code, § 679.11, subd. (g).)

6) Mandates certifying entities to complete the certification within 30 days of the request, except in cases where the applicant is in immigration removal proceedings, in which case the certification must be completed within 7 days of the request. (Pen. Code, § 679.11, subd. (i).)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "AB 1261 would solidify pathways for justice and relief for California's most vulnerable residents by codifying the procedures for S visas and clarifying the procedures for U and T visas, aligning the California Penal Code

with existing federal law. Fear of detection, deportation, dismissal, or humiliation often prevent undocumented crime victims or witnesses of crime from seeking assistance from law enforcement agencies. This bill would seek to mitigate said fears by highlighting and clarifying how the undocumented community can protect their status and presence in the State while also seeking justice and relief by cooperating with law enforcement. Federal comprehensive immigration reform may not occur for many years, but AB 1261 is a step in the right direction towards ensuring public safety and justice for all."

2) **S-Visas**: The S-Visa program is for noncitizen criminal informants/witnesses who have reliable information about a criminal/terrorist organization and cooperate with law enforcement. Only law enforcement agencies can initiate S-Visas. Law enforcement agencies use Form 1-854A to request an S visa for a noncitizen witness/criminal informant. After a noncitizen informant has fulfilled their obligation (cooperation), law enforcement agencies can use Form I-854B to authorize an S-visa holder to apply for an adjustment in status to become a lawful permanent resident. (https://www.uscis.gov/green-card/green-card-eligibility/green-card-for-an-informant-s-nonimmigrant [as of April 4, 2023].)

   To be eligible for an S-Visa, the noncitizen must, among other things, possess critical reliable information concerning a criminal organization or enterprise, or a terrorist organization or operation, and must have supplied, or be willing to supply, that information to law enforcement authorities. (8 U.S.C. § 1101 (a)(15)(S).) The two most common types of S-Visas are the S5-Visa and the S6-Visa. The S5-Visa may be granted to a foreign national who has been determined by the Attorney General to possess critical and reliable information concerning a criminal organization or enterprise and who provides that information to federal or state law enforcement or a federal or state court. In contrast, the S6-Visa classification may be granted to a noncitizen who the Attorney General and Secretary of State have determined possesses critical and reliable information concerning terrorism and who is willing to supply, or has supplied, information to *federal* law enforcement authorities or to a *federal* court.

   This bill would codify procedures in state law allowing law enforcement agencies to certify a Form I-854 certification for a qualified criminal informant to obtain an S-Visa and provide requirements that certifying entities and officials must adhere to in the process. While it does not specify applicability to S5-Visas or S6-Visas, practically speaking this will apply to S5-Visas.

3) **T-Visas**: "The Victims of Trafficking and Violence Prevention Act (VTVPA) of 2000 was enacted to strengthen the ability of law enforcement agencies to investigate and prosecute serious crimes and trafficking in persons, while offering protections to victims of such crimes without the immediate risk of being removed from the country. Congress, created the T nonimmigrant status ("T-visa") program out of recognition that human trafficking victims without legal status may otherwise be reluctant to help in the investigation or prosecution of this type of criminal activity. Immigrants can be particularly vulnerable to human trafficking due to a variety of factors, including but not limited to: language barriers, separation from family and friends, lack of understanding of U.S. laws, fear of deportation, and cultural differences. Accordingly, under this law, Congress sought not only to prosecute perpetrators of crimes committed against immigrants, but also to strengthen relations between law enforcement and immigrant communities." (See *U and T Visa Law Enforcement Resource Guide,* Department of Homeland Security, p. 9, <

https://www.dhs.gov/sites/default/files/publications/PM_15-4344%20U%20and%20T%20Visa%20Law%20Enforcement%20Resource%20Guide%2011.pdf >.)

"The T visa allows eligible victims to temporarily remain and work in the U.S., generally for four years. While in T nonimmigrant status, the victim has an ongoing duty to cooperate with law enforcement's reasonable requests for assistance in the investigation or prosecution of human trafficking. If certain conditions are met, an individual with T nonimmigrant status may apply for adjustment to lawful permanent resident status (i.e., apply for a green card in the United States) after three years in the United States or upon completion of the investigation or prosecution, whichever occurs earlier." (*U and T Visa Law Enforcement Resource Guide, supra,* at pp. 9-10.)

To be eligible for a T-Visa, the noncitizen victim must meet four statutory requirements: (1) he or she is or was a victim of a severe form or trafficking in person, as defined by federal law; (2) is in the United States or at a port of entry due to trafficking; (3) has complied with any reasonable request from law enforcement for assistance in the investigation or prosecution of the crime; and (4) would suffer extreme hardship if removed from the United States. (*U and T Visa Law Enforcement Resource Guide, supra,* at p. 9.)

Although declaration is not required for the application (contrast U-Visa below where a certification of cooperation is required), the U.S. Citizenship and Immigration Services gives significant weight to the declaration when considering the T-visa application. (*U and T Visa Law Enforcement Resource Guide, supra,* at pp. 10-11.)

This bill would clarify that an applicant for a T-Visa can request certification by the certifying entity while outside the United States, and that the suspect need not be apprehended for the person to apply. This bill would further provide that law enforcement cannot refuse to complete the corresponding form due to the victim's criminal history information, immigration history, or gang membership, or because the certifying official believes that the Department of Homeland Security will not approve the application. This bill would also require a written explanation when a certifying official denies a Form I-914 certification. Finally, this bill would expand the application procedures not only for direct victims, but also for indirect, and bystander/witness victims.

4) **U-Visas**: In October 2000, Congress, as part of the reauthorization of the Violence Against Women Act, created the U-Visa to provide noncitizen crime victims an avenue to obtain lawful immigration status and thus encourage cooperation with law enforcement by noncitizen victims of crimes other than human trafficking. In order to qualify for a U-Visa: the applicant must have suffered substantial physical or mental abuse as a result of having been a victim of certain qualifying activity; the applicant must possess information concerning such criminal activity; the applicant must be helpful, have been helpful, or likely to be helpful in the investigation or prosecution of a crime; and the criminal activity must have occurred in the U.S. or violated the state or federal law of the United States.

In order to apply for a U-Visa, the qualified noncitizen victim must obtain a certification of a helpfulness from a law enforcement official, prosecutor, judge or federal or state agency authorized to detect investigate or prosecute any of the criminal activities listed in the U-Visa statute. This certification form is called Form I-918.

This bill would make the same changes described above that are being made to T-Visas also apply to U-Visas.

5) **Argument in Support**: According to the *Los Angeles County District Attorney's Office*, the sponsor of this bill, "Law enforcement routinely encounters immigrants 'terrified' to access the criminal legal system – from reporting crimes, to filing for protective orders, to serving as witnesses – for fear of deportation. One study found a majority of prosecutors reported that domestic violence, sexual assault, and human trafficking cases were underreported and more difficult to investigate and/or prosecute as a result of increased immigration enforcement.

"A 2017 survey of law enforcement agencies found that 71% of the agencies believed that when immigrant victims do not cooperate with law enforcement it affects the ability to hold violent perpetrators accountable; 64% found that it affects officer safety; and 69% reported that it affects community safety.

"The criminal justice system depends on all members of the community being willing to report crimes, cooperate with investigators, testify in court and join efforts to prevent future violence — but we cannot expect people to collaborate with a government they don't trust. Research shows that immigrant communities are less likely to contact or cooperate with law enforcement when they are a victim or witness to a crime if they are afraid that law enforcement will investigate their immigration status or the immigration status of their loved ones.

"In the City of Los Angeles, nearly 60% of violent crimes never lead to an arrest. The law enforcement community must do everything in our power to begin breaking down the barriers to the reporting, detecting, investigating, prosecuting and preventing crime. This is especially true to the third of the city's residents who are immigrants and to the nearly 2.2 million non-citizens in the greater Los Angeles area who are at risk of or fearful of being removed by immigration authorities.

"A major tool available to law enforcement to encourage undocumented immigrants to cooperate with authorities to combat crime is the U-Visa, T-Visa and S-Visa programs which provide a legal pathway for noncitizens who report crimes to law enforcement to stay in the country....

"Federal law grants local law enforcement agencies and prosecutors significant discretion to determine who is able to receive these visas in their jurisdictions.

"AB 1261 will help establish fair and transparent policies for these victim/witness visa programs by clarifying the existing law surrounding these programs.

"AB 1261 provides clear definitions of the different types of victims/witnesses eligible to receive visas under these programs. It also provides guidance to law enforcement and prosecutors on the requirements and factors that are not required for a U, T, or S Visa to be issued.

"When a law enforcement agency or prosecutor's office certifies the application for one of these visas, it attests that an applicant has been a victim/witness of a qualifying crime, has

information about the crime, and 'has been helpful, is being helpful, or is likely to be helpful' to law enforcement, prosecutors, judges, or to other federal, state, or local authorities in 'investigating or prosecuting the criminal activity.' The certifying of these visas does not confer legal status to the applicant, it merely serves to attest that qualifying facts exist. The United States Citizenship and Immigration Services within the Department of Homeland Security determines whether the applicant meets the statutory requirements and the ultimate determination of whether someone qualifies for a U, T, or S Visa.

"Despite this fact, studies analyzing the rationale for denying certification have found vast misconceptions about the statutory requirements for certification – and in some cases, a misunderstanding about the purpose of certification. Law enforcement agencies and prosecutors who fail to certify visa applications for eligible applicants based on these misconceptions or misguided rationales actually inflict harm on their communities.

"The U, T, and S Visa certifications are a critical means of strengthening relationships between law enforcement and our immigrant communities, and show vulnerable members of the community that they can safely report crimes and assist in investigations. By helping ensure that undocumented community members feel protected by law enforcement, these programs can increase the likelihood immigrants will turn to law enforcement after a crime has occurred.

"Research confirms that effective visa certification policies can build trust with immigrant communities and contribute to public safety. Not only do these programs provide the 'immediate practical benefits of ensuring that victims are able to assist with investigations,' there are also longer term benefits, like building confidence among immigrant communities that "going to law enforcement will help rather than hurt them." Another study found that when law enforcement adopted practices and policies that resulted in visa certification and other forms of immigration assistance, they reported 'seeing increases in the willingness of [immigrant] crime victims to turn to these agencies and courts for help.' The research is clear that these programs enhance public safety across all communities."

6) **Related Legislation**:

   a) SB 831 (Caballero), would authorize the Governor to work with the federal government to establish a pilot program allowing agricultural workers to start a process toward legal status. SB 831 is pending in the Senate Committee on Human Services.

   b) AB 1306 (Carrillo),would prevent the California Department of Corrections and Rehabilitation from transferring any individual to immigration authorities who is eligible for release pursuant to specified provisions, including, youth offender, elderly, and medical parole releases, clemency actions by the Governor, as well as specified re-sentencing provisions. AB 1306 will be heard in this Committee today.

7) **Prior Legislation**:

   a) AB 2321 (Jones-Sawyer), Chapter 329, Statutes of 2020, permitted a prosecutor or a court to access sealed juvenile records for the limited purpose of certifying victim helpfulness in an application for a U-Visa or a T-Visa.

b) AB 2426 (Reyes), Chapter 187, Statutes of 2020, provided that a certifying official shall not refuse to complete the Form I-914 or Form I-918 Supplement B certification or to certify helpfulness because a case has already been prosecuted or otherwise closed, or because the time for commencing a criminal action has expired.

c) AB 917 (Reyes), Chapter 576, Statutes of 2019, reduced the timelines for a certifying entity to process a victim certification for an immigrant victim of a crime for the purposes of obtaining U-Visas and T-Visas.

d) AB 2027 (Quirk), Chapter 749, Statutes of 2016, required, upon the request of an immigrant victim of human trafficking, a certifying agency to certify victim cooperation on the applicable form so that the victim may apply for a T-Visa to temporarily live and work in the United States.

e) SB 674 (De Leon), Chapter 721, Statutes of 2015, provided that, upon request of a victim or victim's family member, a certifying official from a certifying entity shall certify victim helpfulness on the applicable U-Visa certification form when the victim was a victim of qualifying criminal activity and has been helpful, is being helpful, or is likely to be helpful to the detection, investigation, or prosecution of that criminal activity.

REGISTERED SUPPORT / OPPOSITION:

Support

Los Angeles County District Attorney's Office (Sponsor)

Opposition

None on file.

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

Date of Hearing: April 11, 2023
Counsel: Andrew Ironside

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Reginald Byron Jones-Sawyer, Sr., Chair

AB 1291 (McCarty) – As Amended April 3, 2023

SUMMARY: Requires cities and counties to post financial details about law enforcement use-of-force settlements and judgments on their internet websites, including how much each settlement cost and how the state and municipalities will pay for each settlement. Specifically, **this bill**:

1) Requires each municipality, on or before February 1 of each year, to post on its internet website law enforcement settlements and judgments of $50,000 or more during the previous year resulting from allegations of improper police conduct, including, but not limited to, claims involving the use of force, assault and battery, malicious prosecution, or false arrest or imprisonment, broken down by individual settlement or judgment.

2) Requires the municipality to post all of the following information:

   a) The court in which the action was filed;

   b) The name of the law firm representing the plaintiff;

   c) The name of the law firm or agency representing each defendant;

   d) The date the action was filed;

   e) Whether the plaintiff alleged improper police conduct, including, but not limited to, claims involving use of force, assault and battery, malicious prosecution, or false arrest or imprisonment; and,

   f) If the action has been resolved, the date on which it was resolved, the manner in which it was resolved, and whether the resolution included a payment to the plaintiff by the city, and, if so, the amount of the payment.

3) Requires each municipality, on or before February 1, of each year, to post on its internet website all of the following:

   a) The total number of settlements and judgments related to improper police conduct during the previous year irrespective of the settlement or judgment amount;

   b) The total amount of money paid for cases of improper police conduct;

c) The estimated costs budgeted in the current budget for law enforcement misconduct settlements and judgments, if these costs are included in the municipality's budget; and,

d) The actual amount of money paid for law enforcement misconduct settlements and judgements in the fiscal year immediately prior to the budget year.

4) Requires the municipality, if any such settlements or judgments are paid for using municipal bonds, to post on its internet website the amount of the bond, the time it will take the bond to mature, interest and fees paid on the bond, and the total future cost of the bond.

5) Requires the municipality to post on its internet website any such settlements or judgments that were paid by insurance, broken down by individual settlement or judgment, and the amount of any premiums paid by the municipality for insurance against settlements or judgments resulting from allegations of improper police conduct, as specified.

6) Provides that posting requirements shall not be construed to prohibit or interfere with a person from obtaining documents under the California Public Records Act (CPRA).

7) Defines "municipality" as a city, county, or city and county with a police department or a sheriff's department.

8) Includes legislative findings and declarations.

EXISTING LAW:

1) Provides that the people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny. (Cal. Const., Art. I, § 3, subd. (b)(1).)

2) Defines "public records" to include any writing containing information relating to the conduct of the public's business, prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics. (Gov. Code, § 7920.530.)

3) States that the Legislature, mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state. (Gov. Code, § 7921.000.)

4) Provides general categories of documents or information that are exempt from disclosure, essentially due to the character of the information, and unless it is shown that the public's interest in disclosure outweighs the public's interest in non-disclosure of the information, the exempt information may be withheld by the public agency with custody of the information. (Gov. Code, § 7930.100 et seq.)

5) Does not require, under the CPRA, disclosure of investigations conducted by the office of the Attorney General and the Department of Justice, the Office of Emergency Services and any state or local police agency, or any investigatory or security files compiled by any other state or local police agency, or any investigatory or security files compiled by any other state or local agency for correctional, law enforcement, or licensing purposes. (Gov. Code, §

7923.600, subd. (a).)

6) Requires an agency to justify withholding any record by demonstrating that the record in question is exempt under express provisions of the CPRA, or that on the facts of a particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record. (Gov. Code, § 7922.000.)

7) Requires the public agency, when a member of the public requests to inspect a public record or obtain a copy of a public record, in order to assist the member of the public make a focused and effective request that reasonably describes an identifiable record or records, to do all of the following, to the extent reasonable under the circumstances:

   a) Assist the member of the public to identify records and information that are responsive to the request or to the purpose of the request, if stated.

   b) Describe the information technology and physical location in which the records exist.

   c) Provide suggestions for overcoming any practical basis for denying access to the records or information sought. (Gov. Code, § 7922.600, subd. (a)(1)-(3).)

8) Provides that, unless otherwise specified, the personnel records of peace officers and custodial officers and records maintained by a state, or local agency or information obtained from these records, are confidential and shall not be disclosed in any criminal or civil proceeding, except as specified. (Pen. Code, § 832.7, subd. (a).)

9) Provides that peace officer or custodial officer personnel records and records maintained by a state or local agency are not confidential and must be made available for public inspection under the CPRA. (Pen. Code, § 832.7, subd. (b)(1).)

10) Provides that a record relating to the report, investigation, or findings of any of the following are discoverable under the CPRA:

   a) An incident involving the discharge of a firearm at a person by a peace officer or custodial officer;

   b) An incident involving the use of force against a person by a peace officer or custodial officer that resulted in death or in great bodily injury;

   c) A sustained finding involving a complaint that alleges unreasonable or excessive force; and,

   d) A sustained finding that an officer failed to intervene against another officer using force that is clearly unreasonable or excessive. (Pen. Code, § 832.7, subd. (b)(1)(A).)

11) Authorizes an agency to redact a record of police misconduct, including personal identifying information, where on the facts of the particular case the public interest served by not disclosing the information clearly outweighs the public interest serve by disclosure of the information. (Pen. Code, § 832.7, subd. (b)(7).)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "For far too long, cities and counties have spent taxpayer dollars on settlements in police misconduct and excessive use of force cases without public disclosure. In order for the public to obtain information about these law enforcement cases, they must file public records act requests. The onus should not be on citizens to get this information. Shining a light on all government spending is not only the right thing to do, it is critical to increase public understanding about law enforcement practices, will improve police accountability for misconduct, and outcomes."

2) **Governor's Veto Message to AB 603 (McCarty):** In 2021, the legislature passed AB 603 (McCarty), which was similar to this bill. Despite near unanimous legislative support, the Governor vetoed it. His veto message said:

> I am returning Assembly Bill 603 without my signature.
>
> This bill would require municipalities to annually post on their internet websites specified information relating to settlements and judgments resulting from allegations of improper police conduct. The information will include amounts paid, broken down by individual settlement and judgment, and information on bonds used to finance use of force settlement and judgment payments.
>
> The vast majority of the information that this legislation would require to be posted on department websites is already available through a Public Records Act request or in court records. Given this, I am concerned that this legislation is not only unnecessary, but that it will also have potentially significant General Fund costs associated with the imposition of a state-reimbursable mandate on local law enforcement agencies.

There are several important differences between AB 603 and this bill. First, while AB 603 required municipalities to post on their websites information about settlements or judgments for police misconduct in any amount, this bill would require disclosure of only those settlements or judgments that exceed $50,000. Second, this bill would require municipalities to post information on the previous year's settlements and judgements, the total amount paid for those actions, the estimated costs of police misconduct budgeted for in the municipality's current budget, and the actual amount of money spent from the previous budget on misconduct settlements and judgments. AB 603 did not require municipalities to post this information. Finally, this bill would eliminate the provision in AB 603 requiring the California State Transportation Agency to post information on settlements and judgments against the California Highway Patrol. However, these differences do not really address the crux of the Governor's veto message.

3) **Background on the CPRA**: Under the CPRA, the public is granted access to public records held by state and local agencies. (Gov. Code, § 7921.000.) "Modeled after the federal Freedom of Information Act (5 U.S.C. § 552 et seq.), the [CPRA] was enacted for the purpose of increasing freedom of information by giving members of the public access to

records in the possession of state and local agencies. Such 'access to information concerning the conduct of the people's business,' the Legislature declared, 'is a fundamental and necessary right of every person in this state.'" (*Los Angeles County Bd. of Supervisors v. Superior Court* (2016) 2 Cal.5th 282, 290 [internal citations omitted].) The purpose of the CPRA is to prevent secrecy in government and to contribute significantly to the public understanding of government activities. (*City of San Jose v. Superior Court* (1999) 74 Cal.App.4th 1008, 1016-1017.)

In light of these dual concerns of privacy and disclosure, the CPRA includes a number of disclosure exemptions. (Gov. Code, § 7930.100 et seq.) Agencies may refuse to disclose records that are exempted or prohibited from public disclosure pursuant to federal or state law. This includes Evidence Code provisions relating to privilege. (*Ibid.*) But, even if a specific exception does not exist, an agency may refuse to disclose records if on balance, the interest of nondisclosure outweighs disclosure. (Govt. Code, § 7922.000.) "The specific exceptions of section [7930.100, et seq.] should be viewed with the general philosophy of section [7922.000] in mind; that is, that records should be withheld from disclosure only where the public interest served by not making a record public outweighs the public interest served by the general policy of disclosure." (53 Ops.Cal.Atty.Gen. 136 (1970).)

The California Supreme Court has found a policy favoring disclosure especially salient when the subject is law enforcement. (See *Long Beach Officers Association v. City of Long Beach* (2014) 59 Cal.4th 59, 74, see also *Commission on Peace Officer Standards & Training v. Superior Court* (2007) 42 Cal.4th 278, 297.) In *Commission on Peace Officer Standards*, the Supreme Court observed:

> The public's legitimate interest in the identity and activities of peace officers is even greater than its interest in those of the average public servant. "Law enforcement officers carry upon their shoulders the cloak of authority to enforce the laws of the state. In order to maintain trust in its police department, the public must be kept fully informed of the activities of its peace officers." [Citation.] "It is indisputable that law enforcement is a primary function of local government and that the public has a far greater interest in the qualifications and conduct of law enforcement officers, even at, and perhaps especially at, an 'on the street' level than in the qualifications and conduct of other comparably low-ranking government employees performing more proprietary functions. The abuse of a patrolman's office can have great potentiality for social harm …."

(*Commission on Police Officer Standards*, at pp. 297–298, fn. Omitted; cf. Pen. Code, § 832.7, subd. (b)(1) [authorizing disclosure of reports, investigations, and findings that contain peace officer personnel records if they pertain to use of force incidents].)

The disclosures required under this bill are narrower than those that have found general support by the Supreme Court and the legislature. This bill would require municipalities to post on their websites information about the where and when an action alleging law enforcement misconduct was filed, the type of misconduct alleged, and information relating to the resolution of the action. Municipalities would also have to post information about the number of settlements and judgments related to police misconduct in the previous year and the costs of those actions.

4) **Police Use of Force Statistics:** The California Department of Justice collects information on use of force incidents that result in serious bodily injury or death or involved the discharge of a firearm. According to the 2021 use of force incident reporting, there were 660 civilians involved in police use of force incidents that involved the discharge of a firearm or use of force resulting in serious bodily injury or death. (DOJ, *2021 Use of Force Incident Reporting* (2022), p. 2, see https://data-openjustice.doj.ca.gov/sites/default/files/2022-08/USE%20OF%20FORCE%202021.pdf [as of Mar. 16, 2023].) Of those, 349 resulted in serious bodily injury and 149 resulted in death. (*Id.* at p. 43.) Demographics of the civilians were 50.6 percent (334) Hispanic, 25.5 percent (168) white, and 16.7 percent (110) black. (*Id.* at p. 2.)

   The report showed that 1,462 officers were involved in the use of force incidents. (*Id.* at p. 3.) Of the 1,462 officers, 43.6 percent (638) did not receive force from a civilian, 18.9 percent (277) received force during physical contact with a civilian, and 17.5 percent (256) received force by the discharge of a firearm from a civilian. (*Ibid.*) Demographics of officers were 49.6 percent (725) white, 38.3 percent (560) Hispanic, 6.0 percent (88) Asian/Pacific Islander, and 4.0 percent (58) black. (*Ibid.*)

5) **Argument in Support**: According to the *Prosecutors Alliance of California*, "Each year tens of millions of dollars are awarded to plaintiffs in civil lawsuits that allege misconduct by our law enforcement officers. These awards and settlements result in significant expenditures of taxpayer dollars. Although these settlements and awards are public records, it is often difficult for the public to find out about these payments.

   "AB 1291 would require local jurisdictions to post financial details about police misconduct settlements and judgments on their websites, including how much each settlement cost and how the municipalities will pay for each settlement. This information will provide for more transparency surrounding allegations of misconduct by our law enforcement agencies."

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

7) **Related Legislation**:

   a) AB 807 (McCarty), would require a state prosecutor to investigate incidents in which the use of force by a peace officer results in the death of a civilian. AB 807 is pending hearing in the Assembly Appropriations Committee.

   b) SB 400 (Wahab), would provide that a law enforcement agency that formerly employed a peace officer or custodial officer is not prohibited from disclosing to the public the termination for cause of that officer. AB 400 will be heard today in the Senate Public Committee.

   c) SB 838 (Menjivar), would revise the definition of "crime" for purposes of the Victim Compensation Program to include an incident in which an individual sustains serious bodily injury or death as the result of a law enforcement officer's use of force and make changes to eligibility factors as they would apply to these types of claims. SB 838 is pending hearing in the Senate Appropriations Committee.

8) **Prior Legislation**:

a) AB 603 (McCarty), of the 2021-2022 Legislative Session, was identical to this bill. The Governor vetoed AB 603.

b) AB 1314 (McCarty), of the 2019-2020 Legislative Session, was substantially similar to this bill. AB 1314 did not receive a hearing in the Senate Public Safety Committee.

c) SB 16 (Skinner), Chapter 402, Statutes of 2021, expands the categories of personnel records of peace officers and custodial officers that are subject to disclosure under the CPRA, imposes certain requirements regarding the time frames and costs associated with CPRA requests, and prohibits assertion of the attorney-client privilege to limit disclosure of factual information and billing records.

d) SB 978 (Bradford), Chapter 978, Statutes of 2018, required law enforcement agencies to post online all current standards, policies, practices, operating procedures, and education and training materials that would otherwise be available to the public if a request was made pursuant to the CPRA.

e) SB 1421 (Skinner), Chapter 988, Statutes of 2018, subjects specified personnel records of peace officers and correctional officers to disclosure under the CPRA.

f) SB 1286 (Leno), of the 2015-2016 Legislative Session, would have provided greater public access to peace officer and custodial officer personnel records and other records maintained by a state or local agency related to complaints against those officers. SB 1286 was held in the Senate Appropriations Committee.

g) AB 1648 (Leno), 2007 of the 2007-2008 Legislative Session, as introduced, would have overturned the California Supreme Court decision in *Copley-Press, Inv. v. Superior Court* (2006) 39 Cal.4th 1272, and restored public access to peace officer records. AB 1648 failed passage in the Assembly Public Safety Committee.

REGISTERED SUPPORT / OPPOSITION:

Support

California Public Defenders Association (CPDA)
Prosecutors Alliance California

Opposition

None

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

Date of Hearing: April 11, 2023
Chief Counsel: Sandy Uribe

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Reginald Byron Jones-Sawyer, Sr., Chair

AB 1306 (Wendy Carrillo) – As Amended March 16, 2023

SUMMARY: Prohibits the California Department of Corrections and Rehabilitation (CDCR) from cooperating with the United States Department of Homeland Security, as specified. Specifically, **this bill**:

1) Prohibits, notwithstanding other laws, CDCR from cooperating with the Department of Homeland Security in the following manner when specified persons are being released:

   a) Detaining a person on the basis of an immigration hold request;

   b) Providing an immigration authority with release date information;

   c) Responding to a notification request; and,

   d) Transferring a person to an immigration authority, or facilitating or assisting with a transfer.

2) Provides that these prohibitions apply to persons being released pursuant to a youth offender parole hearing, elderly parole, medical parole, compassionate release recall and resentencing, vacatur of a felony murder conviction and resentencing, vacatur of a conviction because the person was a victim of human trafficking or intimate partner violence, resentencing based on childhood trauma, being a youthful offender or a victim of human trafficking or intimate partner violence, resentencing pursuant to the California Racial Justice Act, or a grant of clemency.

3) Contains legislative findings and declarations.

EXISTING STATE LAW:

1) Requires CDCR and the Department of Youth and Community Restoration (DYCR) to refer the name and location of any incarcerated person or ward who may be an undocumented immigrant and who may be subject to deportation to the Department of Homeland Security for a determination of whether the person is undocumented and subject to deportation. (Pen. Code, § 5025, subd. (a).)

2) Requires CDCR and DYCR to make case files available to the Department of Homeland Security for purposes of investigation. (Pen. Code, § 5025, subd. (a).)

3) Requires CDCR and DYCR to cooperate with the Department of Homeland Security by providing the use of prison facilities, transportation, and general support, as needed, for the purpose of conducting and expediting deportation hearings and subsequent placement of deportation holds on undocumented immigrants who are incarcerated in state prison. (Pen. Code, § 5026, subd. (a).)

4) Prohibits law enforcement agencies (LEAs) (including school police and security departments) from using resources to investigate, interrogate, detain, detect, or arrest people for immigration enforcement purposes. These provisions are commonly known as the Values Act. Restrictions include:

   a) Inquiring into an individual's immigration status;

   b) Detaining a person based on a hold request from ICE;

   c) Providing information regarding a person's release date or responding to requests for notification by providing release dates or other information unless that information is available to the public;

   d) Providing personal information, as specified, including, but not limited to, name, social security number, home or work addresses, unless that information is available to the public;

   e) Arresting a person based on a civil immigration warrant;

   f) Participating in border patrol activities, including warrantless searches;

   g) Performing the functions of an immigration agent whether through agreements known as 287(g) agreements, or any program that deputizes police as immigration agents;

   h) Using ICE agents as interpreters;

   i) Transferring an individual to immigration authorities unless authorized by a judicial warrant or judicial probable cause determination, or except as otherwise specified;

   j) Providing office space exclusively for immigration authorities in a city or county law enforcement facility; and,

   k) Entering into a contract with the federal government to house or detain adult or minor non-citizens in a locked detention facility for purposes of immigration custody. (Gov. Code, § 7284.6, subd. (a).)

5) Describes the circumstances under which a LEA has discretion to respond to transfer and notification requests from immigration authorities. These provisions are known as the TRUST Act. LEAs cannot honor transfer and notification requests unless one of the following apply:

   a) The individual has been convicted of a serious or violent felony, as specified;

b) The individual has been convicted of any felony which is punishable by imprisonment in state prison;

c) The individual has been convicted within the last five years of a misdemeanor for a crime that is punishable either as a felony or misdemeanor (a wobbler);

d) The individual has been convicted within the past 15 years for any one of a list of specified felonies;

e) The individual is a current registrant on the California Sex and Arson Registry;

f) The individual has been convicted of a federal crime that meets the definition of an aggravated felony as specified in the federal Immigration and Nationality Act; or,

g) The individual is identified by ICE as the subject of an outstanding federal felony arrest warrant for any federal crime; or,

h) The individual is arrested on a charge involving a serious or violent felony, as specified, or a felony that is punishable by imprisonment in state prison, and a magistrate makes a finding of probable cause as to that charge. (Gov. Code, § 7282.5, subd. (a).)

6) Requires local law enforcement agencies, to provide an individual in custody a written consent form as well as copies of specified documentation prior to an interview between ICE and the individual, and to notify the individual regarding the intent of the agency to comply with ICE requests. These provisions are known as the TRUTH Act. (Gov. Code, § 7283.)

7) Defines "hold request" as "a federal Immigration and Customs Enforcement (ICE) request that a local law enforcement agency maintain custody of an individual currently in its custody beyond the time they would otherwise be eligible for release in order to facilitate transfer to ICE" and includes, but is not limited to DHS Form I-247D." (Gov. Code, §§ 7283, subd. (b) & 7284.4, subd. (e).)

8) Defines "notification request" as an Immigration and Customs Enforcement request that a local law enforcement agency inform ICE of the release date and time of an individual in its custody in advance of informing the public and includes, but is not limited to, DHS Form I-247N. (Gov. Code, §§ 7283, subd. (f) & 7284.4, subd. (e).)

9) Defines "transfer request" as an Immigration and Customs Enforcement request that a local law enforcement agency facilitate the transfer of an individual in its custody to ICE, and includes, but is not limited to, DHS Form I-247X. (Gov. Code, §§ 7283, subd. (g) & 7284.4, subd. (e.).)

EXISTING FEDERAL LAW:

1) Prohibits the federal government from "conscripting" the states to enforce federal regulatory programs. (U.S. Const. Tenth Amend.)

2) Provides that any authorized immigration officer may at any time issue Immigration Detainer-Notice of Action, to any other federal, state, or local law enforcement agency. A

detainer serves to advise another law enforcement agency that the Department of Homeland Security (DHS) seeks custody of an alien presently in the custody of that agency, for the purpose of arresting and removing the alien. The detainer is a request that such agency advise the DHS, prior to release of the alien, in order for the DHS to arrange to assume custody, in situations when gaining immediate physical custody is either impracticable or impossible. (8 CFR § 287.7(a).)

3) States that upon a determination by the DHS to issue a detainer for an alien not otherwise detained by a criminal justice agency, such agency shall maintain custody of the alien for a period not to exceed 48 hours, excluding Saturdays, Sundays, and holidays in order to permit assumption of custody by the DHS. (8 CFR § 287.7(d).)

4) Authorizes the Secretary of DHS to enter into agreements that delegate immigration powers to local police. The negotiated agreements between ICE and the local police are documented in memorandum of agreements (MOAs). (8 U.S.C. § 1357(g).)

5) Provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." (U.S. Const. Fourteenth Amend.)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "AB 1306, 'The HOME Act' is a more narrow approach to end transfers between the Department of Corrections and Rehabilitation (CDCR) and Immigration Customs Enforcement (ICE) for individuals who have served their time and been paroled. The bill focuses on previous restorative justice legislation that has been signed into law and ensures individuals under those policies are able to return home and restart their lives regardless of their citizenship status."

2) **Cooperation with Immigration Authorities**: The Values Act, which became effective on January 1, 2018, limits the involvement of state and local law enforcement agencies in federal immigration enforcement. It prohibits law enforcement agencies (including school police and security departments) from using resources to investigate, interrogate, detain, detect, or arrest people for immigration enforcement purposes. It also places limitations on the ways in which law enforcement agencies can collaborate with federal task forces that involve elements of immigration enforcement.

   The Values Act was an expansion of prior state law, the TRUST Act which prohibited law enforcement from honoring federal immigration holds unless the detainee had a criminal history involving a serious or violent felony.

   The Values Act contains some exceptions that allows law enforcement agencies to cooperate with immigration authorities. Under the Values Act, law enforcement is allowed to engage with immigration authorities in the following circumstances:

   a) Provide a person's release date or personal information, as specified, if such information is available to the public;

b) Respond to notification and transfer requests when the individual had been convicted of specified crimes which reflected a higher public safety danger and are on the serious end of the criminal spectrum. Specifically, those crimes include serious and violent felonies, as well as offenses requiring an individual to register as a sex offender;

c) Make inquiries into information necessary to certify an individual for a visa for a victim of domestic violence and human trafficking;

d) Respond to a request from immigration authorities for information about a person's criminal history;

e) Participate with a joint law enforcement task force, as long as the primary purpose of the task force is not immigration enforcement; or,

f) Give immigration authorities access to interview an individual in agency custody as long as the interview access complied with the requirements of the TRUTH Act.

CDCR is not considered a law enforcement agency under the Values Act or under the TRUST. In fact, there are provisions in the Penal Code which specifically require CDCR to cooperate with ICE. (See Pen. Code, §§ 5025 & 5026.)

This bill does not repeal those provisions. Rather, this bill would prohibit CDCR from cooperating with ICE but only as it pertains to some undocumented individuals, depending on the reason for their release. This bill would prohibit CDCR from providing information or assistance to ICE if the subject is being released on: elderly parole; medical parole; compassionate release; pursuant to a youth offender parole hearing; due to the vacatur of a felony murder conviction and resentencing; the vacatur of a conviction because the subject was a victim of human trafficking or intimate partner violence; resentencing based on childhood trauma; being a youthful offender or a victim of human trafficking or intimate partner violence; resentencing pursuant to the California Racial Justice Act; or because of a grant of clemency.

3) **Equal Protection Issues**: The Fourteenth Amendment's Equal Protection Clause has been described as mandating that all persons in similar situations should be treated alike under the law. (*City of Cleburne v. Cleburne Living Ctr.* (1985) 473 U.S. 432, 439.) At its core, the principal of equal protection ensures that the government does not treat a group of people unequally without some justification. (*People v. Chatman* (2018) 4 Cal.5th 277, 288.) "[E]qual protection safeguards against the arbitrary denial of benefits to a certain defined class of individuals." (*People v. McKee* (2010) 47 Cal.4th 1172, 1207.)

A person claiming that the state has created a classification that affects two or more similarly situated groups must show that the classification treats them in an unequal manner. The extent of justification required to survive equal protection scrutiny in a specific context depends on the nature or effect of the classification at issue. (*People v. Chatman*, *supra* 4 Cal.5th at p. 288.) If the classification draws a distinction based on a suspect classification, such as race, or affects a fundamental right, it will be given the most exacting scrutiny. In those cases, "the state has the burden of establishing it has a compelling interest that justifies the law and that the distinctions, or disparate treatment, made by that law are necessary to further its purpose. (*Ibid.*)

On the other end of the spectrum, where a challenged law does not draw a distinction based on suspect classification nor burden fundamental rights, a denial of equal protection will only be found if there is no rational relationship between a disparity in treatment and some legitimate government purpose. (*People v. Chatman*, *supra* 4 Cal.5th at pp. 288-289.) "A classification in a statute is presumed rational until the challenger shows that no rational basis for the unequal treatment is reasonably conceivable." (*Id.* at p. 289.) A rational basis inquiry asks two questions. First, did the state adopted a classification affecting two or more groups that are similarly situated in an unequal manner? If so, does the challenged classification ultimately bear a rational relationship to a legitimate state purpose? (*Ibid.*) "A classification in a statute is presumed rational until the challenger shows that no rational basis for the unequal treatment is reasonably conceivable." (*People v. Ngo* (2023) 2023 Cal.App. Lexis 182 [March 10, 2023, E078723].)

Applying even the lowest level of scrutiny, this bill potentially denies similarly situated undocumented immigrants being released from prison equal treatment under the law. Two people with the same exact criminal conviction could be treated differently simply due to the reason for their release. A similarly situated immigrant who has paid their debt to society in full could be transferred to ICE simply because they did not receive the benefit of an enumerated type of early release or legislative change in the law. Similarly, a person convicted of a less serious crime could be transferred to ICE while a person committing a much more serious crime could not because the former did not benefit from a form of early parole or a specified legislative criminal justice reform while the latter did. For example, what about an inmate firefighter who risks their life battling California wildfires but does not receive a pardon from the Governor? (Former inmate firefighter released from ICE custody, returns home to California (ktvu.com).) What about an individual who is resentenced because of the dismissal of a gun enhancement or repeal of another sentencing enhancement, such as a drug enhancement? What about an individual who is resentenced because of a referral from a district attorney or pursuant to CDCR's exceptional conduct referral process under Penal Code section 1172.1?

In order to avoid potential equal protection challenges, should CDCR's cooperation with ICE be prohibited altogether, or alternatively, be limited to those instances in which a local law enforcement entity would be allowed to cooperate with ICE, such as when the individual has committed a violent or serious offense, or one requiring sex offender registration (See Gov. Code, § 7282.5)? Additionally, should existing Penal Code provisions which direct CDCR to cooperate with ICE be repealed?

4) **Argument in Support**: According to the *California Coalition for Women Prisoners*, a co-sponsor of this bill, "In recent years, the Legislature, California voters, and Governors have demonstrated a strong commitment to reforming our criminal legal system and addressing systemic racism and mass incarceration by enacting landmark reforms. Tragically, solely because of their place of birth, immigrants and refugees who would otherwise benefit from these reforms approved by the legislature are instead released to ICE and subjected to the double punishment of ICE detention and deportation. Once in immigration detention, immigrants face dire consequences including lack of due process, no appointed legal counsel, no right to bail, and an arbitrary second detention never handed down in a criminal court in facilities beyond state oversight where abuses are well documented. Moreover, this unjust practice perpetuates a criminal legal system that treats individuals unequally simply because

of where they were born. The state's role in voluntarily sending California residents to the custody of ICE undercuts our progress towards a more equitable society, and unfairly targets immigrants and refugees.

"When California's prisons voluntarily and unnecessarily transfer immigrant and refugee community members eligible for release from state custody to ICE for immigration detention and deportation purposes, they also subject these community members to permanent separation from the country, their families, homes, and livelihoods. California should not be actively participating in the separation of immigrant and refugee families and inflict irreparable harm to those who came here fleeing war and genocide or to simply build a better life for themselves and their children.

"In addition, state collaboration in federal immigration enforcement programs has raised constitutional concerns, including arrests and detentions that violate the Fourth Amendment to the United States Constitution, and that target immigrants on the basis of race or ethnicity in violation of the Equal Protection Clause.

"Finally, transferring California residents to ICE custody is costly. By passing AB 1306 California stands to save state resources that can be invested in mental health, housing, youth development, and access to living wages– all of which have been proven to reduce crime and stabilize communities.

"As the state with the largest immigrant community, California has an ethical and moral obligation to be a national leader that ensures the steps the state has already taken towards reforming our criminal legal system includes our immigrants and refugee communities. California should not subject community members to double punishment, nor disregard otherwise applicable laws that would enable their return home purely because they are refugees or immigrants. Harmonizing broadly-supported reforms to ensure equal application to immigrants and refugees will reunite families, strengthen communities, and fulfill the state's commitment to addressing racial injustice and upholding our values of fairness and equality."

5) **Related Legislation**: AB 617 (Jones-Sawyer) would remove the prohibition on providing immigration-related legal services to an individual who has been convicted of, or who is currently appealing a conviction for, a violent or serious felony. AB 617 is pending in the Assembly Judiciary Committee.

6) **Prior Legislation**:

   a) AB 937 (Carrillo), of the 2021-2022 Legislative Session, would have, among other things, repealed statutory provisions directing CDCR to implement and maintain procedures to identify, within 90 days of assuming custody, incarcerated persons who are undocumented felons subject to deportation and refer them to ICE. AB 937 was refused passage in the Senate.

   b) AB 2596 (Bonta), of the 2019-2020 Legislative Session, would have eliminated the existing ability for law enforcement agencies to cooperate with federal immigration authorities by giving them notification of release for inmates or facilitating inmate

transfers. AB 2596 was never heard in this committee due to Covid 19.

c) AB 2948 (Allen), of the 2017-2018 Legislative Session, would have repealed the California Values Act. AB 2948 failed passage in this committee.

d) AB 2931 (Patterson), of the 2017-2018 Legislative Session, would have expanded the list of qualifying criminal convictions which permit law enforcement to cooperate with federal immigration authorities. AB 2931 failed passage in this committee.

e) AB 298 (Gallagher), of the 2017-2018 Legislative Session, would have repealed the TRUST Act and required law enforcement to cooperate with federal immigration by detaining an individual convicted of a felony for up to 48 hours on an immigration hold, as specified, after the person became eligible for release from custody. AB 298 failed passage in this committee.

f) AB 1252 (Allen), of the 2017-2018 Legislative Session, would have repealed the TRUST Act and prohibited state grants to county and local "sanctuary jurisdictions." AB 1252 failed passage in this committee.

g) SB 54 (De Leon), Chapter 495, Statutes of 2017, limited the involvement of state and local law enforcement agencies in federal immigration enforcement.

h) AB 2792 (Bonta), Chapter 768, Statutes of 2016, requires local law enforcement agencies to provide copies of specified documentation received from ICE to the individual in custody and to notify the individual regarding the intent of the agency to comply with ICE requests.

i) AB 4 (Ammiano), Chapter 570, Statutes of 2013, prohibits a law enforcement official from detaining an individual on the basis of an ICE hold after that individual becomes eligible for release from custody, unless, at the time that the individual becomes eligible for release from custody, certain conditions are met, including, among other things, that the individual has been convicted of specified crimes.

REGISTERED SUPPORT / OPPOSITION:

Support

Alliance for Boys and Men of Color (Co-Sponsor)
Asian Americans Advancing Justice - Asian Law Caucus (Co-Sponsor)
Asian Americans Advancing Justice-southern California (Co-Sponsor)
Asian Prisoner Support Committee (Co-Sponsor)
Buen Vecino (Co-Sponsor)
California Coalition for Women Prisoners (Co-Sponsor)
California Immigrant Policy Center (Co-Sponsor)
Communities United for Restorative Youth Justice (Co-Sponsor)
Freedom for Immigrants (Co-Sponsor)
Harbor Institute for Immigrant and Economic Justice (Co-Sponsor)
Ice Out of Marin (Co-Sponsor)

Indivisible Sausalito (Co-Sponsor)
Interfaith Movement for Human Integrity (Co-Sponsor)
National Day Laborer Organizing Network (Co-Sponsor)
Orange County Rapid Response Network (Co-Sponsor)
San Diego Immigrant Rights Consortium (Co-Sponsor)
San Francisco Public Defender (Co-Sponsor)
Siren: Services Immigrant Rights and Education Network (Co-Sponsor)
Tsuru for Solidarity (Co-Sponsor)
Vietrise (Co-Sponsor)
18 Million Rising
ACLU California Action
Alliance San Diego
Amnesty International USA
Asian Pacific Islander Re-entry and Inclusion Through Support and Empowerment
Bend the Arc: Jewish Action, Southern California
California Attorneys for Criminal Justice
California Collaborative for Immigrant Justice
California Public Defenders Association
Chinese Progressive Association
Contra Costa Immigrant Rights Alliance
Council on American-islamic Relations, California
Courage California
Cure California
Dolores Huerta Foundation
Drop Lwop Coalition
Felony Murder Elimination Project
Homerise San Francisco
Human Impact Partners
Immigrant Defense Advocates
Immigrant Legal Resource Center
Indivisible CA Statestrong
Indivisible Sacramento
Indivisible San Francisco
Initiate Justice
Long Beach Immigrant Rights Coalition
Mujeres Unidas Y Activas
Norcal Resist
Orange County Equality Coalition
People's Budget Orange County
Santa Cruz Barrios Unidos INC.
Smart Justice California
Southeast Asia Resource Action Center
The Transformative In-prison Workgroup

Opposition

None on file.

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

Date of Hearing: April 11, 2023
Counsel: Andrew Ironside

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Reginald Byron Jones-Sawyer, Sr., Chair

AB 1360 (McCarty) – As Amended March 28, 2023

SUMMARY: Authorizes the Counties of Sacramento and Yolo to establish pilot programs to offer secured residential treatment for qualifying individuals suffering from substance use disorders (SUDs) who have been convicted of "drug-motivated" felony crimes. Specifically, **this bill**:

1) Allows the Counties of Sacramento and Yolo to offer secured residential treatment pilot programs, known as "Hope California", for individuals suffering from SUDs who have been convicted of drug-motivated felony crimes, as specified.

2) Requires the pilot programs to align with the resolutions adopted by the counties in recognition of the goal of ensuring that people with behavioral health conditions receive treatment out of custody wherever possible.

3) Authorizes the Counties of Sacramento and Yolo to offer the pilot program to eligible individuals if the program meets all of the following conditions:

   a) The program facility is licensed by the State Department of Health Care Services (DHCS) as an alcoholism or drug abuse recovery or treatment facility;

   b) The program facility is a clinical setting managed and staffed by the county's health and human services agency (HHSA), with oversight provided by the county's probation department;

   c) The program facility is not in a jail, prison, or other correctional setting;

   d) The program facility is secured but does not include a lockdown setting;

   e) The individual, upon a judge pronouncing a sentence to be served in a county jail or state person, must choose and consent to participate in the program in lieu of incarceration;

   f) The program is limited to one facility site per county;

   g) The DHCS monitors the program facility to ensure the health, safety, and well-being of program participants;

   h) The DHCS has authority to access the program facility to investigate complaints by program participants and to ensure the facility complies with applicable statutes and regulations;

i) The program facility ensures that participants have visitation rights, including through the use of a telephone;

j) The county develops and staffs the program in partnership with relevant community-based organizations and drug treatment services providers to offer support services;

k) The support services include, but are not limited to, employment skill assessments, money management, technology education, tutoring, career planning, developing resumes and cover letters, and searching and applying for employment;

l) HHSA ensure that a risk, needs, and psychological assessment, utilizing the Multidimensional Assessment of the American Society of Addiction Medicine (ASAM), as part of the ASAM criteria, be performed for each individual identified as a candidate for the program;

m) The participant's treatment, in terms of length and intensity, within the program is based on the findings of the risk, needs, and psychological assessment and the recommendations of treatment providers;

n) The program adopts the Treatment Criteria of ASAM;

o) The program may take into consideration evolving best practices in the SUD treatment community;

p) The program has a comprehensive written curriculum that informs the operation of the program and outlines the treatment and intervention modalities;

q) The program provides an individualized, medically assisted treatment plan for each resident including, but not limited, medically assisted treatment options and counseling based on the recommendations of a substance use disorder specialist;

r) A judge determines the length of the treatment program after being informed by, and based on, the risk, needs, and psychological assessment and recommendations of treatment providers;

s) The participant continues outpatient treatment for a period of time and may also be referred to a "step-down" residential treatment facility after leaving the secured residential treatment facility;

t) A judge shall also determine that the program will be carried out in lieu of a jail or prison sentence after making a finding that the defendant's decision to choose alternative treatment program is knowing, intelligent, and voluntary;

u) The program provides, for each participant successfully leaving the program, a comprehensive continuum of care plan that includes recommendations for outpatient care, counseling, housing recommendations, and other vital components of successful recovery;

v) To the extent permitted under federal and state law, treatment provided to a participant during the program is reimbursable under the Medi-Cal program, if the participant is a Medi-Cal beneficiary and the treatment is a covered benefit under the Medi-Cal program;

w) If treatment services provided to a participant during the program are not reimbursable under the Medi-Cal program or through the participant's personal health coverage, funds allocated to the state from the 2021 Multistate Opioid Settlement Agreement, subject to an appropriation by the Legislature, may be used to reimburse those treatment services to the extent consistent with the terms of the Settlement Agreement and the Final Judgment;

x) An outcomes assessment is completed by an independent evaluator; and,

y) The county collects and monitors all of the following data for participants of the program:

   i) The participant's demographic information, including age, gender, race, ethnicity, marital status, familial status, and employment status;

   ii) The participant's criminal history;

   iii) The participant's risk level, as determined by the risk, needs, and psychological assessment;

   iv) The treatment provided to the participant during the program, and if the participant completed that treatment;

   v) The participant's outcome at the time of program completion, six months after completion, and one year after completion, including subsequent arrests and convictions; and,

z) The county reports all of the following information annually to the DHCS and to the Legislature, excluding any personally identifiable information of participants:

   i) The risk, needs, and psychological assessment tool used for the program;

   ii) The curriculum used by each program;

   iii) The number of participants with a program length other than one year and the alternative program lengths used;

   iv) Individual data on the number of participants in the program;

   v) Individual data, as specified; and,

   vi) A one- and three-year evaluation of the number of subsequent arrests and convictions of the participants.

4) States that eligible drug-motivated crimes include any felony crime except sex crimes requiring sex offender registration, "serious" felonies, or "violent" felonies, as specified, and

excluding nonviolent drug possession offenses.

5) Requires the judge to offer the defendant voluntary participation in the pilot program as an alternative to a jail or prison sentence that the judge would otherwise impose at the time of sentencing or pronouncement of judgment in which sentencing is imposed if the following conditions are met:

   a) The defendant's crime was caused in whole or in part by the defendant's SUD;

   b) The defendant's crime was a felony, except for specified sex crimes or serious or violent felonies; and,

   c) The judge makes their determination based on the recommendation of the treatment providers who conducted the assessment, on a finding by HHSA that the defendant's participation in the program would be appropriate, and on the report on whether to offer the defendant placement in the secured residential treatment program, as specified.

6) States that the amount of time in the secured residential treatment facility is determined by the recommendations of the treatment providers who conducted the assessment.

7) Requires that the amount of time, combined with any outpatient treatment or "step-down" residential treatment, does not exceed the term of imprisonment to which the defendant would otherwise be sentenced, not including any additional term of imprisonment for enhancements, for the drug-motivated crime.

8) Prohibits the court from placing the defendant on probation for the underlying offense.

9) Declares that the defendant is eligible to receive good conduct credits.

10) Declares that the individual shall be on supervision with the probation department during the period in which an individual is participating in the pilot program.

11) Requires a report to be prepared with input from any of the interested parties – including the district attorney, the attorney for the participant, the probation department, HHSA, and any contracted drug treatment program provider – to assist the court in making the determination as to whether to offer the defendant placement in the secured residential treatment program.

12) Authorizes the treatment providers or program administrators to recommend to the court that the individual's participation be terminated and that the individual be transferred out of the secured residential treatment program if they determine that continued participation in the program would not be in the best interest of the individual or the program.

13) Requires the court to order the participant to be transferred out of the secured residential treatment phase of the program prior to the end of the original order and to order the participant to complete the remainder of the original sentence imposed prior to their consent to enter the program if the treatment providers or program administrators make such a recommendation.

14) Authorizes a pilot program participant to request that the court terminate their participation in the program and that the participant be transferred out of the secured residential treatment program to complete the remainder of their originally imposed sentence, after account for any credits to which they are entitled.

15) Requires the court to order the participant be released prior to the end of the original order if the treatment providers make a recommendation to the court that the participant no longer needs to be in the secured residential treatment program.

16) Requires the court to expunge and seal the conviction from the participant's record if the participant successfully completes the court-ordered drug treatment program.

17) Requires the court to expunge the conviction of any previous drug possession or drug use crimes on the participant's record if the participant successfully completes the secured residential treatment program.

18) Declares that a participant's completion of treatment must be defined and determined by the treatment providers and not by the court, district attorney's office, or the probation department.

19) Declares that the participant's successful completion of treatment does not require the participant to complete the duration of the treatment originally ordered by the court.

20) Requires the court to ensure that the rights of the victim under Marsy's Law are honored before expunging the conviction.

21) Sunsets the pilot program on January 1, 2026.

22) Declares that a special statute is necessary and that a general statute cannot be made applicable within the meaning of Section 16 of Article IV of the California Constitution because of the unique circumstances that the Counties of Sacramento and Yolo have experienced with regard to difficulties in treating individuals who have been convicted of drug-motivated crimes as a result of their substance use disorders.

23) Includes legislative findings and declarations.

EXISTING LAW:

1) Provides that an individual qualifies for the CARE process only if all of the following criteria are met:

   a) The person is 18 years of age or older;

   b) The person is currently experiencing a severe mental illness, as specified, and has a diagnosis identified in the disorder class: schizophrenia spectrum and other psychotic disorders, as defined;

c) The person is not clinically stabilized in on-going voluntary treatment;

d) At least one of the following is true:

i) The person is unlikely to survive safely in the community without supervision and the person's condition is substantially deteriorating; or,

ii) The person is in need of services and supports in order to prevent a relapse or deterioration that would be likely to result in grave disability or serious harm to the person or others, as defined.

e) Participation in a CARE plan or CARE agreement would be the least restrictive alternative necessary to ensure the person's recovery and stability; and,

f) It is likely that the person will benefit from participation in a CARE plan or CARE agreement. (Welf. & Inst., § 5972, subds. (a)-(f).)

2) Defines "CARE agreement" as a voluntary settlement agreement entered into by the parties, including the same elements as a CARE plan to support an individual in accessing community-based services and supports. (Welf. & Inst., § 5971, subd. (a).)

3) Defines "CARE plan" as an individualized, appropriate range of community-based services and supports, which include clinically appropriate behavioral health care and stabilization medications, housing, and other supportive services. (Welf. & Inst., § 5971, subd. (b).)

4) Identifies the persons who may file a petition to initiate the CARE process, including, among others, a person with whom the respondent resides, the spouse or parent or other caregiver of the respondent, a first responder who has repeated interactions with the respondent, the director of a county behavior health agency in which the respondent resides or is found, or the respondent themselves. (Welf. & Inst., § 5974.)

5) Establishes the process by which a petition can be filed with the court and a hearing can be held to determine whether the respondent should be required to engage in behavioral health treatment, as specified. (Welf. & Inst., § 5975 et seq.)

6) States that pretrial diversion refers to the procedure of postponing prosecution of an offense filed as a misdemeanor either temporarily or permanently at any point in the judicial process from the point at which the accused is charged until adjudication. (Pen. Code, § 1001.1.)

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

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

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

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

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

9) Authorizes the court, after considering the positions of the defense and prosecution, to grant pretrial diversion to a defendant if the defendant meets specified criteria. (Pen. Code, § 1001.36, subds. (a)-(b).)

10) Provides that "pretrial diversion" for purposes of mental health diversion means the postponement of prosecution, either temporarily or permanently, at any point in the judicial process from the point at which the accused is charged until adjudication, to allow the defendant to undergo mental health treatment, subject to specified conditions. (Pen. Code, § 1001.36, subd. (c).)

11) Provides that the counties of Alameda, Butte, Napa, Nevada, and Santa Clara may establish a pilot program to operate a deferred entry of judgment pilot program for certain eligible, young-adult defendants. (Pen. Code, § 1000.7, subd. (a).)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "Substance use disorder is a public health issue and needs to be treated as such. It is clear that our jails and prisons are not working. We need to help people with their addictions through evidence based treatment. This voluntary pilot program in four counties will help those get the treatment they need, ultimately reducing recidivism and increasing public safety."

2) **Former Legislation Authorizing Secured Treatment Pilot Programs and Governor's Veto Message:** AB 1542 (McCarty), of the 2021-2022 Legislative Session was substantially similar to this bill, except that it would have authorized only Yolo County to establish a secured residential drug treatment facility pilot program. The Governor vetoed the bill on October 8, 2021. In his veto message, the Governor said:

> "I am returning Assembly Bill 1542 without my signature.
>
> AB 1542 would authorize the County of Yolo to offer a pilot program that would allow individuals struggling with substance use disorders, who have been convicted of qualifying drug-motivated crimes, to be placed in a Secured Residential Treatment Program.
>
> I understand the importance of developing programs that can divert individuals away from the criminal justice system, but coerced treatment for substance use disorder is not

the answer. While this pilot would give a person, the choice between incarceration and treatment, I am concerned that this is a false choice that effectively leads to forced treatment. I am especially concerned about the effects of such treatment, given that evidence has shown coerced treatment hinders participants' long-term recovery from their substance use disorder. For these reasons, I am returning this bill."

(Governor's veto message on AB 1542 (Oct. 8, 2021) (2021-2022 Reg. Session) < https://www.gov.ca.gov/wp-content/uploads/2021/10/AB-1542-1082021.pdf>.)

Last year, AB 1928 (McCarty), was introduced and was substantially similar to the bill the governor vetoed. Unlike AB 1542, which applied only to Yolo County, AB 1928 would have applied to the Counties of San Joaquin, Santa Clara, and Yolo. AB 1928 was held on suspense in the Assembly Appropriations Committee.

This bill is substantially similar to the previous two bills. It would authorize Sacramento County and Yolo County to offer the secured residential treatment pilot programs. Unlike AB 1542, but like AB 1928, this bill would require the judge to make a finding that the defendant's decision to enter treatment was "knowing, intelligent, and voluntary"; the county to develop and staff the program in partnership with relevant community-based organizations and drug treatment service providers; and the program to provide an individualized treatment plan with medication assisted treatment options and counseling based on the recommendations of a substance use disorder specialist. This bill would also prohibit the facility from going into "lockdown."

3) **Efficacy of Compelled or Coerced Substance Use Treatment**: This bill would require a judge, in the counties with the pilot programs, to offer a criminal defendant convicted of a felony the opportunity to go to a secured residential treatment facility instead of jail or prison after making a finding that the defendant's decision to choose the alternative treatment program is knowing, intelligent, and voluntary.

Opponents argue that offering the defendant the choice between jail/prison or treatment in a secured facility at the time of sentencing is so coercive as to undermine the presumption that consent was truly voluntary, that in effect treatment is compelled. Research shows that compelled treatment is ineffective. (Lunze et al, *Mandatory addition treatment for people who use drugs: global health and human rights analysis*, BMJ (June 9, 2016); Parhar et al., *Offender Treatment: A Meta-Analysis of Effectiveness*, Criminal Justice and Behavior (Sept. 2008) Vol. 35, No. 9, p. 1128, Sep. 2008 < https://studysites.sagepub.com/stohrstudy/articles/05/Parhar.pdf> [as of Mar. 7, 2022].)

However, some researchers distinguish between programs like the one proposed by this bill and compelled treatment. As the authors of a meta-analysis examining the effectiveness of compulsory drug treatment programs explain, "Compulsory drug treatment (particularly in inpatient settings) is often abstinence-based, and it is generally nested within a broader criminal justice-oriented response to drug-related harms. Compulsory treatment is distinct from coerced treatment, wherein individuals are provided with a choice, however narrow, to avoid treatment." (Werb et. al, *The Effectiveness of Compulsory Drug Treatment: A Systemic Review*, Int'l J. of Drug Policy (Feb. 2016) 28:1-9, [excluding studies of "coerced or quasi-compulsory treatment (i.e., wherein individuals are provided with a choice between treatment and a punitive outcome such as incarceration…)" from its analysis]; see also, Bazazi,

Commentary on Rafful et al. (2018): Unpacking involuntary interventions for people who use drugs, Addiction J. (2018) Vol. 113 at p. 1064.)

The evidence for the effectiveness of coerced treatment is mixed. (See e.g., Bright, *Does coerced treatment of substance-using offenders lead to improvements in substance use and recidivism? A review of the treatment efficacy literature*, Aust. Psychol. (2013) 48:69-81; Schuab et al., *Comparing outcomes of 'voluntary' and 'quasi-compulsory' treatment of substance dependence in Europe*, European Addiction Research, (2010) 16(1):53-60; Anglin et al, *The Effectiveness of Coerced Treatment for Drug Abusing Offenders*, UCLA Drug Abuse Research Center (1998) at pp. 5-10 [paper presented at the Office of National Drug Control Policy's Conference of Scholars and Policy Makers, Washington, D.C., March 23-25, 1998].) Nevertheless, according to the Substance Abuse and Mental Health Services Administration (SAMHSA), an agency within the U.S. Department of Health and Human Services, "Coerced treatment by the criminal justice system has been shown to be at least as effective as non-coerced treatment, when time in treatment is held constant." (SAMHSA, *Substance Abuse Treatment For Adults in the Criminal Justice System: A Treatment Improvement Protocol (TIP) 44* (2005) at p. 22 [reprinted in 2014] [internal citations omitted] ["SAMHSA TIP 44"].)

One of the principal concerns with compelled or coerced treatment is that the person suffering from substance use disorder has not voluntarily agreed to treatment, and as such the treatment is likely to be ineffective. Research has found that "mandated treatment was ineffective, particularly when the treatment was located in custodial settings, whereas voluntary treatment produced significant treatment effect sizes regardless of setting." (Parhar et al., *supra*.) Others question whether voluntariness at the time treatment begins necessarily impacts treatment outcomes. (Hatchel et al., *Mandated Treatment and Its Impact on Therapeutic Process and Outcome Factors*, Frontiers in Psychiatry (Apr. 12, 2019) Vol. 10, No. 219.) According to SAMHSA, "Offenders' motivation for treatment may change over time; for example, as they become more familiar with peer mentors, counseling staff, program expectations, and their own self-defeating behaviors from the past." (SAMHSA TIP 44, *supra*.)

Regardless, some policy-makers have supported efforts to compel persons suffering from severe mental illness and substance use disorders into treatment. (See Katz, *Changing Focus: The Right to Treatment of Serious Mental Illness*, SAMHSA (Apr. 16, 2018) <https://www.samhsa.gov/sites/default/files/the_right_to_treatment.pdf> [stating that "[s]tate civil commitment laws [are] inadequate to provide necessary treatment/treatment duration," and that "[t]here is a failure to use…laws to compel treatment for individuals at risk of harm to [them]self or others."].) On March 3, 2022, Governor Gavin Newsom announced a plan to give family-members, county and community-based social services, behavior health provides, or first responders the ability to petition a court to have a person placed into involuntary treatment for up to 24 months. (Wiley, *California judges could order help for homeless Californians under Newsom's new plan*, L.A. Times (Mar. 3, 2022) <https://www.latimes.com/california/story/2022-03-03/california-judges-order-help-homeless-people-newsom-plan> [last visited Mar. 7, 2022].) According to the Governor's announcement:

> CARE Court is designed on the evidence that many people can stabilize, begin healing, and exit homelessness in less restrictive, community-based care settings. It's a long-term

strategy to positively impact the individual in care and the community around them. The plan focuses on people with schizophrenia spectrum and other psychotic disorders, who may also have substance use challenges, and who lack medical decision-making capacity and advances an upstream diversion from more restrictive conservatorships or incarceration.

(CARE Court, Fact Sheet (Mar. 2022) <https://www.gov.ca.gov/wp-content/uploads/2022/03/Fact-Sheet_-CARE-Court-1.pdf>) On September 14, 2022, Governor Newsome signed into law the Community Assistance, Recovery, and Empowerment (CARE) Act. (SB 1338 (Umberg), Chapter 319, Statutes of 2022; Welf. & Inst. Code, § 5970, et seq.)

Individuals experiencing severe mental illness with a diagnosis of schizophrenia spectrum and other psychotic disorders qualify for the CARE process. Many people who have a substance use disorder also struggle with mental disorders, and there is an "especially pronounced [overlap] with serious mental illness." (National Institute on Drug Abuse, Common Comorbidities with Substance Use Disorders Research Report (Apr. 2020) < https://nida.nih.gov/publications/research-reports/common-comorbidities-substance-use-disorders/part-1-connection-between-substance-use-disorders-mental-illness> [last visited Apr. 6, 2023].) Indeed, "Patients with schizophrenia have higher rates of…drug use disorders than the general population." (*Ibid.*) Would there may be overlap between the population covered by CARE court and the one likely to be offered participation in the secured residential treatment pilot programs?

4) **Overdose Rates and Negative Mental Health Outcomes for Incarcerated People:** This bill proposes to allow some offenders to participate in a secured residential treatment program instead of serving their sentences in jail or prison. Research shows that incarceration can be traumatic. Incarcerated persons may suffer from "posttraumatic stress disorders, as well as other psychiatric disorders, such as panic attacks, depression and paranoia; subsequently, these prisoners find social adjustment and social integration upon release." (Mika'il DeVeaux, *The Trauma of the Incarceration Experience*, Harv. C.R.-C.L. L.Rev. (2013) at p. 258-259.)

Moreover, incarcerated persons have an increased risk of overdose and death upon release. According to a report by the Massachusetts Department of Public Health (MDPH) analyzing available data on opioid deaths in the state, "Those who have recently been released from Massachusetts prisons have a short-term risk of death from opioid overdose that is greater than 50 times the risk of the general public." (MDPH, *An Assessment of Opioid-Related Deaths in Massachusetts* (2013-2014) (Sept. 2016) at p. 9; see also Binswanger et al., *Release from Prison – A High Risk of Death for Former Inmates*, The New England J. of Med. (Jan. 2007) Vol. 356, No. 2; Merall et. al, *Meta-analysis of drug-related deaths soon after release from prison*, Addiction J. (Sept. 2010) Vol. 105, No. 9.) Another found that "[p]eople released from prison are at up to 40 times higher risk of overdose in the time following release." (Jurecka et at., *Using Evidence to Inform Legislation Aimed at Curbing Fentanyl Deaths*, JAMA Health Forum (Jan. 27, 2023) <https://jamanetwork.com/journals/jama-health-forum/fullarticle/2800863> [last visited Mar. 31, 2023].)

Many of these deaths may be attributable to a loss of tolerance resulting from forced

abstinence. (Merall et. al, *supra*; see also Vo et al., *Assessing HIV and overdose risks for people who use drugs exposed to compulsory drug abstinence programs (CDAP): A systemic review and meta-analysis*, Int'l J. of Drug Policy (Oct. 2021) Vol. 96).)

5) **2021 Multistate Opioid Settlement Agreement:** This bill provides that funds allocated to the state from the 2021 Multistate Opioid Settlement Agreement may be used to reimburse treatment services given to program participants if those services are not reimbursable under Medi-Cal or through personal health care coverage.

   A large coalition of the country's leading medical and mental health groups, public policy organization, and research centers worked together to develop recommendations for how best to spend funds received from the settlement. The resulting Principles for the Use of Funds From the Opioid Litigation recommended, among other things, spending money to bolster underfunded substance use and behavior health programs; funding initiatives that have been shown to work, such as harm reduction programs and communication campaigns to reduce stigma; investing in youth prevention; focusing on racial equity by elevating and expanding diversion programs and linking participants with community-based services; and developing a fair and transparent process for deciding where to spend settlement funds. (Johns Hopkins Bloomberg School of Public Health, Principles for the Use of Funds From the Opioid Litigation <https://opioidprinciples.jhsph.edu/> [last visited Mar. 9, 2022].)

   Would spending funds from the settlement to reimburse treatment services for participants in programs that have not been shown to work be better allocated to interventions that have strong evidence for their efficacy? (See Jurecka et al., *supra.*)

6) **Procedure at Sentencing:** This bill requires the judge to offer the pilot program to the defendant at the time of sentencing, which raises several issues. First, many of the offenders that fit the eligibility criteria for this program are also likely eligible for felony probation. (Pen. Code, § 1203.) Yet this bill states that any participant in the program cannot be placed on probation. Probation is often a preferable choice for defendants rather than any amount of time in custody, even at an alternative site such as a secured residential treatment facility. (Cf. Arnold et al., *Drug Courts in the Age of Sentencing Reform*, Center for Court Innovation (2020) p. 2 <https://www.innovatingjustice.org/sites/default/files/media/documents/2020-03/report_sentencingreform_03262020.pdf k\> [last viewed Mar. 31, 2023] [defendants refusing participation in drug court because the program was too long and intensive].) It may be difficult to find participants in the program if the consequences of doing so means that a defendant will lose the opportunity to be placed on probation.

   Second, when probation is not imposed, crimes are punishable by a triad of determinate sentences. By default, a felony with an unspecified punishment is punishable by 16 months, 2, or 3 years in the county jail. (Pen. Code, § 1170, subd. (h)(1).) Imposition of the middle term is generally required, unless there are circumstances in aggravation or mitigation of the crime. California Rules of Court dictate that the sentencing judge may consider circumstances in aggravation or mitigation and any other factor reasonably related to the sentencing decision in order to select one of the three terms of punishment. The judge must state their reasons on the record for the term they select. It is not clear in this bill whether a judge would have to first sentence the defendant to a term of imprisonment before offering the program, or simply announce their intention to do so.

Third, this bill does not provide for the possibility that treatment providers may determine that an offender would benefit from treatment in a noncustodial setting. For example, upon evaluation, treatment providers may find that an individual would benefit from noncustodial inpatient treatment, sober living, and/or outpatient treatment; or that an offender's substance use disorder was exacerbated by co-occurring issues, personal and/or social, that could be better addressed in an outpatient setting. Put differently, this bill appears to grant treatment providers the authority to influence determinations about custody only if they agree in advance that an offender's needs will be addressed in secured residential treatment. A contrary finding would result in an offender spending time in jail or prison, which potentially places treatment providers in the position of making recommendations that they believe, based on a needs assessment, could cause harm.

Given the dangers of incarceration and the limitations of their authority, would treatment providers feel pressure to recommend secured residential treatment even for offenders for whom a lower level of care would be more appropriate?

7) **Second Year Program Participation:** This bill has a sunset date of January 1, 2026, two years after the date when the pilot programs would become effective. Would a person that treatment providers believe would benefit from secured residential treatment be excluded because the recommended treatment duration would extend beyond the sunset date? If so, many individuals evaluated during the second year of the pilot program would likely not qualify to participate.

8) **Argument in Support**: According to the *League of California Cities*: "According to the National Institute of Health and the National Institute for Drug Abuse, an estimated 65% percent of the United States prison and jail populations have an active substance use disorder (SUD). Another 20% percent did not meet the official criteria for a SUD, but were under the influence of drugs or alcohol at the time of the crime. Furthermore, economic and societal costs of untreated substance abuse in the U.S. now exceed $700 billion.

"AB 1360 would provide the four counties in consultation with the American Society of Addiction Medicine, county drug treatment providers, and other community stakeholders another treatment option for individuals suffering from SUD that commit repeat felonies due to their addiction. The program is voluntary and includes wrap-around services, and if completed, patients would have their records expunged and sealed.

"Cal Cities supports additional funding and resources to address the substance use crisis through appropriate prevention and intervention efforts, educational awareness campaigns, and increased access to life-saving overdose treatment aids such as naloxone."

9) **Argument in Opposition**: According to the *California Association of Alcohol and Drug Program Executives*: "AB 1360 would create a program allowing judges to sentence people convicted of 'drug-motivated crimes' to a secured facility, described as a 'Secured Residential Treatment Program.' It does not describe the conditions of the facility, or describe the qualifications of those who would be responsible for the treatment or security aspects of these facilities.

"We assume that the author and proponents are well-intentioned. However, research strongly suggests that this approach would not be effective or fiscally responsible. Research finds that

coerced treatment is much more expensive than voluntary treatment, but has no demonstrable benefit in terms of treatment outcomes when compared to voluntary treatment. Studies also suggest that forced treatment makes individuals less trustful of substance use disorder (SUD) treatment, and therefore less likely to engage SUD treatment or other medical services in the future.

"Ultimately this bill would waste resources that could be better invested in voluntary services in the community. The costs for prosecutors, defense attorneys, judges, bailiffs, court staff, and whatever entity would be responsible for guarding people within the secure facility would likely take the lion's share of any funding allocated to this program- -funding that should be going to community based treatment providers. Further, AB 1360 might actually increase the length of time people are under supervision of courts, or in jail, because people who do not complete treatment in the secured facility could be resentenced to incarceration.

"Instead of establishing an expensive, ineffective and potentially harmful coerced treatment program, we recommend that state and local funds prioritize expanding access to evidence-based, voluntary substance use disorder treatment and harm reduction services, permanent supportive housing, and access to other health and social services."

10) **Related Legislation**:

a) AB 697 (Davies), would establish the Drug Court Success Incentives Pilot Program, which authorizes the Counties of Sacramento, San Diego, and Solano to offer up to $500 per month of supportive services to adult defendants who participate in the county's drug court to encourage participation in, and successful completion of, drug court. AB 697 is pending hearing in the Assembly Appropriations Committee.

b) AB 890 (Joe Patterson), would require a court to order a defendant who is granted probation for specified drug offenses involving fentanyl and other specified opiates to complete a fentanyl and synthetic opiate education program. AB 890 is pending hearing in Assembly Appropriations Committee.

11) **Prior Legislation**:

a) AB 1928 (McCarty), of the 2021-2022 Legislative Session, would have authorized the Counties of San Joaquin, Santa Clara, and Yolo to establish pilot programs to offer secured residential treatment for qualifying individuals suffering from substance use disorders (SUDs) who have been convicted of drug-motivated felony crimes. AB 1928 was held on suspense in the Assembly Appropriations Committee.

b) AB 1542 (McCarty), of the 2021 – 2022 Legislative Session, would have authorized the Counties of San Joaquin, Santa Clara, and Yolo to establish pilot programs to offer secured residential treatment for qualifying individuals suffering from substance use disorders who have been convicted of drug-motivated felony crimes. The Governor vetoed AB 1542.

c) AB 2877 (McCarty), of the 2019 – 2020 Legislative Session, would have required a person who commits a crime while under the influence of a specified controlled substance, or with the specific intent of directly or indirectly obtaining that controlled

substance to participate in a drug treatment program as a condition of probation, if probation is imposed. AB 2877 did not receive a hearing in this Committee.

REGISTERED SUPPORT / OPPOSITION:

Support

California District Attorneys Association
County of Yolo
League of California Cities

Opposition

CA Association of Alcohol and Drug Executives, INC
Disability Rights California
California Public Defenders Association (CPDA)

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

Date of Hearing: April 11, 2023
Counsel: Cheryl Anderson

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Reginald Byron Jones-Sawyer, Sr., Chair

AB 1378 (Essayli) – As Amended March 9, 2023

SUMMARY: Makes the violation of a protective order issue based on victim or witness intimidation or threats punishable in the alternative as a misdemeanor or state prison felony. Makes the violation punishable as a state prison felony if the person was armed with a firearm. Specifically, **this bill**:

1) Makes an intentional and knowing violation of a criminal protective order issued based on victim or witness intimidation or threats punishable as a misdemeanor by up to one year in the county jail, or as a felony for 16 months, two years, or three years in state prison, and/or a fine of up to $1,000.

2) Makes the violation punishable as a state prison felony for two, three, or four years if the person was armed with a firearm.

3) Makes conforming changes.

EXISTING LAW:

1) Authorizes the trial court in a criminal case to issue protective orders when there is a good cause belief that harm to, or intimidation or dissuasion of, a victim or witness has occurred or is reasonably likely to occur. (Pen. Code, § 136.2, subd. (a).)

2) Provides that a person violating a protective order may be punished for any substantive offense described in provisions of law related to intimidation of witnesses or victims, or for contempt of court. (Pen. Code, § 136.2, subd. (b).)

3) Requires a court to consider issuing a restraining order lasting up to 10 years protecting victims for convictions including, but not limited to domestic violence, certain types of human trafficking, gang activity, statutory rape, pimping of a minor, and offenses requiring sex offender registration. (Pen. Code, §§ 136.2, subd. (i)(1); 273.5, subd. (j); 368, subd. (l); 646.9, subd. (k); 1201.3, subd. (a).)

4) Provides that a post-conviction protective order may be issued by the court regardless of whether the defendant is sentenced to the state prison, or a county jail, or subject to mandatory supervision, or whether the defendant is placed on probation. The duration of a protective order issued by the court should be based upon the seriousness of the facts before the court, the probability of future violations, and the safety of the victim and the victim's immediate family. (Pen. Code, § 136.2, subd. (i)(1).)

5) Requires a court to consider issuing a restraining order up to 10 years long protecting percipient witness, upon clear and convincing evidence of witness harassment, in cases with convictions including, but not limited to domestic violence, statutory rape, gang activity, and sex registerable offenses. (Pen. Code, § 136.2, subd. (i)(2).)

6) Authorizes a court to place conditions on a 10-year restraining order that can include electronic monitoring for up to one year, as specified. (Pen. Code, § 136.2, subd. (i)(3).)

7) Provides that a person subject to a protective order shall not own, possess, purchase, or receive, or attempt to purchase or receive, a firearm while the protective order is in effect. (Pen. Code, § 136.2, subd. (d)(1).)

8) Provides that a person who purchases, or receives, or attempts to purchase or receive, a firearm while knowing that the protective order is in effect is punishable by up to one year in the county jail as a misdemeanor, or in state prison for 16 months, two years, or three years, and/or by a fine up to $1,000, or both. (Pen. Code, §§ 136.2, subd. (d)(1), 29825, subd. (a).)

9) Provides that a person who owns or possesses a firearm while knowing that the protective order is in effect is punishable by up to one year in the county jail as a misdemeanor, by a fine up to $1,000, or by both. (Pen. Code, §§ 136.2, subd. (d)(1), 29825, subd. (b).)

10) Punishes an individual for willful disobedience of, among other things, a lawful protective order as a misdemeanor by up to one year in the county jail and/or a fine up to $1,000. (Pen. Code, § 166, subd. (c)(1).)

11) Makes a second or subsequent conviction for a violation of a lawful protective order occurring within seven years of a prior conviction for a violation and involving an act of violence or "a credible threat" of violence, as provided, punishable by imprisonment in a county jail not to exceed one year, or in the state prison for 16 months, or two, or three years. (Pen. Code, § 166, subd. (c)(4).)

12) States that except as provided, a person who is armed with a firearm in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment for one year pursuant to realignment, unless the arming is an element of that offense. This additional term shall apply to a person who is a principal in the commission of a felony or attempted felony if one or more of the principals is armed with a firearm, whether or not the person is personally armed with a firearm. (Pen. Code, § 12022, subd. (a)(1).)[1]

13) Provides that any person who personally uses a firearm in the commission or attempted commission of a felony, in addition and consecutive to the punishment for the underlying felony offense, shall be sentenced to a term of 3, 4, or 10 years in state prison, unless the use of a firearm is an element of the offense for which they are convicted. A person who personally uses an assault weapon or machine gun during the commission of a felony or

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[1] Armed has been interpreted to mean available for use. (*People v. Delgadillo* (2005) 132 Cal. App. 4th 1570, 1574.)

attempted felony is subject to an additional consecutive term of 5, 6, or 10 years in state prison. (Pen. Code, § 12022.5, subds. (a) & (b).)[2]

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "AB 1378 is a common sense approach that allows for more judicial discretion in the cases of a protective order violation. AB 1378 makes it possible for the first violation to be punishable as either a misdemeanor or a felony at the discretion of the court. Furthermore, AB 1378 specifically addresses situations where the violator is armed with a firearm during the violation of a protective order, and makes such violations punishable as a felony."

2) **Protective Orders, Generally**: As a general matter, a court can issue a restraining order in any criminal proceeding pursuant to Penal Code section 136.2, subdivision (a)(1), upon a good cause belief that harm to, or intimidation or dissuasion of, a victim or witness has occurred or is reasonably likely to occur. Protective orders issued under this portion of the statute are valid only during the pendency of the criminal proceedings. (*People v. Ponce* (2009) 173 Cal.App.4th 378, 382.)

   Specific to domestic violence and offenses requiring sex offender registration, the case file must be clearly marked so that the court is aware of their nature for purposes of considering a protective order. (Pen. Code, § 136.2, subd. (e)(1).) The court has the authority to issue pre- and post-conviction protective orders. (*People v. Lopez* (2002) 75 Cal.App.5th 227.) When a defendant has been convicted of domestic violence, as defined, and rape, statutory rape, spousal rape, or any crime requiring sex offender registration, it can issue a protective order lasting up to 10 years. (Pen. Code, § 136.2, subd. (i)(1).)

   Violation of a protective order is punishable as contempt of court, as a misdemeanor, by up to one year in the county jail. (Pen. Code, §§ 136.2, subd. (b), 166, subd. (c)(1).) A second or subsequent conviction for a violation of an order occurring within seven years of a prior conviction for a violation of an order and involving an act of violence or "a credible threat" of violence is punishable as a misdemeanor by imprisonment in a county jail not to exceed one year, or as a felony in the state prison for 16 months or two or three years. (Pen. Code, § 166, subd. (c)(4.)

   This bill would make a first violation of these protective orders alternatively punishable as a misdemeanor by up to a year in the county jail or as a felony by 16 months, two years, or three years. If a firearm is used, it would be punishable as a felony by two, three, or four years in state prison.

   However, contempt of court is not the only option available to a prosecutor when the

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[2] The firearm need not be operable or loaded. (*People v. Nelums* (1982) 31 Cal.3d 355, 360; see *People v. Steele* (1991) 235 Cal.App.3d 788, 791–795.) Someone personally uses a firearm if they intentionally display the firearm in a menacing manner, hits someone with the firearm, or fires the firearm. (*People v. Bland* (1995) 10 Cal.4th 991, 997; *People v. Johnson* (1995) 38 Cal.App.4th 1315, 1319–1320; see also Pen. Code, § 1203.06, subd. (b)(2).)

violation of a protective order is based on intimidation or threats against a victim or witness to a crime. Under current law, the person violating the order may be punished for specified substantive offenses underlying the issuance of the order. For example, if the person violates the order by knowingly and maliciously preventing or dissuading, or attempting to prevent or dissuade, any witness or victim from attending or giving testimony at any trial or proceeding, the offense can be punished as a felony by 16 months, two years, or three years in state prison. (Pen. Code, §§ 136.1, subd. (a)(1), 136.2, subd. (b).) If they are armed with a firearm – i.e., have a firearm available for use – they can receive an additional year of punishment. (Pen. Code, § 12022, subd. (a)(1).) If a firearm is used – i.e., displayed in a menacing manner – the person could receive up to an additional 10 years. (Pen. Code, § 12022.5, subd. (a).) Additionally, criminal threats is a separate offense punishable by up to three years in state prison, on top of which firearm enhancements may be added. (Pen. Code, § 422.)

3) **Lack of Enforcement of Restraining Orders:** According to the managing staff attorney at Jenesse Center, a non-profit domestic violence prevention and intervention organization, the enforcement of restraining orders lacks the priority they feel it should have. "One of the overarching concerns . . . is that police do not fully understand and are unprepared to respond adequately to domestic violence calls....It comes up repeatedly with our client population. 'You know, I have this restraining order, he continues to violate it, the police aren't doing anything'" (https://xtown.la/2021/11/15/domestic-violence-restraining-order/)

"[I]n 2020, the LAPD received 5,126 calls about domestic violence restraining orders, but only filed 765 reports of restraining order violations, less than 15% of the total." (https://xtown.la/2021/11/15/domestic-violence-restraining-order/) According to the coordinator of the Los Angeles Police Department's domestic violence unit, officers may have difficulty enforcing restraining orders because they first need to ensure the order is valid when they get to the scene – i.e., that the accused was properly notified of the order. Officers also do not receive enough training about domestic violence and responding to those calls. (*Ibid.*)

4) **Practical Considerations:** The bill states the enhanced punishment for firearm use applies to paragraphs (1) and (2). There is no paragraph (2).

5) **Argument in Support**: According to the *California District Attorneys Association*, "California has long recognized that intimidation of victims and witnesses poses an unacceptable threat to the pursuit of justice. Such intimidation is outlawed by Penal Code section 136.1, and courts are authorized under Penal Code section 136.2 to issue what is known as a criminal protective order when there is 'good cause belief that harm to, or intimidation or dissuasion of, a victim or witness has occurred or is reasonably likely to occur.'

"Under current law a violation of a criminal protective order that does not involve any other crime is punishable as contempt of court under Penal Code section 166. (See Pen. Code, § 136.2, subd. (b).) This requires the violation be treated as a misdemeanor unless the defendant has already been convicted of violating a protective order within seven years and the current violation involves an act or threat of violence. (Pen. Code, § 166, subd. (c).)

"AB 1378 recognizes that, in some instances, even a first-time violation of a criminal protective order represents such an affront to the safety of the victim and to the ends of

justice that the crime should be prosecuted as a felony. AB 1378 would therefore permit it to be prosecuted as a misdemeanor or a felony. AB 1378 recognizes, further, that any time a violation of a criminal protective order is committed with a firearm, the actual and potential harm to victims and the disruption of justice is even greater, and thus the bill would permit enhanced felony penalties when firearms are involved.

6) **Argument in Opposition**: According to the *California Public Defenders Association*, "Individuals subject to a criminal protective order are frequently individuals who are experiencing their first contact with the criminal justice system. In most cases these individuals represent families in crisis and attempting to manage not only the criminal justice system while caring for and raising children. The wide range of cases where such an order can be imposed and where such order is frequently imposed against the will of the protected person abound. While we recognize that disobedience of a court order does require consequences, those consequences for the first offense are appropriately limited to a misdemeanor level.

"Providing for an escalated deterrent for repeatedly violating a criminal protective order makes both fiscal and logical sense. A misdemeanor offense for such a violation carries up to 364 days in a county jail facility, which is no small sanction and is more than sufficient to vindicate the goals of the order initially, providing the court with up to a year of discretion with sentencing. If that proves to be an insufficient sanction, then the second violation could result in up to three-years of incarceration.

"The taxpayer costs associated with this bill would be high and of little deterrent value. Creating felony punishment for a single violation of an order, frequently before the underlying offense has even been adjudicated would be monumentally expensive. AB 1378's proposed punishment for violating the protective order would be harsher in most cases than the punishment for underlying offense resulting in the order.

"Lastly, and most importantly, there is no empirical evidence offered by the author that increased punishment deters individuals from violating criminal protective orders. Although the research shows that longer sentences in general do not deter crime, this finding would be particularly true of individuals who are either emotionally distraught due to breakup of a relationship or are suffering from mental illness."

7) **Related Legislation**:

   a) AB 36 (Gabriel) would, among other things, prohibit a person subject to protective orders, as specified, issued on or after July 1, 2024, from owning, possessing, purchasing, or receiving a firearm or ammunition within three years after the expiration of the order and make a violation of this provision a crime. AB 36 is pending hearing in the Assembly Judiciary Committee and this committee.

   b) AB 467 (Gabriel) clarifies that a court that sentenced a defendant and issued a 10-year criminal protective order, may make modifications to it throughout the duration of the order. AB 467 has been read a second time and ordered to third reading.

8) **Prior Legislation**:

a) AB 2040 (Maienschein), of the 2021-2022 Legislative Session, would have made the violation of certain domestic violence-related protective orders, which involve forcible entry into, or unlawful presence in, the protected person's "residential dwelling," punishable by a minimum of 30 days in the county jail, unless the sentence is not in the interest of justice. AB 2040 was held in the Assembly Appropriations Committee.

b) SB 935 (Min), Chapter 88, Statutes of 2022, clarified that certain protective orders issued under the Domestic Violence Protection Act (DVPA) may be renewed more than once.

REGISTERED SUPPORT / OPPOSITION:

Support

Arcadia Police Officers' Association
Burbank Police Officers' Association
California District Attorneys Association
Claremont Police Officers Association
Corona Police Officers Association
Crime Victims Alliance
Culver City Police Officers' Association
Deputy Sheriffs' Association of Monterey County
Fullerton Police Officers' Association
Los Angeles School Police Officers Association
Murrieta Police Officers' Association
Newport Beach Police Association
Palos Verdes Police Officers Association
Placer County Deputy Sheriffs' Association
Pomona Police Officers' Association
Riverside Police Officers Association
Riverside Sheriffs' Association
Santa Ana Police Officers Association
Upland Police Officers Association

Opposition

California Public Defenders Association (CPDA)

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

Date of Hearing: April 11, 2023
Counsel: Liah Burnley

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Reginald Byron Jones-Sawyer, Sr., Chair

AB 1380 (Berman) – As Introduced February 17, 2023

SUMMARY: Expands the crime of "revenge porn" to include the distribution of specified images obtained without the authorization of the person depicted or by exceeding authorized access from the property, accounts, messages, files, or resources of the person depicted.

EXISTING FEDERAL LAW: Protects the freedom of speech and of the press. (U.S. Const., 1st Amend.)

EXISTING STATE LAW:

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

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

3) Makes it a misdemeanor to use a concealed camcorder, motion picture camera, or photographic camera of any type, to secretly videotape, film, photograph, or record by electronic means, another identifiable person under or through the clothing being worn by that other person, for the purpose of viewing the body of, or the undergarments worn by, that other person, without the consent or knowledge of that other person, with the intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of that person and invade the privacy of that other person, under circumstances in which the other person has a reasonable expectation of privacy. (Pen. Code, § 647, subd. (j)(2).)

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

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

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

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

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

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

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

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

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

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

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

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

12) Provides that every person who, with intent to place another person in reasonable fear for their safety, or the safety of the other person's immediate family, by means of an electronic communication device, and without consent of the other person, and for the purpose of causing that other person unwanted physical contact, injury, or harassment, by a third party, electronically distributes, publishes, e-mails, hyperlinks, or makes available for downloading, personal identifying information, including, but not limited to, a digital image of another person, or an electronic message of a harassing nature about another person, is guilty of a misdemeanor punishable by up to one year in the county jail and/or a fine not exceeding $1,000. (Pen. Code, § 653.2, subd. (a).)

13) Provides that every person who sends, brings, possesses, prepares, publishes, produces, develops, duplicates or prints any obscene matter depicting a person under the age of 18 years engaging in or simulating sexual conduct, as defined, with the intent to distribute, exhibit, or exchange such material, is guilty of either a misdemeanor punishable by imprisonment in the county jail for up to one year, and/or a fine not to exceed $1,000, or guilty of a felony punishable by imprisonment in the state prison, and/or a fine not exceeding $10,000. (Pen. Code, § 311.1, subd. (a).)

14) Specifies that every person who sends, brings, possesses, prepares, publishes, produces, duplicates or prints any obscene matter depicting a person under the age of 18 years engaging in or simulating sexual conduct, as defined, for commercial purposes is guilty of a felony, punishable by imprisonment in the state prison for two, three, or six years and a fine up to $100,000. (Pen. Code, § 311.2, subd. (b).) A person convicted of this offense is subject to sex offender registration for 10 years. (Pen. Code, § 290 subds. (c) & (d)(1).)

15) Provides that any person who hires or uses a minor to assist in the preparation or distribution of obscene matter is guilty of a misdemeanor, unless the person has a prior conviction, in which case the crime is a felony. (Pen. Code, §§ 311.4, subd. (a), 311.9, subd. (b).)

16) Provides that any person who hires or uses a minor to assist in the possession, preparation or distribution of obscene matter for commercial purposes is guilty of a felony, punishable by imprisonment in the state prison for three, six, or eight years. (Pen. Code, § 311.4, subd. (b).)

17) Makes it a misdemeanor for a person to advertise or promote the sale, distribution, or exhibition of matter represented or held out by him or her to be obscene. (Pen. Code, § 311.5.)

18) Defines "obscene matter" as "matter, taken as a whole, that to the average person, applying contemporary statewide standards, appeals to the prurient interest, that, taken as a whole, depicts or describes sexual conduct in a patently offensive way, and that, taken as a whole, lacks serious literary, artistic, political, or scientific value." (Pen. Code, § 311, subd. (a).)

19) Establishes a private cause of action against a person who intentionally distributes by any means a photograph, film, videotape, recording, or any other reproduction of another, without the other's consent when all of the following conditions are satisfied:

    a) The person knew that the other person had a reasonable expectation that the material would remain private;

    b) The distributed material exposes an intimate body part of the other person, or shows the other person engaging in an act of intercourse, oral copulation, sodomy, or other act of sexual penetration. Defines "intimate body part" to mean any portion of the genitals, and in the case of a female, any portion of the breasts below the top of the areola, that is either uncovered or visible through less than fully opaque clothing; and,

    c) The other person suffers general or special damages, as defined. (Civ. Code, § 1708.85, subds. (a) & (b).)

20) Provides that a depicted individual has a cause of action against a person who does either of the following:

    a) Creates and intentionally discloses sexually explicit material and the person knows or reasonably should have known the depicted individual in that material did not consent to its creation or disclosure; or,

    b) Intentionally discloses sexually explicit material that the person did not create, and the person knows the depicted individual in that material did not consent to the creation of the sexually explicit material. (Civ. Code, § 1708.86, subd. (b).)

21) Defines "depicted individual" as "an individual who appears, as a result of digitization, to be giving a performance they did not actually perform or to be performing in an altered depiction." (Civ. Code, § 1708.86, subd. (a)(4).)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "AB 1380 will strengthen California's law against revenge porn by closing the loopholes in the current law used by individuals to avoid punishment for distributing private sexual images of another person without their consent. Under current law, there are circumstances where a jury cannot agree that the photo or video distributed was taken under circumstances where the parties agreed that the image shall remain private because the image or video was taken surreptitiously. If a sexually explicit image or video is secretly taken and then distributed, this circumstance should fall under California's revenge porn laws. This bill will clarify that the existing crime of revenge porn applies when an image is knowingly obtained without the victim's knowledge or consent.

    "To ensure that victims of revenge porn are adequately protected, this bill will ensure that a person cannot distribute secretly recorded or captured image or video without the authorization of the person depicted. Additionally, it would ensure that a person cannot distribute images or videos that are stolen from the depicted person. Too often perpetrators of revenge porn leverage legal loopholes to get away with this heinous crime, leaving victims traumatized, humiliated, and without justice. AB 1380 will ensure that if you record and distribute another person's sexually explicit images without their consent there will be legal consequences."

2) **Existing Law Already Captures the Conduct this Bill Intends to Criminalize**: The intent of this bill is to criminalize the situation where an "image is knowingly obtained without the victim's knowledge or consent" and distributed. Penal Code section 647 subdivision (j) prohibits secretly filming, photographing, or recording another person who may be in a state of full or partial undress, for the purpose of viewing the body of, or the undergarments worn by, that other person, without the consent or knowledge of that other person, in any area in which that other person has a reasonable expectation of privacy, with the intent to invade the privacy of that other person. (Pen. Code, § 647, subd. (j)(3).) The act of secretly taking a picture or filming a person, with the intent to invade the privacy of that person, whether or not the image is subsequently distributed, is already criminal offense. For example, in *In re M.H.* (2016) Cal.App.5th 699, evidence was sufficient to find that a minor invaded the

privacy of a fellow high school student when he used his smartphone to surreptitiously record another student in a school bathroom stall while he was either masturbating or jokingly pretending to do so, and had the video disseminated on social media. Similarly, in *People v. Johnson* (2015) Cal.App.4th 1432, the defendant was guilty of the offense for secretly photographing individuals under their skirts while shopping at Target.

In addition, Penal Code section 502 makes unauthorized access to a computer network, which includes a phone or social media profile, a crime. Under Section 502, there is protection for traditional hacking, but the statute also protects individual users from unauthorized access, and the offence is chargeable as a misdemeanor or felony. (Pen. Code, § 502.) In 2015, the Attorney General prosecuted a cyber-hacker who hacked into email accounts and stole victims' private intimate images. The defendant pled guilty to computer intrusion. (Office of the Attorney General, *Attorney General Kamala D. Harris Announces Guilty Plea of Hacker Involved in Cyber Exploitation Scheme* (June 17, 2015) <https://oag.ca.gov/news/press-releases/attorney-general-kamala-d-harrisannounces-guilty-plea-hacker-involved-cyber> [as of March 30, 2023].)

3) **Existing Civil Remedies**: There is currently a civil remedy in place for this situation. In 2014, the Legislature enacted AB 2643 (Wieckowski), Chapter 859, Statutes of 2014, creating a private right of action against a person who intentionally distributes a sexually explicit photographs or other images or recordings of another person, without the consent of that person. (Civ. Code, § 1708.85.) In cases where the person depicted has not suffered serious emotional harm, they can nonetheless get an injunction to stop distribution of the image. (Civ. Code, § 1708.85, subd. (d).) Depending on the circumstances, a civil suit stemming from revenge porn can be commenced under many other theories, such as intentional infliction of emotional distress, fraud, false light, invasion of privacy, defamation, copyright infringement, misappropriation, and civil harassment.

4) **Constitutional Concerns:** Due process of law is based on the concepts of preventing arbitrary law enforcement and providing adequate notice to potential offenders. (*People v. Iniguez* (2016) 247 Cal.App.4th Supp. 1, 6 [citations omitted].) These protections are often referred to collectively as the 'fair warning' rule. (*Ibid.*) The vagueness doctrine bars enforcement of a statute, which either forbids or requires the doing of an act in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application. (*Ibid.*) A vague law not only fails to provide adequate notice to those who must observe its strictures, but also "impermissibly delegates basic policy matters to law enforcement, judges, and juries for resolution on an ad hoc and subjective basis, with the dangers of arbitrary and discriminatory application. (*Ibid.*) The language used must have "reasonable specificity."(*Ibid.*)

The language proposed in this bill may be considered vague because it fails to specify *who* must knowingly record capture or otherwise obtain an image without authorization of the person depicted. This bill provides that "the image was knowingly [...] obtained without the authorization of the person depicted;" or "the image is knowing obtained by exceeding authorized access [...] of the person depicted." The bill lacks specificity as to whether a person who distributes an image is guilty of the offense, even if they did not know that the image was captured without the consent of the person depicted. Accordingly, this bill could fail to put people reasonably on notice of the conduct the law intends to prohibit.

In addition, the First Amendment to the United States Constitution provides that congress shall make no law abridging the freedom of speech. The First Amendment applies to the states under the due process clause of the Fourteenth Amendment. (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 133–134.) To avoid being unconstitutionally overbroad, "statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society." (*Broadrick v. Oklahoma* (1973) 413 U.S. 601, 611–612.)

This bill could be unconstitutionally overbroad in violation of the First Amendment because it could arbitrarily foreclose to any person the right to distribute photographs of certain images, even if the person distributing the image does not know that the image was captured without the authorization of the person depicted. For example, a person could take a screenshot of a video posted online that was knowingly captured by a third party without the authorization of the person depicted in the images. If that person shares the video, for example by sending it in a text to a friend, they could be guilty of a misdemeanor. Such a prohibition could have a chilling effect on speech. Further, though the intent of this bill is to prevent the harms associated with "revenge porn," the images covered by this statute may not always be obscene – in some cases, the images they may involve nudity rather than sexual acts.

5) **Argument in Support**: According to the *California District Attorneys Association* (CDAA), "With the continued growth in social media use and internet accessibility, the crime of revenge porn has become an increasingly common crime with ever more devastating consequences on victims. The crime itself can often be committed within seconds, through the click of a mouse or the tap of a screen, but victims are forced to live with the consequences for years to come. Each new advancement in technology brings new ways for perpetrators to obtain and distribute revenge porn.

"The revenge porn statute, as presently written, seemingly precludes the prosecution of revenge porn when the distributed image was taken or obtained without the victim's knowledge or consent. This ambiguity in the statute's language impedes the prosecution of revenge porn in this specific context despite the victims still being subjected to the ugly consequences that this statute was enacted to prevent. By clarifying the revenge porn statute to explicitly include the distribution of intimate images taken without the victim's knowledge or consent, along with accounting for advancements in technology by including images obtained by exceeding authorized access, this bill will strengthen and expand protections for victims of revenge porn."

6) **Related Legislation**: AB 1602 (Alvarez), would add to the definition of disorderly conduct the attempt to engage in the crime of soliciting prostitution, the attempt to agree to engage in prostitution, or the attempt to engage in prostitution. AB 1602 is pending hearing in this Committee.

7) **Prior Legislation**:

   a) SB 23 (Rubio), Chapter 483, Statutes of 2021, extends the statute of limitations for the crime of revenge porn to allow prosecution to commence within one year of the

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

b) AB 307 (Lackey), of the 2021-2022 Legislative Session, would have required a person convicted of revenge porn to register as a sex offender. The hearing for AB 307 in the Assembly Public Safety Committee was canceled at the request of the author.

c) SB 894 (Rubio), of the 2019-2020 Legislative Session, would have allowed the prosecution for revenge porn to commence within one year of the discovery of the offense. SB 894 was never heard by the Senate Committee on Public Safety.

d) AB 2065 (Lackey), of the 2019-2020 Legislative Session, would have made the distribution of an intimate image of another person a felony offense punishable in state prison and requiring registration as a sex offender, and would have created new and separate misdemeanor crimes prohibiting the distribution and threatened distribution of such images. AB 2065 was not heard in this Committee.

e) AB 602 (Berman), Chapter 491, Statutes of 2019, created a private right of action for a "depicted individual" against a person who either creates or intentionally discloses sexually explicit material without the consent of the depicted person.

f) AB 2643 (Wieckowski), Chapter 859, Statutes of 2014, created a private right of action against a person who intentionally or recklessly distributes a sexually explicit photograph or other image or recording of another person, without the consent of that person.

g) SB 1255 (Cannella), Chapter 863, Statutes of 2014, expanded the elements of the misdemeanor offense which prohibits the unlawful distribution of a consensually-taken image of an identifiable person's intimate body parts.

h) SB 255 (Cannella), Chapter 466, Statutes of 2013, created a new misdemeanor for the distribution of an image of an identifiable person's intimate body parts which had been taken with an understanding that the image would remain private.

i) SB 1484 (Ackerman), Chapter 666, Statutes of 2004, expanded the crime of disorderly conduct to include the use of a concealed instrumentality to secretly videotape another fully or partially undressed person for the purpose of viewing that person's body or undergarments without the consent while that person is inside a bedroom, bathroom, changing room, fitting room, dressing room, or tanning booth, or in any other area in which that other person has a reasonable expectation of privacy, with the intent to invade that person's privacy.

REGISTERED SUPPORT / OPPOSITION:

Support

California District Attorneys Association
California State Sheriffs' Association

Opposition

None.

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

Date of Hearing: April 11, 2023
Counsel: Liah Burnley

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Reginald Byron Jones-Sawyer, Sr., Chair

AB 1412 (Hart) – As Introduced February 17, 2023

SUMMARY: Removes borderline personality disorder (BPD) from the mental disorders excluding a defendant from eligibility for pretrial mental health diversion.

EXISTING LAW:

1) 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).)

2) Defines "Pretrial diversion" as the postponement of prosecution, either temporarily or permanently, at any point in the judicial process from the point at which the accused is charged until adjudication, to allow the defendant to undergo mental health treatment. (Pen. Code, § 1001.36, subd. (f).)

3) 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 (DSM), including, but not limited to, bipolar disorder, schizophrenia, schizoaffective disorder, or post-traumatic stress disorder, but excluding antisocial personality disorder, BPD, 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).)

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

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

    b) The defendant consents to diversion and waives their right to a speedy trial;

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

d) The defendant will not pose an unreasonable risk of danger to public safety if treated in the community. (Pen. Code, § 1001.36, subd. (c).)

5) 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).)

6) Provides that, at any stage of the proceedings, the court may require the defendant to make a prima facie showing that they will meet the minimum requirements of eligibility for diversion and that the defendant and the offense are suitable for diversion. (Pen. Code, § 1001.36, subd. (e).)

7) States that the period during which criminal proceedings against the defendant may be diverted is limited as follows:

   a) If the defendant is charged with a felony, the period shall be no longer than two years.

   b) If the defendant is charged with a misdemeanor, the period shall be no longer than one year. (Pen. Code, § 1001.36, subd. (f).)

8) Provides that, if any of the following circumstances exists, the court shall hold a hearing to determine whether the criminal proceedings should be reinstated, the treatment should be modified, or the defendant should be referred to the conservatorship investigator of the county:

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

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

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

d) Based on the opinion of a qualified mental health expert, the defendant is performing unsatisfactorily in the assigned program or the defendant is gravely disabled. (Pen. Code, § 1001.36, subd. (g).)

9) Provides that, if the defendant has performed satisfactorily in diversion, at the end of the period of diversion, the court shall dismiss the defendant's criminal charges that were the subject of the criminal proceedings at the time of the initial diversion. (Pen. Code, § 1001.36, subd. (h).)

10) States that, upon successful completion of diversion, if the court dismisses the charges, the arrest upon which the diversion was based shall be deemed never to have occurred, and the court shall order access to the record of the arrest restricted, except as specified. The defendant who successfully completes diversion may indicate in response to any question concerning the defendant's prior criminal record that the defendant was not arrested or diverted for the offense, except as specified. (Pen. Code, § 1001.36, subd. (h).)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "Borderline personality disorder (BPD) affects 2-6% of the world's population with slightly higher rates among women and younger individuals. Current law allows pretrial diversion for individuals with mental health disorders but excludes those diagnosed with borderline personality disorder. Borderline personality disorder is characterized in the Diagnostic and Statistical Manual of Mental Disorders as a pervasive pattern of instability of interpersonal relationships, self-image, and marked impulsivity. The exclusion of BPD from diversion eligibility perpetuates harmful stigma about the disorder and limits access to care for people at high risk of suicide. AB 1412 will ensure that Californians living with borderline personality disorder have equitable access to pretrial diversion and strive to reduce recidivism within an often misunderstood population."

2) **BPD:** BPD is characterized by intense, rapidly fluctuating moods combined with impulsivity and interpersonal difficulties. (Biskin RS, *Management of Borderline Personality Disorder* (Nov. 2012) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3503902/> [as of March 30, 2023].) BPD has been used for decades to "label patients who are 'hopeless', those who get therapists upset, and is one of the most controversial mental health diagnoses." Al-Alem, Linah and Omar, Hatim A., *Borderline Personality Disorder: An Overview of History, Diagnosis and Treatment in Adolescents* (2008) Pharmacology and Nutritional Sciences Faculty Publications.) The term borderline came into existence because such patients were believed to lie on the borderline between psychosis and neurosis, with the label "borderline" first coined in 1938. (*Ibid.*) In 1980, BPD was accepted as a psychological term and included in the DSM III and later as a personality disorder, together with histrionic, antisocial, and narcissistic personality disorders. (*Ibid.*)

BPD can be a difficult diagnosis because of similarities to other conditions, particularly mood disorders. The validity of the current criteria for BPD shares problems with other

psychiatric disorders: namely, the absence of biological markers, unclear delimitation from other disorders. The diagnostic criteria for BPD allow for 256 different combinations of symptoms that could lead to a diagnosis. (Biskin RS, Paris J., *Diagnosing Borderline Personality Disorder* (Nov 2012) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3494330/> [as of March 30, 2023].)

In the past, treatment of BPD was considered challenging, but interventions have been developed over the past two decades that have dramatically changed the lives of individuals with BPD. (*Ibid.*) There have been advances in our understanding and treatment approaches to BPD, which preclude dismissing BPD as an untreatable condition. For example, psychotherapy is the most important component in the treatment of BPD, which results large reductions in symptoms that persist over time. The most popular treatment for BPD is dialectical behavior therapy (DBT). DBT consists of weekly individual sessions and weekly life-skills group sessions that teach skills in four domains: mindfulness, distress tolerance, regulation of emotions and interpersonal effectiveness. Phone consultation with the therapist is available at all hours, and team consultation meetings play an important role. The therapy is designed to last at least one year. (Biskin RS, Paris J., *Management of Borderline Personality Disorder* (Nov. 2012) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3503902/> [as of March 30, 2023].)

In addition to DBT, there are other effective psychotherapies for BPD including schema-focused therapy, mentalization-based therapy, systems training for emotional predictability and problem-solving, and transference-focused psychotherapy. Psychotherapies are usually utilized in a chronic and outpatient setting and have shown to be cost-effective. (Lee JS., *Borderline Personality Disorder in the Courtroom* (June 2020) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8547869/> [as of March 30, 2023].) Although admission to a general psychiatric ward is not recommended in most instances, several specialized inpatient treatments for BPD have been shown to be efficacious. (Biskin RS, Paris J., *Management of Borderline Personality Disorder* (Nov. 2012) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3503902/> [as of March 30, 2023].)

Pharmacologic treatments have also been effective in treating BPD. Medications commonly used for mood and psychotic disorders have shown modest efficacy in improving the mood and behavior of BPD patients, including mood stabilizers and antipsychotics. (Lee JS., Borderline Personality Disorder in the Courtroom (June 2020) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8547869/> [as of March 30, 2023].)

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 enter a plea. If diversion is successfully completed, the criminal charges are dismissed and the defendant may, with certain exceptions, legally answer that they have never been arrested or charged for the diverted offense. (Pen. Code, §§ 1001.7, 1001.9.)

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.*)

Defendants are eligible for pretrial mental health diversion if they have been diagnosed with a mental disorder identified in the most recent edition of the DSM, including but not limited to bipolar disorder, schizophrenia, schizoaffective disorder, or PTSD. (Pen. Code, § 1001.36, subd. (b)(1).) However, the law specifically excludes individuals with antisocial personality disorder, BPD, and pedophile from eligibility for mental health diversion. (*Ibid.*)

In addition, all of the following is required for mental health diversion:

- Courts have discretion to refuse to grant diversion even though the defendant meets all of the requirements. (Pen. Code, § 1001.36, subd. (a).)
- Court must consider sides of the defense and prosecution in deciding whether to grant diversion. (Pen. Code, § 1001.36, subd. (a).)
- The defendant must be suitable for pretrial diversion, which includes that the defendant agrees to comply with treatment, and that the defendant will not pose an unreasonable risk of danger to public safety if treated in the community. (Pen. Code, § 1001.36, subd. (c).)
- The court may consider the opinion of the prosecutor, defense, the treatment plan, the defendant's violence and criminal history, and opinions of qualified mental health professionals. (Pen. Code, § 1001.36, subd. (c).)
- That the defendant cannot be charged with certain offenses like murder or rape and offenses requiring sex offender registration. (Pen. Code, § 1001.36, subd. (d).)
- The court must be satisfied that the recommended mental health treatment will meet the needs of the specialized defendant. (Pen. Code, § 1001.36, subd. (f).)
- The provider of the mental health treatment must provide regular reports to the court. (Pen. Code, § 1001.36, subd. (f).)
- The court can reinstate criminal proceedings if the defendant is engaged in criminal conduct during diversion. (Pen. Code, § 1001.36, subd. (g).)
- The court can reinstate criminal proceedings if the defendant is performing unsatisfactorily during diversion. (Pen. Code, § 1001.36, subd. (g).)

Based on these criteria, and the requirement that a person in mental health diversion cannot be a risk to public safety, should individuals be categorically excluded from mental health diversion on the basis of their BPD diagnosis?

4) **Disparate Treatment of Personality Disorders in the Criminal Justice System:** Within the criminal justice system, there has been a strong push to exclude personality disorders, like BPD, from the types of mental illnesses potentially significant enough to warrant exculpation of fault or consideration of decreased criminal responsibility. Johnson SC, Elbogen EB. *Personality Disorders at the Interface of Psychiatry and the Law: Legal Use and Clinical Classification* (June 2013) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3811091/> [as of March 30, 2023].) "Some state statutes (ie, California and Oregon) go as far as excluding all personality disorders with respect to the insanity defense." (*Ibid.*) "Perhaps because of their relatively high prevalence within the criminal justice system, personality disorders have

to some degree lost their identity as mental illnesses, and instead are often seen as common population characteristics." (*Ibid.*) The diagnoses of certain personality disorders are among the most frequently made diagnoses within offender and prison populations. (*Ibid.*) "Their expression no longer falls outside of the norms when the offender population is considered the population of concern; thus, they lose their usefulness as differentiating factors within at least part of the legal system." (*Ibid.*)

California excludes personality disorders, including BPD in other laws, not just the insanity defense. For example, the court can dismiss enhancements in the interests of justice, but not for people diagnosed with BPD. (Pen. Code, § 1385.) When a plea of not guilty by reason of insanity is entered, the defense is not allowed solely on the basis of a "personality or adjustment disorder, a seizure disorder, or an addiction to, or abuse of, intoxicating substances." (Pen. Code, § 29.8.)

As explained above, there have been significant advances in our understanding of BPD, which is no longer considered untreatable. Given our progressed understanding of BPD, as well as the advancements in treatment, it would be prudent to reevaluate how individuals with BPD are treated in the criminal justice system. Wholly discounting BPD from mental health diversion excludes a wide swath of defendants who otherwise could be amenable to treatment, and whose entry and reentry into the criminal justice system might otherwise be prevented.

5) **Some Individuals with BPD May Be Eligible for Diversion, While Others May Be Unfairly Excluded:** In *Negron v. Superior Court* (2021) 70 Cal.App.5th 1007, the California Court of Appeal determined that a "Defendant's antisocial personality disorder (ASPD) did not disqualify him from mental health diversion, even though ASPD was expressly excluded by Pen. Code, § 1001.36, subd. (b)(1)(A), because defendant also suffered from several qualifying mental health disorders. Section 1001.36, subd. (b)(1)(A), simply disallows defendants from establishing eligibility for diversion based on an excluded disorder. Suffering from an excluded disorder does not categorically bar defendants from establishing eligibility based on a different, qualifying disorder." (*Id.* at p. 1016.) Otherwise put, the court determined that a "defendant satisfies section 1001.36(b)(1)(A) so long as he or she suffers from a qualifying disorder, even if he or she is also diagnosed with an excluded disorder." (*Ibid.*)

The court further opined that, "It is entirely predictable, and thus certainly within the contemplation of the Legislature, that a person might suffer from included *and* excluded disorders. Because section 1001.36(b)(1)(A) requires suffering only *one* included disorder, the Legislature would have been aware a defendant could still meet that requirement notwithstanding suffering from a disorder section 1001.36(b)(1)(A) designates as excluded. Had the Legislature intended to wholly preclude from diversion any person diagnosed with an excluded disorder (regardless of concurrently suffering from included disorders), the sentence phrasing of section 1001.36(b)(1)(A) would have shifted from simply listing excluded *disorders* to disqualifying *persons* with any of the excluded disorders." (*Negron v. Superior Court*, *supra*, at p. 1017.)

Therefore, consistent with the court's reasoning in *Negron v. Superior Court*, it is possible, that under existing law, a person who has BPD and other mental disorders can participate in mental health diversion, but a person who only has BPD is not eligible. It is inequitable that a

person with multiple disorders can participate in diversion and receive treatment, but a person who is diagnosed with BPD only cannot.

6) **Argument in Support**: According to *PathPoint*, "This legislation is essential because it recognizes that individuals with BPD are unfairly excluded from the program despite evidence showing that treatment reduces criminal behavior, arrests, and recidivism in this population.

"A study published in the Journal of Forensic Psychiatry and Psychology in 2020 found that individuals with BPD who received Dialectical Behavior Therapy (DBT) had significantly fewer arrests than those who did not receive treatment (Murray et al., 2020). The odds of engaging in criminal behavior were approximately 85% lower for individuals with BPD who received DBT compared to those who did not receive treatment. A review of 33 treatment trials for BPD analyzed data from 2,256 participants and discovered that treatment positively reduced BPD symptoms, self-harm, suicidality, and general psychopathology (Cristea et al., 2017). Additionally, The Holloway Skills Therapy Program (HoST) was created in the UK specifically for incarcerated women with BPD. Those who finished the 8-week treatment saw a remarkable 88.2% decrease in disciplinary actions (Gee & Reed, 2013). These findings suggest that referring people with BPD to treatment achieves rehabilitation in ways that incarceration does not.

"Excluding individuals with BPD from pretrial diversion eligibility entrenches systemic stigma, which exacerbates both public stigma and self-stigma. People with BPD make important contributions to society and deserve equitable and just treatment, and compassion. Treatment is essential for reducing the risk of suicide among people with BPD, as self-harming behaviors are common in BPD, and 10% of people with BPD die by suicide, a higher rate than any other psychiatric disorder.

"Research also shows that BPD is no more dangerous than mental illnesses covered by the diversion program. While the data in this area are limited because BPD is almost always comorbid with other disorders, rates of recidivism associated with attention deficit hyperactivity disorder (ADHD) are similar to BPD, and substance use disorders are associated with higher rates of recidivism than personality disorders (Babinski et al., 2015; Wu et al., 2014).

"BPD is treatable, highly heritable, and associated with significant neurobiological differences. The overwhelming consensus among scholars is that BPD is treatable, and psychotherapy is the first-line intervention for BPD. This is also true for many instances of other disorders. In many studies, the combination of psychotherapy and medication is the most effective. Even in the case of psychosis, psychotherapy is often necessary for addition to or as an alternative to medication. Therefore, it is essential that individuals with BPD have access to the same treatment and support as those with other mental health conditions."

7) **Related Legislation**:

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

b) AB 1310 (McKinnor), would allow individuals with a firearm enhancement to file a court petition for resentencing, but excludes individuals with certain mental disorders, including BPD. AB 1310 is pending in Assembly Appropriations Committee.

c) SB 63 (Ochoa Bogh), would establish a Homeless and Mental Health Court Grant Program to be administered by the Judicial Council and excludes from the program individuals with certain mental disorders, including BPD. SB 63 is pending in Senate Appropriations Committee.

8) **Prior Legislation**:

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

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

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

REGISTERED SUPPORT / OPPOSITION:

Support

Access Psychology Foundation
California Access Coalition
California Council of Community Behavioral Health Agencies (CBHA)
California Public Defenders Association (CPDA)
Community Solutions for Children, Families and Individuals
Dbsa California
Emotions Matter INC.
National Association of Social Workers, California Chapter
National Education Alliance for Borderline Personality Disorder
New England Personality Disorders Association
Pathpoint
Tessie Cleveland Community Services Corporation

77 Private Individuals

Opposition

2 Private Individuals

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

Date of Hearing: April 11, 2023
Counsel: Cheryl Anderson

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Reginald Byron Jones-Sawyer, Sr., Chair

AB 1497 (Haney) – As Amended March 30, 2023

PULLED BYAUTHOR

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

Date of Hearing: April 11, 2023
Chief Counsel: Sandy Uribe

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Reginald Byron Jones-Sawyer, Sr., Chair

AB 1507 (Gallagher) – As Introduced February 17, 2023

PULLED BY AUTHOR

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

Date of Hearing: April 11, 2023
Chief Counsel: Sandy Uribe

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Reginald Byron Jones-Sawyer, Sr., Chair

AB 1544 (Lackey) – As Introduced February 17, 2023

SUMMARY: Allows a police or sheriff's department receiving a report of known or suspected child abuse or severe neglect to forward any such reports that are investigated and determined to be substantiated to the Department of Justice (DOJ) for inclusion in the Child Abuse Central Index (CACI), except as specified. Specifically, **this bill**:

1) Eliminates the provision in existing law which prohibits law enforcement from forwarding reports of abuse and neglect to the DOJ for inclusion in the CACI, and instead authorizes a police or sheriff's department to forward to DOJ a report of its investigation of known or suspected child abuse or severe neglect that is determined to be substantiated.

2) Specifies that law enforcement cannot forward cases of general neglect.

3) Specifies that law enforcement can only forward reports of known or suspected child abuse or severe neglect made on or after January 1, 2024, or reports made before January 1, 2024, pertaining to open cases still being investigated on that date.

4) States that if a previously filed report subsequently proves to be not substantiated, DOJ shall be notified in writing of that fact and shall not retain the report.

5) Requires a law enforcement department that chooses to forward reports of known or suspected abuse and neglect to DOJ for inclusion in CACI to adopt notification and grievance procedures.

6) Requires the notification procedures to, at a minimum, include the following:

   a) A notice of the CACI listing which includes the victim's name, a brief description of the alleged abuse or severe neglect, and the date and location where it occurred;

   b) A description of the grievance procedures for challenging inclusion in the CACI; and,

   c) A form to request a grievance hearing;

7) Provides that this notification must be sent to the person's last known address within five business days of submission of the person's name to DOJ for inclusion in the CACI.

8) Requires the DOJ to create a grievance procedure for reports of substantiated allegations of abuse and severe neglect that were made by law enforcement.

9) Requires a person wanting a grievance hearing to request it within 30 days. Failure to send the completed request form within this time frame constitutes a waiver of the right to the hearing.

10) States that a completed grievance form must contain the referral number; the name of the investigating agency; the person's contact information and date of birth; the reason for the grievance, and contact information for the person's attorney or representative, if any.

11) Allows the person requesting the hearing to have an attorney or other representative present.

12) States that the grievance hearing must be scheduled within 10 business days, held within 60 calendar days, and that notice of the hearing date must be given at least 30 days before its scheduled date, unless the parties agree otherwise.

13) Allows either party to request a continuance not to exceed 10 days. Additional continuances may be allowed for good cause or with mutual agreement of both parties.

14) Allows the law enforcement agency forwarding the CACI submission to resolve the grievance at any point by changing a finding of substantiated abuse or severe neglect to a finding of not substantiated and by notifying DOJ of the need to remove the person's name from the CACI.

15) Allows the person requesting the hearing or their attorney, as well as the law enforcement agency, to examine the all records and relevant evidence that is not otherwise confidential that the opposing party intends to introduce at the grievance hearing.

16) Requires DOJ to redact specified information to protect the identity and health and safety information of a mandated reporter.

17) Require the law enforcement agency that forwarded the report to release disclosable information to the person's attorney if that person has provided written consent.

18) Requires the parties to exchange witness lists at least 10 days in advance of the hearing. Failure to do so may constitute grounds for objection to the consideration of the evidence or testimony of a witness during the hearing.

19) Establishes rules for presentation of testimony and examination of the witnesses.

20) Requires DOJ to make a determination at the conclusion of the hearing based on the evidence presented whether the allegation of abuse or severe neglect is unfounded, substantiated, or inconclusive.

21) Mandates that the hearing be audio recorded as part of the official administrative record and that DOJ maintain the administrative record, as specified, and to file it with the court in the event any party seeks judicial review.

22) Requires DOJ to render a written decision within 30 days of the grievance hearing and requires the decision be sent to the person who requested the hearing and their attorney, if applicable.

23) Makes the grievance hearing administrative record confidential and requires its retention for at least one year from the date of decision.

24) States that DOJ shall bill the forwarding law enforcement agency for the expenses related to the grievance hearing.

EXISTING LAW:

1) Requires that any specified mandated reporter who has knowledge of or observes a child, in his or her professional capacity or within the scope of his or her employment whom the reporter knows, or reasonably suspects, has been the victim of child abuse, shall report it immediately to a specified child protection agency. (Pen. Code, § 11166, subd. (a).)

2) Requires specified local agencies to send the DOJ reports of every case of child abuse or severe neglect that they investigate and determine to be substantiated. (Pen. Code, § 11169, subd. (a).)

3) Directs the DOJ to maintain an index, referred to as the CACI, of all substantiated reports of child abuse and neglect submitted as specified. (Pen. Code § 11170, subds. (a)(1) and (a)(3).)

4) Allows DOJ to disclose information contained in the CACI to multiple identified parties for purposes of child abuse investigation, licensing, and employment applications for positions that have interaction with children. (Pen. Code, § 11170, subd. (b).)

5) Requires reporting agencies to provide written notification to a person reported to the CACI. (Pen. Code, § 11169, subd. (c).)

6) Provide that, except in those cases where a court has determined that suspected child abuse or neglect has occurred or a case is currently pending before the court, any person listed in the CACI has the right to hearing which comports with due process before the agency that requested the person's CACI inclusion. (Pen. Code, §11169, subds. (d) & (e).)

7) Requires a reporting agency to notify the DOJ when a due process hearing results in a finding that a CACI listing was based on an unsubstantiated report. (Pen. Code, § 11169, subd. (h).)

8) Requires the DOJ to remove a person's name from the CACI when it is notified that the due process hearing resulted in a finding that the listing was based on an unsubstantiated report. (Pen. Code, § 11169, subd. (h).)

9) Provides that any person listed in CACI who has reached age 100 is to be removed from CACI. (Pen. Code, §11169, subd. (f).)

10) Provides that any non-reoffending minor who is listed in CACI shall be removed after 10 years. (Pen. Code, § 11169, subd. (g).)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "The Child Abuse Central Index was originally developed to assist investigators with determinations for whether immediate action needed to be taken in potentially dangerous situations for our youth. CACI has been plagued with issues affecting the lives of vulnerable communities throughout its development. It is the role of the legislature to address these concerns and reform the system to better serve children.

   "In my district, we have experienced an abnormally high number of catastrophic incidents where children have died of abuse that has been deemed torture despite reports to both law enforcement and social services. We need to make substantive policy changes to the systems that ensure child protection to better coordinate the response. This starts with improving the information available to decision makers that will allow them to save vulnerable children before it is too late. My bill aims to improve the available data while ensuring strength-based respect for all communities."

1) **Child Abuse Central Index (CACI)**: The CACI was created in 1965 as a centralized system for collecting reports of suspected child abuse. This is not an index of persons who necessarily have been convicted of any crime; it is an index of persons against whom reports of child abuse or neglect have been made, investigated, and determined by the reporting agency (local welfare departments and law enforcement) to meet the requirements for inclusion, according to standards that have changed over the years.

   Access to CACI initially was limited to official investigations of open child abuse cases, but in 1986 the Legislature expanded access to allow the Department of Social Services (DSS) to use the information for conducting background checks on applications for licenses, adoptions, and employment in child care and related services positions.

   DOJ provides the following summary of CACI on its website:

   "The Attorney General administers the Child Abuse Central Index (CACI), which was created by the Legislature in 1965 as a tool for state and local agencies to help protect the health and safety of California's children.

   "Each year, child abuse investigations are reported to the CACI. These reports pertain to investigations of alleged physical abuse, sexual abuse, mental/emotional abuse, and/or severe neglect of a child. The reports are submitted by county welfare and probation departments.

   "The information in the Index is available to aid law enforcement investigations, prosecutions, and to provide notification of new child abuse investigation reports involving the same suspects and/or victims. Information also is provided to designated social welfare agencies to help screen applicants for licensing or employment in child care facilities and foster homes, and to aid in background checks for other possible child placements, and adoptions. Dissemination of CACI information is restricted and controlled by the Penal Code.

   "Information on file in the Child Abuse Central Index include:

   - "Names and personal descriptors of the suspects and victims listed on reports;

- "Reporting agency that investigated the incident;
- "The name and/or number assigned to the case by the investigating agency;
- "Type(s) of abuse investigated; and
- "The findings of the investigation for the incident are substantiated.

"It is important to note that the effectiveness of the index is only as good as the quality of the information reported. Each reporting agency is required by law to forward to the DOJ a report of every child abuse incident it investigates, unless the incident is determined to be unfounded or general neglect. Each reporting agency is responsible for the accuracy, completeness and retention of the original reports. The CACI serves as a 'pointer' back to the original submitting agency." (See <http://oag.ca.gov/childabuse> [as of March 26, 2023].)

DOJ is not authorized to remove suspect records from CACI unless requested by the original reporting agency. (https://oag.ca.gov/childabuse/selfinquiry [as of March 26, 2023].)

2) **Prior CACI Legislation and Litigation**: In 1963, the Legislature began requiring physicians to report suspected child abuse. (See *Smith v. M.D.* (2003) 105 Cal.App.4th 1169 [discussing evolution of child abuse detection laws].) Two years later, the Legislature expanded the reporting scheme to require that instances of suspected abuse and neglect be referred to a central registry maintained by DOJ. In the early 1980s, the Legislature revised the then-existing laws and enacted the Child Abuse and Neglect Reporting Act (CANRA), which created the current version of the CACI. These revisions did not require that listed individuals be notified of the listing, nor were individuals even able to determine whether they were listed in the CACI.

In *Burt v. County of Orange* (2004) 120 Cal.App.4th 273, the Court of Appeal held that a CACI listing implicates an individual's state constitutional right to familial and informational privacy, thus entitling the person to due process. (*Id.* at pp. 284-285.) Although the CACI does not explicitly grant a hearing for a listed individual to challenge placement on the CACI, the statutory scheme contained an implicit right to a hearing. (*Id.* at p. 285.) The court declined to provide guidance on what procedures that hearing should include. The court merely stated that the county social services agency was required to afford a listed individual a "reasonable" opportunity to be heard. (*Id.* at p. 286.)

In *Humphries v. Los Angeles County* (9th Cir. 2009) 554 F.3d 1170, the Ninth Circuit held that an erroneous listing of parents who were accused of child abuse on the CACI without notice and an opportunity to be heard would violate the parents' due process rights. Specifically,"[t]he lack of any meaningful, guaranteed procedural safeguards before the initial placement on CACI combined with the lack of any effective process for removal from CACI violates the [parents'] due process rights." (*Id* at 1200.) The court ruled that, "California must promptly notify a suspected child abuser that his name is on the CACI and provide 'some kind of hearing' by which he can challenge his inclusion." (*Id.* at 1201.)

In 2011, the Legislature amended the Child Abuse and Neglect Reporting Act to provide for a hearing to seek removal from the CACI. (See AB 717 (Ammiano), Chapter 468, Statutes of 2011.) The same legislation also limited the reports of abuse and neglect for inclusion in CACI to substantiated reports. Inconclusive and unfounded reports were removed. And of particular significance to this bill, the Legislature also amended the Act to prohibit law enforcement from forwarding reports of abuse and neglect to the DOJ for inclusion in the

CACI.

This bill would undo the latter legislative change, and allow, but not require, law enforcement to report claims of substantiated abuse or severe neglect to CACI. This bill specifically prohibits reporting claims of general neglect.

The policy committee analyses for AB 717 (Ammiano) do not specifically discuss why the statute was amended to prohibit law enforcement from forwarding reports of abuse and neglect to the DOJ. However, both the Assembly Public Safety Committee and Senate Public Safety Committee analyses noted that bill codified several requirements addressed in court settlements as well as constitutional deficiencies noted in other cases. Thus, it is likely that the provision was a result of a settlement in *Gomez v. Saenz* (2003) which required county social service agencies, but not law enforcement agencies, to provide notice and a hearing. As a result, there was no method for removal of a CACI report when the report was made by a law enforcement agency.

3) **Current Practice**: Department of Social Services (DSS) child welfare staff will submit the names of perpetrators from "substantiated" referrals of abuse and/or neglect to the DOJ for inclusion in the CACI. Staff will further inform those persons that their name has been submitted for listing on the CACI, and provide them with information on the process to grieve/contest the listing.

In response to the settlement in *Gomez v. Saenz*, all child welfare departments in California have agreed to notify individuals of their listing on the CACI, give individuals the right to grieve the listing, and provide grievance hearings for those who challenge the listing.

Pursuant to the *Gomez v. Saenz* settlement, when submitting a person's name for listing on the CACI, the Department is required to provide the person (by mail) with three forms – the completed Notice of Child Abuse Central Index Listing (SOC 832), the Request for Grievance Hearing (SOC 834), and the Grievance Procedures for Challenging Reference to the Child Abuse Central Index (SOC 833). (http://www.cdss.ca.gov/cdssweb/entres/forms/English/SOC833.pdf)

If an individual requests a grievance hearing, there are strict procedures to follow. For example, the hearing must occur within 10 business days, and no later than 60 calendar days from the request for a hearing. The complaining party is entitled to have an attorney or other representative assist him or her at the hearing. The grievance hearing officer must be a person not directly involved in the decision or in the investigation that is the subject of the hearing; nor can a coworker or direct supervisor of persons involved in making the finding be the hearing officer. The complaining party and his or her representatives must be permitted to examine all records and relevant evidence. The complaining party is entitled to a witness list. All testimony must be given under oath or affirmation. The proceedings must be audio recorded as part of the official administrative record. There must be a written decision, and the complainant may challenge that decision by means of a writ of mandate. (http://www.cdss.ca.gov/cdssweb/entres/forms/English/SOC833.pdf)

This bill would apply many of the DSS grievance procedures to those law enforcement agencies which seek to begin forwarding allegations of substantiated abuse and neglect to DOJ for inclusion in the CACI. However, it will be the DOJ that is responsible for

administering grievance hearings when the agency submitting the CACI report is a law enforcement agency.

4) **Governor's Veto Message**: In 2018, the Legislature passed AB 2005 (Santiago), which was substantially similar to this bill; however it was vetoed by then-Governor Jerry Brown. In his veto message, the Governor said:

"In 2011 I signed AB 717 (Ammiano), which was intended to update the procedures governing the index as well as establish due process protections for individuals added to the database. At that time, the ability of law enforcement to submit cases to the index was eliminated, in part to eliminate redundancies and reduce costs.

"I am not fundamentally opposed to once again granting law enforcement the authority to submit cases to the index, however this bill does so in a manner that would undoubtedly lead to inconsistent application across and within counties. I encourage the proponents to work with the relevant stakeholders, including the Department of Social Services and Department of Justice, to further refine this proposal for future consideration."

This bill addresses the crux of former Governor Brown's veto message because it requires the DOJ to establish a grievance hearing process for persons wishing to challenge a submission made by a law enforcement agency, and moreover requires the DOJ to administer those hearings.

5) **Argument in Support**: According to the *Los Angeles County Inter-agency Council on Child Abuse and Neglect* (ICAN), "By removing law enforcement reports from the Index, a significant group of abusers who are outside the family are excluded from CACI. All cases where children are harmed in day care, in school settings, at playgrounds etc. will not be in the Index, thus eliminating important information should a clearance be requested on a person or provider who would be in a care giving role or on any subsequent allegations. The inability of law enforcement to submit reports to CACI has created a large gap in our ability to protect children from future harm."

6) **Argument in Opposition**: According to *Los Angeles Dependency Lawyers, Inc.*, "Law enforcement agencies' abuse of this power led to legislation several years ago that took away their authorization to report onto the CACI. The Legislature should not give them back the power they misused. Further, rather than addressing the concerns raised by the California State Auditor in 2022, AB 1544 simply worsens a broken system. …

"CACI has become the subject of numerous legal challenges. In response to one such challenge, the Ninth Circuit Court of Appeals held that the CACI violated the Fourteenth Amendment due process clause because of inadequate procedures for challenging allegations reported to CACI. (*Humphries v. County of Los Angeles* (2009) 554 F.3d 1170, 1200.) Following the decision in Humphries, the Legislature put in place the existing restriction against law enforcement reporting to CACI. This was part of a set of statutory reforms intended to address the terrible due process violations and abuses that had occurred.

"The facts in *Humphries* are instructive. The Humphries were accused of abuse by Mr. Humphries' daughter from a previous marriage. They were arrested on a charge of felony torture, their other two children were placed in foster care, and an investigation report

regarding the allegations was entered into CACI as a "substantiated" report. Although the Humphries were acquitted and found "factually innocent," and the juvenile dependency petition was dismissed, the Los Angeles Sheriff's Department refused to reverse its report labeling the allegations as substantiated. As a result of their refusal, the report remained in the CACI until the court ordered the agency to remove it.

"Following the *Humphries* decision, the Legislature made significant changes to Penal Code section 11169 to establish some procedural safeguards. First, the standard for the inclusion of report on CACI was changed from "determined not to be unfounded" to "determined to be substantiated." Second, persons listed on the CACI were given the right to a hearing to challenge the listing. Third, subdivision (b) was added to bar police and sheriffs' departments from forwarding reports to CACI. In addition to these statutory changes, a settlement decision in *Gomez v. Saenz* established limited due process requirements regarding reports of abuse submitted to CACI by social service agencies. These requirements resulted in the adoption of the Department of Social Services (DSS) regulations now applicable when child welfare agencies submit reports onto CACI.

"This bill puts in place notice and grievance procedures similar to those required under the DSS regulations. Unfortunately, the proposed procedures, like the DSS procedures, fail to provide adequate due process protections or safeguards to ensure the accuracy of information reported. The standard for finding a report to be "substantiated" requires only that the investigator who conducted the investigation – not an independent reviewer – determine that it is "more likely than not" that the abuse occurred. (Penal Code §11165.12.) The DSS grievance procedures have inadequate service requirements, fail to provide individuals with sufficient notice of the details of the alleged incident, fail to provide notice of the potential consequences of being listed on CACI, and create an unreasonable deadline for filing a challenge. The grievance procedures proposed in AB 1544 share these shortcomings. CACI remains a database of unproven allegations that can subject the persons listed to the stigma of being identified as child abusers and the real consequences of being unable to hold certain jobs or to become foster or adoptive parents. Individuals listed often have little recourse to challenge the listing. …

"The problems caused by the lack of adequate due process protections will be compounded if, as proposed in AB 1544, law enforcement agencies are allowed to submit reports onto CACI and are responsible for providing notice and conducting grievance proceedings where requested. First, persons who are investigated by law enforcement for child abuse face potential criminal prosecution – with the potential for consequences such as loss of liberty. The procedural protections provided must be greater than those provided when the stakes are not as high – the DSS procedures, inadequate even where child welfare agency reports are at issue, are even less adequate in this context.

Second, persons who receive notice from a law enforcement agency that they have been reported to CACI are placed in an untenable position. If a person chooses to challenge the report in a grievance proceeding held before an official from the law enforcement agency, the law enforcement agency may then take the evidence that person submits and use it in their investigation or to support criminal prosecution. But if the person recognizes this risk and chooses not to challenge the listing on CACI, or chooses not to testify in the hearing, that person may then unjustly be listed on CACI as a child abuser, with all of the consequences that flow from that, with no further opportunity to have the report removed from the

database.

"Third, allowing each law enforcement agency to determine whether to report is an invitation to inconsistent application of the law. AB 1544 will allow each agency to determine whether it will submit reports onto the CACI, and each agency that chooses to do so will be required to adopt its own grievance procedures. Whether an individual is listed on the CACI will be determined by where that person happens to live. This will result in racial disparities in reporting, as those who live in urban areas served by better-resourced police departments will be reported and those in areas served by smaller law enforcement agencies will not. Governor Brown foresaw this problem when he vetoed AB 2005 (2018), a bill very similar to AB 1544, stating that it would 'undoubtedly lead to inconsistent application across and within counties.' …

"The CACI system is a deeply flawed system that has harmed countless Californians Expanding the CACI by allowing law enforcement reports will increase the number of those harmed and make the system even more treacherous, as new dangers are created for those who face being reported by law enforcement. Now is not the moment to grant law enforcement agencies more powers when those powers were previously abused."

7) **Related Legislation**:

a) AB 391 (Jones-Sawyer), would require a person making a child abuse or neglect report, who is not a mandated reporter, to provide specified information in the report, including their name, telephone number, and information that gave rise to the suspicion of child abuse or neglect. AB 391 is pending hearing in the Assembly Appropriations Committee.

b) SB 47 (Roth), would require an agency that receives a report of known or suspected child abuse to take specified actions, including, among other things, requiring an investigator to make contact with the person who made the report. SB 47 will be heard in the Senate Public Safety Committee today.

8) **Prior Legislation**:

a) AB 1450 (Lackey), of the 2019-2020 Legislative Session, was similar to this bill except that the grievance hearings would have been held by the law enforcement agency that forwarded the CACI submission to the DOJ. AB 1450 failed passage in the Senate Public Safety Committee.

b) AB 2005 (Santiago), of the 2017-2018 Legislative Session, was also substantially similar to this bill. AB 2005 was vetoed.

c) AB 1911 (Lackey), of the 2017-2018 Legislative Session, would have required every county to establish an on-line database to for specified agencies to track the reporting of substantiated allegations of child abuse and neglect by 2029. AB 1911 failed passage in this Committee.

d) AB 1707 (Ammiano), Chapter 848, Statutes of 2012, removed non-reoffending minors from the CACI after 10 years, and amended the CACI notice provisions.

e) AB 717 (Ammiano), Chapter 468, Statutes of 2011, amended the CACI provisions by including only substantiated reports and removing inconclusive and unfounded reports from CACI.

f) SB 1312 (Peace), Chapter 91, Statutes of 2002, would have made numerous changes to CACI including the purging of old reports. The provisions dealing with CACI were deleted before SB 1312 was chaptered.

g) AB 2442 (Keeley), Chapter 1064, Statutes of 2002, established the Child Abuse and Neglect Reporting Act Task Force for the purpose of reviewing the act and CACI.

h) AB 1447 (Granlund), of the 1999-2000 Legislative Session, would have made numerous changes to CACI including the purging of old reports. AB 1477 was never heard by the Senate Judiciary Committee.

REGISTERED SUPPORT / OPPOSITION:

Support

Los Angeles County Inter-Agency Council on Child Abuse and Neglect

Opposition

California Public Defenders Association
Los Angeles Dependency Lawyers, Inc.

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

Date of Hearing: April 11, 2023
Counsel: Liah Burnley

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Reginald Byron Jones-Sawyer, Sr., Chair

AB 1551 (Gipson) – As Introduced February 17, 2023

PULLED BY AUTHOR

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

Date of Hearing: April 11, 2023
Chief Counsel: Sandy Uribe

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Reginald Byron Jones-Sawyer, Sr., Chair

AB 1582 (Dixon) – As Introduced February 17, 2023

SUMMARY: Eliminates the requirement that a juvenile's most recent offense be one of the violent/serious offenses enumerated in Welfare and Institutions Code section 707, subdivision (b) in order for that juvenile to be committed to a secure youth treatment facility.

EXISTING LAW:

1) Provides that a juvenile court ward who meets any of the following conditions shall not be committed to the California Department of Corrections and Rehabilitation (CDCR), Division of Juvenile Justice (DJJ):

   a) The ward is less than 11 years old;

   b) The ward is suffering from a contagious, infectious, or other disease that would probably endanger the lives or health of the other minors in the facility; or,

   c) The ward most recent offense is not one listed in Welfare and Institutions Code section 707, subdivision (b) (hereinafter 707(b) offense). (Welf. & Inst. Code, § 733.)

2) Provides that on or after July 1, 2021, a ward of the juvenile court shall not be committed to the DJJ, except as specified. (Welf. & Inst. Code, § 733.1.)

3) States that the DJJ shall close on June 30, 2023. (Welf. & Inst. Code, § 736.5, subd. (e).)

4) Defines "secure youth treatment facility" as a secure facility that is operated, utilized, or accessed by the county of commitment to provide appropriate programming, treatment, and education for wards having been adjudicated for specified offenses. (Welf. & Inst. Code, § 875, subd. (g)(1).)

5) Provides that, commencing July 1, 2021, the court may order that a ward who is 14 years of age or older be committed to a secure youth treatment facility if the ward meets all of the following criteria:

   a) The juvenile is adjudicated and found to be a ward of the court based on a 707(b) offense that was committed when the ward was 14 years of age or older;

   b) The 707(b) offense is the most recent offense for which the juvenile has been adjudicated; and,

c) The court has made a finding on the record that a less restrictive alternative disposition for the ward is unsuitable. (Welf. & Inst. Code, § 875, subd. (a).)

6) Enumerates 30 serious and violent offenses which permit a juvenile to be transferred to adult court, or be admitted to a secure youth treatment facility, and previously to DJJ. These include: murder, arson, robbery, specified sex crimes committed by force, specified forms of kidnapping, attempted murder, carjacking, aggravated mayhem, voluntary manslaughter, a felony offense in which the minor personally used a weapon, and others. (Welf. & Inst. Code, § 707, subd. (b).)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "There are a series of criteria that must be met in order for a juvenile to be committed to a Secure Youth Treatment Facility (SYTF). AB 1582 would remove the requirement that the triggering offense be the most recent offense for which the juvenile has been adjudicated. AB 1582 is needed to correct inaccuracy in current code. The elimination of §875(a)(2) will not result in an increased number of individuals being committed to SYTF, rather, it will comport with the overall intent of SB 823 fostering positive youth development, promoting public and community safety and offering fair and flexible terms of commitment."

2) **Juvenile Justice Realignment in California**: Historically CDCR's DJJ housed the majority of the state's juvenile offenders with the number of juveniles housed in these facilities exceeding 15,000 in the 1990's. In 2003, plaintiffs filed a lawsuit, *Farrell v. Hickman* (originally *Farrell v. Harper*), alleging that CDCR was providing inadequate care for minors housed in its facilities. In January 2005, the state and plaintiffs entered into an agreement which committed reforming the state's juvenile justice system to a rehabilitative model.

   In 2007, the Legislature passed SB 81, Chapter 175, Statutes of 2007, known as juvenile justice realignment. The premise was that local authorities were better able than the State to provide rehabilitation for many juvenile offenders. Under this legislation, juvenile courts were prohibited from committing juveniles adjudicated after September 1, 2007, to DJJ unless the adjudication was for certain serious, violent, or sexual offenses.[1] Non-violent offenders housed at DJJ were transferred back to the counties. And in return, counties were provided with funding.

   The Governor's January Budget in 2020 proposed to transfer DJJ to a newly created independent department within the Health and Human Services Agency on July 1, 2020. That approach was intended to align the rehabilitative mission of the state's juvenile justice system with trauma-informed and developmentally appropriate services supported by programs overseen by the state's Health and Human Services Agency. The unprecedented impact of COVID-19 resulted in the withdrawal of this proposal. Subsequently, the May Revision of the Budget proposed to expand on previous efforts to reform the state's juvenile justice system by transferring the responsibility for managing all youthful offenders to local

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[1] These offenses are referred to as 707(b) offenses because that is the statute in which they are listed.

jurisdictions.

SB 823 included intent language to establish a secure youth treatment facility as a commitment option for youth adjudicated for DJJ eligible offenses by March 1, 2021. SB 823 closed intake at the Division of Juvenile Justice (DJJ) on July 1, 2021.

DJJ is scheduled to be closed on June 30, 2023.

3) **Secure Youth Treatment Facilities (SYTFs)**: SYTFs were created as local custodial options for the custody and care of juveniles who would have previously been sent to DJJ but can longer be committed there because of its closure. A minor can only be committed to an SYTF upon adjudication for a 707(b) offense committed at age 14 or older. As under prior law with regards to DJJ commitments, that 707(b) offense must be the most recent offense for which the minor has been adjudicated. (See Welf. & Inst, Code, §§ 875, subd. (a)(2) & 733.)

This bill would delete the requirement that the most recent offense be a 707(b) offense and instead only require that the minor have been adjudicated on a 707(b) offense at some point. The author's background information for this bill contends that "many of the criteria were simply moved over from the code section that was applicable to DJJ, and one [the most recent offense requirement] does not make sense for placement in a SYTF. Such criteria are not needed for SYTF commitment and otherwise interfere with the meaningful adjudication and rehabilitation of SYTF eligible youth."

Notwithstanding this assertion, the Legislature did not simply "move over" the DJJ criteria and apply it to SYTF commitments; other criterion for placement in the most secure custodial settings was changed. For example, whereas a minor could be sent to DJJ at age 11 and older, now SYFT placement is limited to minors 14 years of age or older. (Compare Welf. & Inst. Code, §§ 733 & 875.) Moreover, previously with a DJJ commitment there was no mechanism for moving youth to a less restrictive program once that person was committed to DJJ, as was added for placements at SYTFs. (See Welf. & Inst. Code, § 875, subd. (f); see also Welf. & Inst. Code, § 779.5.) Requiring that the most recent adjudication was for a 707(b) offense was deliberate and is consistent with the intent of juvenile justice realignment. SB 823 (Committee on Budget and Fiscal Review) Chapter 337, Statutes of 2020 stated, among other things that it was the intent of the Legislature and the administration to "ensure that dispositions are in the least restrictive appropriate environment, … and reduce the use of confinement in the juvenile justice system by utilizing community-based responses and interventions."

The author's background sheet also states "Specifically, one requirement stipulates that a youth offender can only be sentenced to a SYTF if their most recent offense is a 707(b) offense, so any offense committed after that cannot be filed to secure a commitment to a SYTF. A minor offender who commits a series of offenses including a 707(b) offense cannot be prosecuted for any of those offenses that occur after in order to preserve a commitment to a SYTF."

However, the creation of SYTFs did not create some new loophole in the law, as the requirement that the most recent offense be a 707(b) offense in order to commit a minor to the most secure placement is not a new concept. It has been the law since 2007. Moreover,

when a minor commits subsequent offenses that are not 707(b) offenses, a prosecutor can move to dismiss the lesser charges to maintain the SYTF commitment pursuant to Welfare and Institutions Code section 782. (See *In re J.B.* (2022) 75 Cal.App.5th 410; see also *In re Greg F.* (2012) 55 Cal.4th 393.)

4) **Argument in Support**: According to the *California District Attorneys Association*, a co-sponsor of this bill, "The SYTF is reserved for minor's who commit the most serious crimes and who demonstrate that their behavior cannot be remediated in a less-restrictive environment. This bill gives the courts the option to place a minor who continues re-offending into a more restrictive facility even if their most recent crime is not listed under WIC 707(b).

"Currently, a juvenile who commits one of the enumerated WIC 707(b) crimes - including murder, attempted murder, robbery, or a forced sexual assault - and then subsequently commits a non-707(b) crime – including domestic violence battery, violation of a restraining order, or possession of a loaded gun - cannot be sentenced to the SYTF. Your bill ensures that a victim of a crime will be protected under the law and that a juvenile offender will be held accountable in an appropriate facility."

5) **Argument in Opposition**: According to the *Pacific Juvenile Defender Center*, "AB 1582 would amend Welfare & Institutions Code ('WIC') section 875 by eliminating the requirement that a youth's most recent adjudicated offense must be listed in WIC section 707(b) in order for the youth to be eligible for commitment to a secure youth treatment facility ('SYTF'). This change runs counter to more than sixteen years of juvenile justice realignment in California, and it flies in the face of the evidence-based principles and legislative intent underlying this realignment.

"As the people of the State of California have formally recognized, 'Evidence has demonstrated that justice system-involved youth are more successful when they remain connected to their families and communities. Justice system-involved youth who remain in their communities have lower recidivism rates and are more prepared for their transition back into the community.' Based on this solid evidentiary foundation, the Legislature has clearly stated its intent that counties 'ensure that [juvenile justice] dispositions are in the least restrictive appropriate environment … and reduce the use of confinement in the juvenile justice system.' Existing law manifests these foundational principles by limiting the most restrictive consequence in juvenile court (SYTF commitment) to the most serious cases (those in which a minor has most recently committed a serious offense, as defined in WIC section 707(b)).

"The provision in question has existed from the very beginning of the juvenile justice realignment process in Senate Bill 81 (2007), and has been reaffirmed at every step throughout multiple amendments and changes in the law over the past 16 years. This 'most recent offense' requirement manifests a clear intention to avoid committing youth to long-term confinement (previously at the Division of Juvenile Justice, now at SYTFs) based on a less serious offense simply because they have committed a WIC section 707(b) offense at some point in the past. Adolescent development and rehabilitation are ongoing and imperfect processes, and existing law rightfully accounts for this by looking to the nature of the most recent offense to determine the permissible range of dispositions.

"AB 1582 disregards this legislative history and the evidence and intent behind it. By eliminating the longstanding 'most recent offense' requirement, this bill would render a greater number of youth eligible for highly restrictive SYTF commitments, which will lead to an increase in the use of confinement in our juvenile justice system. This abrupt reversal of course would move in direct opposition to the evidence-based juvenile justice reforms the Legislature has enacted over the past 16 years. It will result in a greater number of children being removed from their families and communities and confined in locked facilities during the crucial years of adolescent development."

6) **Related Legislation**: SB 448 (Becker), would prohibit the juvenile court to make a determination to detain a minor based on the minor's county of residence. SB 448 will be heard in the Senate Public Safety Committee today.

7) **Prior Legislation**:

   a) SB 92 (Committee on Budget and Fiscal Review), Chapter 18, Statutes of 2021, closes DJJ on June 30, 2023, and allows counties to establish secure youth treatment facilities for certain youth who are 14 years of age or older and found to be a ward of the court based on an offense that would have resulted in a commitment to DJJ.

   b) SB 823 (Committee on Budget and Fiscal Review), Chapter 337, Statutes of 2020, transferred the responsibility for managing all youthful offenders to local jurisdictions and closed DJJ intake on July 1, 2021, subject to certain exceptions. SB 823 also stated legislative intent to establish a separate, long-term local dispositional track for higher-need youth.

   c) SB 439 (Mitchell), Chapter 1006, Statutes of 2018, prohibited the prosecution of children under the age of 12 years in the juvenile court, except when a minor is alleged to have committed murder or specified sex offenses.

   d) SB 1021 (Committee on Budget and Fiscal Review), Chapter 41, Statutes of 2012, prohibited the extension of a ward's parole consideration date and authorized CDCR to promulgate regulations establishing a process for granting wards who have successfully responded to disciplinary sanctions a reduction of any time acquired for disciplinary matters.

   e) SB 81 (Committee on Budget and Fiscal Review), Chapter 175, Statutes of 2007, known as juvenile justice realignment, limited the juvenile offenders who could be committed to state youth correctional facilities.

REGISTERED SUPPORT / OPPOSITION:

Support

California District Attorneys Association (Co-Sponsor)
Chief Probation Officers' of California
Riverside County District Attorney

Opposition

Anti Recidivism Coalition
Asian Prisoner Support Committee
California Attorneys for Criminal Justice
California Public Defenders Association
Center on Juvenile and Criminal Justice
Children's Defense Fund - CA
Commonweal Juvenile Justice Program
Communities United for Restorative Youth Justice
Criminal Justice Clinic, UC Irvine School of Law
Equal Justice Society
Fresno Barrios Unidos
Fresno County Public Defender's Office
Haywood Burns Institute
Human Rights Watch
Instituto Familiar De LA Raza
MILPA (motivating Individual Leadership for Public Advancement)
Pacific Juvenile Defender Center
Public Counsel
San Diego Public Defender
San Francisco Public Defender
Santa Cruz Barrios Unidos INC.
Sigma Beta Xi, INC. (SBX Youth and Family Services)
Young Community Developers
Youth Justice Education Clinic, Center for Juvenile Law and Policy, Loyola Law School

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

Date of Hearing: April 11, 2023
Counsel: Cheryl Anderson

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Reginald Byron Jones-Sawyer, Sr., Chair

AB 1643 (Bauer-Kahan) – As Amended March 14, 2023

SUMMARY: Increases the threshold amount of victim restitution which makes a minor presumptively ineligible for a program of informal supervision from $1,000 to $5,000. Specifically, this bill:

1) Provides that a minor is not eligible for a program of informal supervision, except where the interests of justice would best be served and the court specifies on the record the reasons for its decision, if it appears that the minor has committed an offense in which victim restitution exceeds $5,000, instead of $1,000.

2) Raises the amount which requires the probation officer to commence proceedings within 48 hours if the minor is alleged to have committed an offense in which victim restitution is owed, from exceeding $1,000 to exceeding $5,000.

EXISTING LAW:

1) Subjects a minor between 12 and 17 years of age, inclusive, who violates any federal, state, or local law or ordinance, and a minor under 12 years of age who is alleged to have committed murder or a specified serious sex offense, to the jurisdiction of the juvenile court, which may adjudge the minor to be a ward of the court. (Welf. & Inst. Code, § 602.)

2) States that, in a case where the probation officer concludes that a minor is within the jurisdiction of the juvenile court or will probably soon be within that jurisdiction, they may delineate a specific program of informal supervision for the minor instead of filing a petition to declare the minor a ward of the court, if the minor and the minor's parent or guardian consent. Restricts a program of informal supervision to six months. (Welf. & Inst. Code, § 654, subd. (a).)

3) Provides that if a petition has been filed by the prosecuting attorney to declare a minor a ward of the court, the court may, 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. (Welf. & Inst. Code, § 654.2, subd. (a).)

4) Excludes minors alleged to have committed certain offenses from participating in a program of informal supervision, except where the interest of justice would best be served and the court gives reasons on the record for its decision. Among minors presumptively excluded are those alleged to have committed an offense in which victim restitution exceeds $1,000. (Welf. & Inst. Code, § 654.3.)

5) Prohibits a court from using a minor's inability to pay restitution due to indigence as grounds for finding them ineligible for the program of supervision or a finding that the minor has failed to comply with the terms of the program of supervision. (Welf. & Inst. Code, § 654.3, subd. (a)(5)(A).)

6) Requires the probation officer to refer specified cases to the prosecutor within 48 hours, including cases in which it appears to the probation officer that the minor has committed an offense in which the restitution owed to the victim exceeds $1,000. (Welf. & Inst. Code, § 653.5, subd. (c)(7).)

7) Provides that, in order to preserve and protect a victim's rights to justice and due process, a victim shall be entitled specified rights, including among others, restitution. (Cal. Const., art. I, § 28, subd. (b)(13).)

8) States that it is the unequivocal intention of the People of the State of California that all persons who suffer losses as a result of criminal activity shall have the right to seek and secure restitution from the persons convicted of the crimes causing the losses they suffer. Cal. Const., art. I, § 28, subd. (b)(13)(A).)

9) Provides that restitution shall be ordered from the convicted wrongdoer in every case, regardless of the sentence or disposition imposed, in which a crime victim suffers a loss. (Cal. Const., art. I, § 28, subd. (b)(13)(B).)

10) Permits the juvenile court to, as appropriate, direct a minor under its jurisdiction to pay restitution to the victim or victims, and make a contribution to the victim restitution fund after all victim restitution orders and fines have been satisfied, in order to hold them accountable or restore the victim or community. (Welf. & Inst. Code, § 202, subd. (f).)

11) States the intent of the Legislature that a victim who incurs an economic loss because of a minor's conduct shall receive restitution directly from that minor. (Welf. & Inst. Code, § 730.6, subd. (a)(1).)

12) Requires the court to order the minor to pay, in addition to any other penalty provided or imposed under the law, restitution to the victim or victims in the amount of losses, as determined. (Welf. & Inst. Code, § 730.6, subds. (a)(2)(B) & (h)(1).)

13) Requires the court to order full restitution unless it finds compelling and extraordinary reasons for not doing so, and states them on the record. A minor's inability to pay shall not be considered a compelling or extraordinary reason not to impose a restitution order, nor shall inability to pay be a consideration in determining the amount of the restitution order. (Welf. & Inst. Code, § 730.6, subd. (h)(1).)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "Our laws have not kept up with our world. A $1,000 theft in the 1980's is not the same as today. One iphone in a snatched purse can be

the difference between rehabilitation and jail for a misguided youth offender. Informal probation has been repeatedly shown to improve outcomes for youth, diverting them away from the system and saving them from the traps of repeat offenses. Outdated financial barriers should not stand in the way of helping youth who would otherwise be eligible for diversion from the system."

2) **Informal Supervision (A Pre-Adjudication Diversion Program) Rather Than Wardship**: Juvenile delinquency actions are begun by the filing of a petition under Welfare and Institutions Code section 602. The petition alleges criminal offenses and is brought by the district attorney.

   But, the Welfare and Institutions Code provides an opportunity for pre-petition informal supervision, also known as diversion. (Welf. & Inst. Code, § 654.) If the probation officer concludes that the minor is within the juvenile court's jurisdiction, or likely soon will be, the officer can delineate a specific program of supervision for the minor for up to six months to try to adjust the situation that brings the minor within the juvenile court's jurisdiction. (Welf. & Inst. Code, § 654; *In re Adam R.* (1997) 57 Cal.App.4th 348.) After the filing of a petition, the court may also offer informal supervision. (Welf. & Inst. Code, § 654.2.)

   Informal supervision is a voluntary contract between the probation officer, the minor, and the parents or guardians. If the juvenile successfully completes this program, the case is then closed. If the juvenile is unsuccessful at any time during the six-month period, the probation department may make a referral to the district attorney's office for a formal petition to the juvenile court. (Welf. & Inst. Code, § 654.) Importantly, the court cannot require a minor to admit the truth of the petition before granting informal supervision. (*In re Ricky J.* (2005) 128 Cal.App.4th 783.)

   Under current law, a number of circumstances render a minor presumptively ineligible for informal supervision. As relevant here, a minor presumptively ineligible for informal supervision where the petition alleges that the minor has committed an offense in which victim restitution exceeds $1,000. (Welf. & Inst. Code, § 654.3, subd. (a)(5).)

   Further, probation is required to refer certain types of cases to the prosecutor within 48 hours. These include cases in which it appears to the probation officer that the minor has committed an offense in which the restitution owed to the victim exceeds $1,000. (Welf. & Inst. Code, § 653.5, subd. (b)(7).)

   These dollar limits were established in 1989 – AB 332 (Nolan), Chapter 930, Statutes of 1989 and SB 1275 (Presley), Chapter 1117, Statutes of 1989. They have not been updated since.

   This bill would increase the thresholds to $5,000. This reflects the effects of inflation and also recognizes that diversion of youth produces better outcomes for both the youth and public safety than formal processing through the juvenile justice system.

3) **Diverting Youth Away from the Juvenile Justice System**: A "meta-analysis was conducted to shed some light on whether diversion reduces recidivism at a greater rate than traditional justice system processing and to explore aspects of diversion programs associated with greater reductions in recidivism . . .The results indicated that diversion is more effective

in reducing recidivism than conventional judicial interventions." (https://journals.sagepub.com/doi/abs/10.1177/0093854812451089.)

Additionally, according to the National Center for Youth Law: "In 2016, more than 40,000 California youth were arrested or cited by law enforcement officers for misdemeanor and status offenses. A disproportionate number were children of color, children from lower socio-economic backgrounds, children with disabilities, girls, youth who identify as lesbian, gay, bisexual, transgender, or queer, and foster children.

"This is troubling because system-involved youth suffer from abuse, abandonment, neglect, trauma and developmental disabilities that influence their behaviors. Rather than receive supports and services to address their needs, they are instead funneled into the justice system where they experience further harms, increasing their chances of re-incarceration." (https://youthlaw.org/news/california-commits-nearly-60-million-divert-youth-away-jails-toward-supports.)

4) **Argument in Support**: According to *Pacific Juvenile Defender Center,* the sponsor of this bill, "The $1,000 threshold for minors to be informally supervised by probation or allowed to participate in informal supervision by the juvenile court has not been adjusted since first codified in 1989. Most obviously, the figure has not been adjusted for inflation. But even more importantly, the figure does not account for technological change: In 1989, smartphones — perhaps the most commonly-stolen technology item — had not yet been invented, let alone reached total ubiquity as today. Under the current statutory scheme, if a youth steals or damages an iPhone, even if the youth has no record and is doing well in all other aspects of their life, two decisions must follow. First, the youth must be referred to the DA's Office for filing of charges and is not eligible for pre-filing diversion. Second, once charges are filed, the youth is presumptively ineligible for informal probation.

"A.B. 1643 will increase the presumptive disqualifying dollar threshold for informal supervision to $5,000. This is a common-sense change that recognizes that diversion of youth produces better outcomes for the youth and public safety than formal juvenile justice system processing. It also recognizes that there is a slim (if any) connection between a restitution amount and a youth's likelihood of success on diversion....

"It has become well-recognized that diverting youth away from formal justice system processing for lower-level offenses leads to better, healthier, and more equitable outcomes for youth and the community, and permits diverted youth to connect to services without juvenile court involvement and extended contact with law enforcement. With the restitution threshold raised to $5,000, more youth will be able to access informal supervision and take advantage of the benefits of the program, allowing the harm caused by low-risk youth to be addressed outside of the formal juvenile justice system. The expansion of informal supervision will contribute to decreasing recidivism rates and increase the accessibility of community-based interventions. Youth who receive responses to their behavior that are restorative (rather than punitive) are healthier, less likely to recidivate, and more likely to repair harm. Research also shows that community-based strategies can increase public safety and lessen exposure to the justice system, reducing the need for the system to expend resources. As such, studies consistently recommend increasing community-based interventions like diversion, and reducing the detention of youth except when necessary for public safety.

"Moreover, allowing more youth to access informal supervision directly facilitates more equitable outcomes for youth of color, who are more likely to be criminalized for the same behavior and less likely to be given access to diversion. Specifically, Black and Latino youth who are referred to probation are more likely than white youth to have a petition filed for every category of offense. A.B. 1643 thus places an additional safeguard in place to protect youth of color from being ensnared in the juvenile justice system.

"The juvenile justice system strives to rehabilitate and support youth, and to remove them from the school-to-prison pipeline. Current law, however, reflects an outdated standard based on a disproven mentality of requiring formal system involvement for low-level offenses, and invokes a restitution metric that has no actual relation to whether a youth can be successful without formal system involvement. A.B. 1643 will help ensure that more youth are able to participate in community-based solutions." (Footnotes omitted.)

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

6) **Related Legislation**: AB 1186 (Bonta), would remove the ability of the court to require a minor to pay victim restitution. AB 1186 is the Assembly Appropriations Committee.

7) **Prior Legislation**:

   1) SB 383 (Cortese), Chapter 603, Statutes of 2021, as relevant here, prohibited finding a minor ineligible for informal supervision or finding the minor has failed to comply with the terms of informal supervision where they are unable to pay victim restitution due to indigency.

   a) AB 901 (Gipson), Chapter 323, Statutes of 2020, as relevant here, removed the requirement that the probation officer refer to the prosecutor within 48 hours, cases in which the minor has previously been placed on informal probation.

REGISTERED SUPPORT / OPPOSITION:

Support

Pacific Juvenile Defender Center (Sponsor)
Anti Recidivism Coalition
California Public Defenders Association (CPDA)
Ceres Policy Research
Children's Defense Fund - CA
Communities United for Restorative Youth Justice (CURYJ)
Fresno Barrios Unidos
Haywood Burns Institute
Kids in Common
National Center for Youth Law
San Francisco Public Defender
Santa Clara County Juvenile Justice Commission
Santa Cruz Barrios Unidos INC.

The Young Women's Freedom Center

1 Private Individual

Opposition

None on file

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

Date of Hearing: April 11, 2023
Counsel: Liah Burnley

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Reginald Byron Jones-Sawyer, Sr., Chair

AB 1708 (Muratsuchi) – As Amended March 9, 2023

PULLED BY THE AUTHOR

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

Date of Hearing: April 11, 2023
Chief Counsel: Sandy Uribe

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Reginald Byron Jones-Sawyer, Sr., Chair

AB 1726 (Kalra) – As Introduced February 17, 2023

As Proposed to be Amended in Committee

SUMMARY: Declares all former convictions for loitering with the intent to commit prostitution and for prostitution with a prior conviction by a person who knew they had acquired immune deficiency syndrome (AIDS) legally invalid. Specifically, **this bill**:

1) Provides that all convictions of former Penal Code section 653.22 (loitering with the intent to commit prostitution) are defective due to constitutional error because they were void for vagueness at the time of arrest and conviction and are therefore legally invalid.

2) Provides that all convictions of former Penal Code section 647f (prostitution or solicitation with a prior conviction of the same offense by a person who was HIV/AIDS positive), as it read on December 31, 2017, are defective due to constitutional error because they were void on equal protection grounds at the time of arrest and conviction and are therefore legally invalid.

3) Requires a court receiving a petition for recall and dismissal of these convictions to dismiss and seal them based on constitutional error and legal invalidity.

EXISTING LAW:

1) Provides that a person who is currently serving a sentence for loitering with intent to commit prostitution may petition the court for a recall or dismissal of sentence. (Pen. Code, § 653.29, subd. (a).)

2) Provides that person who has completed their sentence for a conviction of loitering with intent to commit prostitution may file an application with the court to have the conviction dismissed and sealed. (Pen. Code, § 653.29, subd. (b).)

3) Provides that a conviction for a violation of Penal Code section 647f as it read on December 31, 2017, is invalid and vacated. (Pen. Code, § 1170.21.)

4) Allows an individual who was arrested, charged, or convicted for a violation of Section 647f (exposing another to HIV) to indicate in response to any question concerning the prior arrest, charge, or conviction that they were not arrested, charged, or convicted for that charge. (Pen. Code, § 1170.21.)

5) Provides post-conviction relief for persons convicted of exposing another to HIV. (Pen. Code, § 1170.22.)

6) 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. (Pen. Code, § 647 subd. (b)(1).)

7) 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).)

FORMER LAW:

1) Made it a misdemeanor to loiter in a public place with the intent to commit prostitution. (Pen. Code §§ 653.22 and 653.26.)

2) Stated that among the circumstances that may be considered in determining whether a person loiters with intent to commit prostitution are that the person:

   a) Repeatedly beckons to, stops, engages in conversations with, or attempts to stop or engage in conversations with passersby, indicative of soliciting for prostitution;

   b) Repeatedly stops or attempts to stop motor vehicles by hailing the drivers, waving arms, or making any other bodily gestures, or engages or attempts to engage the drivers or passengers of the motor vehicles in conversation, indicative of soliciting for prostitution;

   c) Has been convicted of violating this section, or other offenses related or involving prostitution, within five years of the arrest under this section;

   d) Circles an area in a motor vehicle and repeatedly beckons to, contacts, or attempts to contact or stop pedestrians or other motorists, indicative of soliciting for prostitution;

   e) Has engaged, within six months prior to the arrest under this section, in any behavior described in this subdivision or any other behavior indicative of prostitution activity. (Pen. Code, § 653.22, subd. (b).)

3) Stated that the circumstances set forth above were not exclusive, and that the circumstances should be considered particularly salient if they occurred in an area that is known for prostitution activity. (Pen. Code, § 653.22, subd. (c).)

4) Made a second conviction for prostitution or solicitation a felony, if the person was tested for HIV/AIDS with a positive result and the person knew of the result. (Pen. Code, § 647f.)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "Under federal law, deportation proceedings can still be based on a vacated conviction unless the vacatur is due to a legal defect in the underlying arrest or conviction. In cases where state law does not explicitly specify as such, non-citizens are inadvertently subjected to a two-tiered system where they unfairly face

additional consequences for convictions based on outdated laws and are denied the relief they are entitled to. AB 1726 corrects this oversight and ensures equal access to vacatur under Penal Code Sections 653.29, 1170.21, and 1170.22 by clarifying that all convictions of former Penal Code Section 653.22 and 647f are defective due to vagueness and on equal protection grounds, respectively."

2) **Legislative History of Penal Code Section 653.22**: The crime of loitering with the intent to commit prostitution (former Pen. Code, § 653.22) was enacted in 1995 by AB 1035 (Katz) Chapter 981, Statutes of 1995. At the time, soliciting or agreeing to engage in prostitution was already a crime. According to the Senate Committee's analysis of AB 1035, the author and proponents of the bill expressed that the bill was needed because existing laws were ineffective at producing arrests of persons who were believed to be sex workers, and the presence of such individuals added to crime and blight to neighborhoods. According to the author's statement provided in the analysis:

> Prostitutes and drug dealers blatantly work on the streets in defiance of law enforcement. Prostitution and drug dealing adversely affect the safety, welfare, and health of our neighborhoods while hurting small businesses and decreasing property values. While it is usually quite obvious that prostitutes and drug dealers are conducting business, existing law has been ineffective in securing their arrest.
>
> In order to be arrested, prostitutes must either solicit, accept, or engage in a sexual act for money. Drug dealers must be caught exchanging controlled substances for money. These criminals have become skilled in their operations -- they are familiar with undercover officers and know exactly what they can and cannot say to avoid arrest. They blatantly work the streets in defiance of law enforcement -- and add to the rampant crime and blight in some of our neighborhoods.

(Sen. Comm. on Crim. Procedure, Analysis of Assem. Bill No. 1035 (1995-1996 Reg. Sess.) as amended Apr. 6, 1995, p. d.) The committee analysis cited concerns by opponents of the bill that enacting the proposed crime of loitering with the intent to commit prostitution may allow police officers to make arrests with substantially less than probable cause that a crime has been or will be committed. AB 1035 provided broad discretion on what circumstances could satisfy the intent to commit prostitution, potentially leading to subjective and arbitrary arrests. (*Id.* at pp. i-j.)

A study conducted in 2019 through the Los Angeles County Public Defender's office compiled data from all of the charges of violations of Penal Code section 653.22, loitering for purposes of prostitution, reported from the Compton Branch of the Public Defender's office. During a one-week period of time, a total of 48 cases were reported. (D. 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) https://www.zefflawfirm.com/wp-content/uploads/2021/11/Sex-Work-in-Compton-Report-Derek-Demeri.pdf [as of April 5, 2023].) 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. (*Id.* at p. 2.) As for race, 72.3 percent were Black with the next highest rate being 17 percent for Hispanic. (*Id.* at p. 4.)

SB 357 (Wiener), Chapter 86, Statutes of 2022, repealed those provisions of law and permitted persons who had been convicted of that offense to petition for a dismissal of the conviction and sealing of the record because the prior conviction was now invalid.

As introduced, this bill would declare that the reason those convictions were legally invalid is based on constitutional error, specifically on grounds of void for vagueness. As proposed to be amended in committee, this bill would not specify the specific constitutional error. Nevertheless, while the Legislature can repeal laws, traditionally it is the judicial branch that determines the constitutionality of laws. Does a general declaration by the Legislature that a law is unconstitutional raise a separation of powers issue?

3) **Legislative History of Penal Code Section 647f**: In the 1980's several laws were passed in California that criminalized behaviors of people living with HIV or added penalties to existing crimes for those with HIV. These laws were based on fear and the limited medical science of the time. In 1988, when most of these laws were passed, there were no effective treatments for HIV and discrimination towards people living with HIV was extremely high. One of these laws, former Penal Code section 647f, punished the crime of prostitution or solicitation as a felony if the person was previously convicted of the same offense and was tested for HIV/AIDS with a positive result and the person knew of the result.

A report conducted by the Williams Institute of the University of California, Los Angeles, reviewed data on all law enforcement contacts for HIV-related offenses in California spaning from 1988 to 2014. Of these crimes, the felony solicitation offense was by far the most common reason for law enforcement contact, making up about 94% of all of the contacts, or 1,113 people. (Hasenbush, et al., *HIV Criminalization in California*, Williams Institute, UCLA School of Law (June 2015) at pp. 14-15 < https://williamsinstitute.law.ucla.edu/wp-content/uploads/HIV-Criminalization-California-Updated-June-2016.pdf> [as of April 5, 2023].) The report also looked at the demographics of the individuals who came in contact with the criminal justice system and found patterns that indicate that certain groups had been disproportionately affected by these laws. Black women, while only making up 4% of the population of people diagnosed with HIV in California, made up 21% of the population of people who had contact with the criminal justice system related to their HIV status. White women, while only making up 3% of the population of people diagnosed with HIV in California, made up 15% of the population of people who had contact with the criminal justice system related to their HIV status. By comparison, white men make up 40% of the population of people in California diagnosed with HIV, but only 16% of those who had contact with the criminal justice system related to their HIV status. (*Id.* at p. 17.)

SB 239 (Wiener), Chapter 537, Statutes of 2017, repealed this provision of law, and other HIV criminalization laws, and declared them invalid.

As introduced, this bill would state that the reason former Penal Code section 647f was invalid was that it was unconstitutional, specifically in violation of equal protection. As proposed to be amended this bill will just state that the former law is unconstitutional, but not state the specific grounds for the constitutional error. This declaration raises the same separation of powers question noted above.

4) **Impacts on Immigration Law**: As noted above, the author's stated need for this bill is for purposes of immigration relief.

For purposes of immigration law, the reason for vacating a conviction is critical. A criminal conviction vacated for stated rehabilitative purposes or the stated purpose to avoid immigration consequences remains a conviction for immigration purposes. In contrast, a conviction vacated on some grounds as legally invalid is eliminated as a source of adverse immigration consequences. (See *Matter of Pickering* (BIA 2003) 23 I&N Dec. 621, 622-623, reversed on other grounds in *Pickering v. Gonzales* (6th Cir. 2006) 454 F.3d 525; see also *Pinho v. Gonzales* (3d Cir. 2005) 432 F.3d 193, 195; *Nath v. Gonzales* (9th Cir. 2006) 467 F.3d 1185, 1189.)

When SB 357 (Wiener) of 2022 repealed the crime of loitering with the intent to commit prostitution, it also added a statute providing a procedure to obtain post-conviction relief. (Pen. Code, § 653.29.) That provision already specified that former convictions for loitering with intent to commit prostitution were "legally invalid." (See Pen. Code, § 653.29, subds. (a)(2) & (b)(1).)

Similarly, when SB 239 (Wiener) of 2017 repealed the crime of prostitution or solicitation with a prior by a person who is HIV/AIDS positive, it too added a post-conviction relief statute declaring these convictions "invalid and vacated." (See Pen. Code, § 1170.21.)

Therefore, as to both of these former crimes, arguably this bill really only specifies the reasons for the legal invalidity since they were already declared invalid when repealed.

5) **Argument in Support**: According to the *California Public Defenders Association*, "AB 1726 is a technical fix to last year's SB 357 and 2017's SB 239 to ensure that the record clearing provisions enacted by SB 357 and SB 239 also work for purposes of immigration relief. AB 1726 ensures that vulnerable immigrant populations can benefit from the reforms that resulted from repealing Penal Code sections 647f and 653.22. Many sex workers, particularly in California, are subject to brutal immigration enforcement and deportation for even minor criminal infractions. CPDA members have seen the unjust and disproportionate consequences suffered by our clients.

"Through the representation of our clients, CPDA members have seen how the subjective nature of California Penal Code § 653.22 enabled law enforcement to engage in discriminatory policing that targeted Black and Brown women and members of the transgender community. Penal Code Section 647f was based on fear and limited medical science at the time and penalized sex workers who were living with HIV. SB 357 and SB 239 were attempts to solve these problems and created a process to clear the records for persons convicted of violating these penal code sections. However, the prior bills did not include the specific language needed to help persons who need to have a prior conviction cleared for immigration purposes despite the intention of both bills to provide relief for immigrants. For immigration purposes, a conviction must have been legally or procedurally defective at the time it was entered. AB 1726 simply adds language that would clarify that convictions for violating Penal Code sections 653.22 and 647f were invalid from the beginning, thereby ensuring SB 357 and SB 239 protect all Californians they were meant to protect."

6) **Argument in Opposition**: According to the *California District Attorneys Association*, "At this juncture, our opposition is solely based on the fact that there is case law expressly coming to the opposite conclusion regarding Penal Code section 653.22 (see *People v. Pulliam* (1998) 62 Cal.App.4th 1430; see also *People v. Superior Court (Caswell)* (1988) 46 Cal.3d 381), and an apparent lack of any case law (either in California or other jurisdiction) that supports the idea that former section 647f was violative of equal protection.

"Moreover, the proposed amendment appears entirely unnecessary to accomplishing the goals of the statutes being amended. Courts can dismiss or grant relief to persons who have suffered convictions for these offenses just as well under the current language of the statute as under the proposed amended language. In such circumstances, it would set a bad precedent for the Legislature to bake into statute legal conclusions that are not supported by case law. Such language might be later misused by courts to support unwarranted challenges to other statutes designed to help deter crimes before they occur (and protect the public) by prohibiting loitering with a specific intent. (See e.g., Pen. Code, § 653(b) [loitering arounds schools without a lawful intent and increasing punishment if done by sex offender]; Penal Code § 647 (h) [loitering upon the private property of another, at any time, without visible or lawful business with the owner or occupant"]; Health & Saf. Code, § 11532 [loitering with the intent to engage in drug-related activity].)

"Should this bill be amended to simply invalidate the prior convictions, CDAA would withdraw its opposition."

7) **Related Legislation**: AB 1602 (Alvarez), would expand the crime of disorderly conduct to include attempts to engage in soliciting prostitution, attempts to agree to engage in prostitution, or attempts to engage in prostitution. AB 1602 is pending hearing in this committee.

8) **Prior Legislation**:

   a) SB 357 (Wiener), Chapter 86, Statutes of 2022, decriminalized the act of loitering with the intent to commit prostitution.

   b) SB 483 (Allen), Chapter 728, Statutes of 2021, declared sentence enhancements for prior prison or county jail felony terms and for prior convictions of specified crimes related to controlled substances legally invalid.

   c) SB 233 (Wiener), Chapter 141, Statutes of 2019, made condoms inadmissible as evidence in specified crimes relating to prostitution and prohibited the arrest of a person for misdemeanor drug possession or prostitution-related offenses when the person is reporting certain, more serious crimes

   d) AB 2243 (Friedman), Chapter 27, Statutes of 2018, prohibited the use of evidence that victims of, or witnesses to a violent felony as specified, extortion, or stalking, were engaged in an act of prostitution at or around the time they were the witness or victim to the crime.

   e) SB 239 (Wiener), Chapter 537, Statutes of 2017, repealed provisions of law that punished more harshly intentional transmission of a communicable disease when those acts were

committed by a person who has been diagnosed with AIDS or HIV, and created a new misdemeanor for the intentional transmission of any infectious or communicable disease.

REGISTERED SUPPORT / OPPOSITION:

Support

Best Practices Policy Project
California Attorneys for Criminal Justice
California Public Defenders Association
Ella Baker Center for Human Rights
Equality California
Erotic Service Providers Legal, Education, and Research Project
Initiate Justice
Oasis Legal Services
Sex Workers Outreach Project Sacramento
St. James Infirmary
The Gubbio Project

Opposition

California District Attorneys Association

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

Amended Mock-up for 2023-2024 AB-1726 (Kalra (A))

Mock-up based on Version Number 99 - Introduced 2/17/23
Submitted by: Sandy Uribe, Assembly Public Safety Committee

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

SECTION 1. Section 653.29 of the Penal Code is amended to read:

653.29. (a) (1) A person currently serving a sentence for a conviction of violating former Section 653.22, whether by trial or by open or negotiated plea, may petition for a recall or dismissal of sentence before the trial court that entered the judgment of conviction in the case to request resentencing or dismissal, and sealing, as applicable. All convictions of former Section 653.22 are defective due to constitutional error ~~because they were void for vagueness at the time of arrest and conviction~~ and are therefore legally invalid.

(2) Upon receiving a petition under paragraph (1), the court shall presume the petitioner satisfies the criteria in paragraph (1) unless the party opposing the petition proves by clear and convincing evidence that the petitioner does not satisfy the criteria. If the petitioner satisfies the criteria in paragraph (1), the court shall grant the petition to recall the sentence or dismiss the sentence because it is legally invalid due to constitutional error in the underlying conviction ~~in that the crime was void for vagueness~~ and shall seal the conviction as legally invalid.

(b) (1) A person who has completed their sentence for a conviction of violating Section 653.22, whether by trial or open or negotiated plea, may file an application before the trial court that entered the judgment of conviction in their case to have the conviction dismissed and sealed because the prior conviction is legally invalid due to constitutional error in the underlying conviction ~~in that the conviction was void for vagueness~~.

(2) The court shall presume the petitioner satisfies the criteria in paragraph (1) unless the party opposing the application proves by clear and convincing evidence that the petitioner does not satisfy the criteria in paragraph (1). Once the applicant satisfies the criteria in paragraph (1), the court shall dismiss and seal the conviction as legally invalid due to constitutional error in the underlying conviction ~~on the basis that all convictions of former Section 653.22 are void for vagueness~~.

(c) Unless requested by the applicant, no hearing is necessary to grant or deny an application filed under subdivision (b).

(d) If the court that originally sentenced the petitioner is not available, the presiding judge shall designate another judge to rule on the petition or application.

(e) Nothing in this section is intended to diminish or abrogate any rights or remedies otherwise available to the petitioner or applicant.

(f) The Judicial Council shall promulgate and make available all necessary forms to enable the filing of the petitions and applications provided in this section.

SEC. 2. Section 1170.21 of the Penal Code is amended to read:

1170.21. A conviction for a violation of Section 647f as it read on December 31, 2017, is defective due to constitutional error ~~because it was void on equal protection grounds at the time of arrest and conviction~~ and is therefore legally invalid and vacated. All charges alleging violation of Section 647f are dismissed and all arrests for violation of Section 647f are deemed to have never occurred ~~due to constitutional error because they were void on equal protection grounds at the time of arrest~~. An individual who was arrested, charged, or convicted for a violation of Section 647f may indicate in response to any question concerning their prior arrest, charge, or conviction under Section 647f that they were not arrested, charged, or convicted for a violation of Section 647f. Notwithstanding any other law, information pertaining to an individual's arrest, charge, or conviction for violation of Section 647f shall not, without the individual's consent, be used in any way adverse to their interests, including, but not limited to, denial of any employment, benefit, license, or certificate.

SEC. 3. Section 1170.22 of the Penal Code is amended to read:

1170.22. (a) A person who is serving a sentence as a result of a violation of Section 647f as it read on December 31, 2017, whether by trial or by open or negotiated plea, may petition for a recall or dismissal of sentence before the trial court that entered the judgment of conviction in their case. All convictions of Section 647f, as it read on December 31, 2017, are defective due to constitutional error ~~because they were void on equal protection grounds at the time of arrest and conviction and~~ are therefore legally invalid.

(b) If the court's records show that the petitioner was convicted for a violation of Section 647f as it read on December 31, 2017, the court shall vacate the conviction due to constitutional error ~~because they were void on equal protection grounds at the time of arrest and conviction~~ and are therefore legally invalid and shall resentence the person for any remaining counts.

(c) A person who is serving a sentence and resentenced pursuant to subdivision (b) shall be given credit for any time already served and shall be subject to whatever supervision time they would have otherwise been subject to after release, whichever is shorter, unless the court, in its discretion, as part of its resentencing order, releases the person from supervision.

(d) Under no circumstances may resentencing under this section result in the imposition of a term longer than the original sentence, or the reinstatement of charges dismissed pursuant to a negotiated plea agreement.

(e) Upon completion of sentence for a conviction under Section 647f as it read on December 31, 2017, the provisions of Section 1170.21 shall apply.

(f) Nothing in this and related sections is intended to diminish or abrogate the finality of judgments in any case not falling within the purview of this section.

(g) A resentencing hearing ordered under this section shall constitute a "post-conviction release proceeding" under paragraph (7) of subdivision (b) of Section 28 of Article I of the California Constitution.

(h) The provisions of this section apply to juvenile delinquency adjudications and dispositions under Section 602 of the Welfare and Institutions Code if the juvenile would not have been guilty of an offense or would not have been guilty of an offense governed by this section.

(i) The Judicial Council shall promulgate and make available all necessary forms to enable the filing of petitions and applications provided in this section.

Date of Hearing: April 11, 2023
Counsel: Mureed Rasool

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Reginald Byron Jones-Sawyer, Sr., Chair

AB 1739 (Sanchez) – As Introduced February 17, 2023

SUMMARY: Establishes within the Office of Emergency Services (OES) a pilot program to fund up to 11 district attorney offices to employ vertical prosecution for human trafficking crimes. Specifically, **this bill**:

1) Creates the Human Trafficking Prevention Vertical Prosecution Program within the OES and directs the Director of Emergency Services award funds for up to 11 district attorney offices for vertical prosecution of human trafficking crimes.

2) States that each county selected for funding must meet the following minimum requirements:

   a) Employ a vertical prosecution methodology for human trafficking crimes;

   b) Comply with guidelines issued by OES;

   c) Dedicate at least half the working time of one deputy district attorney and one district attorney investigator solely to the investigation and prosecution of human trafficking;

   d) Provide annual data on the number of human trafficking cases filed, convictions obtained, and sentences imposed for human trafficking offenses in that county;

   e) Enter into an agreement with an OES-funded human trafficking advocacy agency to ensure victims and witnesses of human trafficking receive appropriate services; and,

   f) Consult with similarly situated grant recipients regarding best practices.

3) Mandates that district attorney offices shall use grant funds to supplement and not supplant existing financial resources.

4) States that the OES must use a competitive process in selecting grantees and, at minimum, prospective grantees must demonstrate an ability to comply with the requirements of the program and provide an estimate of human trafficking crimes occurring in their county.

5) Requires OES, on or before January 1, 2026, to submit to the Legislature and Governor's office a report describing which counties were funded, the number of human trafficking cases filed by each county, the number of convictions obtained by each county, and the sentences imposed in each county.

6) Defines human trafficking as a violation of either California's human trafficking statute, or the solicitation of a minor statute.

7) Sunsets the program on January 1, 2028.

EXISTING LAW:

1) Establishes the OES within the office of the Governor. (Gov. Code, § 8585, subd. (a).)

2) Vests the OES with all the duties and powers of the Office of Homeland Security. (Gov. Code, § 8585, subd. (b).)

3) States that a person who deprives or violates the personal liberty of another with the intent to obtain forced labor or services, intent to commit a specified commercial sex offense, or causes, induces, or persuades a minor to engage in a commercial sex act, is guilty of human trafficking. (Pen. Code, § 236.1.)

4) Provides that any person who solicits a minor for an act of prostitution is guilty of disorderly conduct. (Pen. Code, § 647 subd. (l).)

5) Establishes a vertical prosecution program for spousal abuse within the Department of Justice (DOJ) and finds that "the concept of vertical prosecution, in which a specially trained deputy district attorney, deputy city attorney, or prosecution unit is assigned to a case after arraignment and continuing to its completion, is a proven way of demonstrably increasing the likelihood of convicting spousal abusers and ensuring appropriate sentences for those offenders." (Pen. Code, §§ 273.8 *et seq.*)

6) Establishes a vertical prosecution program for repeat sex offenders within the OES and finds that "the concept of vertical prosecution, in which a specially trained deputy district attorney, deputy city attorney, or prosecution unit is assigned to a case after arraignment and continuing to its completion, is a proven way of demonstrably increasing the likelihood of convicting repeat sex offenders and ensuring appropriate sentences for those offenders." (Pen. Code, §§ 999i *et seq.*)

7) Establishes a vertical prosecution program for child abuse within the OES and finds that "the concept of vertical prosecution, in which a specially trained deputy district attorney, deputy city attorney, or prosecution unit is assigned to a case after arraignment and continuing to its completion, is a proven way of demonstrably increasing the likelihood of convicting child abusers and ensuring appropriate sentences for those offenders." (Pen. Code, §§ 999q *et seq.*)

8) Establishes a vertical prosecution pilot program for hate crimes within the DOJ. (Pen. Code, § 422.94.)

9) Establishes a vertical prosecution program within the OES for major narcotic vendors. (Pen. Code, §§ 13880 *et seq.*)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "By supporting the use of vertical prosecution in human trafficking cases, California can take a significant step in helping fight this unconscionable crime. I introduced AB 1739 because vertical prosecution can help reduce re-traumatizing human trafficking victims and increase the likelihood that their abusers will be brought to justice."

2) **Human Trafficking**: According to the DOJ, human trafficking, also known as modern-day slavery, is a crime involving the coercion or compelling of a person to provide labor or services, or to engage in commercial sex acts. The coercion can be physical or psychological, and may involve the use of violence, threats, lies, or debt bondage. It is among the world's fastest growing criminal enterprises and is estimated to be a $150 billion-a-year worldwide industry. The International Labor Organization estimates that there are approximately 24.9 million human trafficking victims globally at any given time. (DOJ. *What is Human Trafficking?* <https://oag.ca.gov/human-trafficking/what-is#top> [as of Mar. 29, 2023]; DOJ. *Human Trafficking*. <https://oag.ca.gov/human-trafficking> [as of Mar. 29, 2023].)

   The U.S. is widely regarded as a destination country for human trafficking. At the federal level, it is estimated that 14,500 to 17,500 victims are trafficked into the U.S. annually. At the state level, California is one of the nation's top destination states for human trafficking. Human trafficking victims do not necessarily fit into any one profile. (*Id.*) Victims of human trafficking include men, women, and children from diverse backgrounds in terms of race, color, national origin, religion, sexual orientation, socioeconomic status, and education level. (*Id.*) Many domestic victims of sex trafficking are runaway or homeless youth with backgrounds of sexual and physical abuse, poverty, or addiction; these vulnerabilities are often exploited by traffickers. (*Id.*) (DOJ. *What is Human Trafficking?* <https://oag.ca.gov/human-trafficking/what-is#top> [as of Mar. 29, 2023]; DOJ. *Human Trafficking*. <https://oag.ca.gov/human-trafficking> [as of Mar. 29, 2023].)

   To help provide services to human trafficking victims in California, on April 26, 2022, OES announced $20 million in grants for local partners. These grants were distributed to 31 community-based organizations for purposes such as survivor-centered counseling, outreach and referral programs, and reentry back into society. Funding also would be used to assist with cell phones, relocations expenses, court/legal fees, and medical care. (OES. *Cal OES Announces $20 million in Grants to Protect and Empower Survivors of Human Trafficking*. (Apr. 26, 2022) <https://news.caloes.ca.gov/human-trafficking-grant/> [as of Mar. 29, 2023].)

3) **Vertical Prosecution**: Prosecutors generally prosecute offenses in two ways, horizontally or vertically. (Lori Mullins. *Prosecuting Cases Vertically: A More Victim-focused Approach.* (May 2015) <https://ggulawreview.com/wp-content/uploads/2015/04/mullins_digital_symposium.pdf> [as of Mar. 29, 2023] at p. 2.) Horizontal prosecution generally refers to a method in which a different prosecutor is in charge of a case depending on what stage of the legal process it is in. (*Ibid.*) For example, one prosecutor may charge a case, another may handle the case at arraignment, then pass it on to another prosecutor for a preliminary hearing, who may then pass it on to another prosecutor for the trial. (*Ibid.*) Vertical prosecution generally refers to a method where there is a designated prosecutor who handles a case from charging all the way through to sentencing or dismisal. (*Ibid.*)

Many large jurisdictions combine horizontal and vertical prosecution. (Cassia Spohn. "Specialized Units and Vertical Prosecution Approaches." *The Oxford Handbook of Prosecutors and Prosecution*. (May 26, 2021) <https://books.google.com/books?hl=en&lr=&id=uzoqEAAAQBAJ&oi=fnd&pg=PA259&dq=vertical+prosecution+&ots=PDMTnhbBqE&sig=TTjXqo96scfci3IlXdz6YKi6N80#v=onepage&q=vertical%20prosecution&f=false> [as of Mar. 29, 2023] at p. 259.) They usually will prosecute routine misdemeanor and felony cases horizontally, and will select more severe or complex cases such as homicides, sex offenses, high-level drug trafficking offenses, or gang offenses, for vertical prosecution by specialized units. (*Ibid.*)

Advocates of vertical prosecution contend that cases involving sexual assault or gang violence have reluctant or fearful victims and face potentially complex and difficult evidentiary issues. (*Id.* at 260.) Furthermore, advocates contend that as a result of continuous contact with a case, the prosecutor will be more informed of the evidentiary issues, will have greater time to develop a comprehensive legal strategy, and will be able to develop familiarity with victims and witnesses leading to securing testimony needed for a conviction. (*Ibid.*) For example, a prosecutor in a specialized vertical unit may develop the enhanced skill needed to confront the fact that a sexual assault victim may not have reported the crime immediately or may have engaged in supposed "risky behavior" before an incident; the fact that a domestic violence victim may not show up to a court appearance, or, if they do, minimize the defendant's behavior; and the fact that a victim or witness of gang violence may fear retaliation for testifying. (*Ibid.*) That said, these assumptions that drive the use of vertical prosecution and specialized units are largely untested as there is no research comparing the efficacy of vertical and horizontal prosecution and limited research examining specialized units. (*Id.* at 267.)

This bill would, in part, fund several district attorney offices to address human trafficking offenses in their respective counties by establishing vertical prosecution units for such offenses as has been done for hate crimes, child abuse, domestic abuse, and repeat sex offenders. This bill would ensure human trafficking victims are not only provided support to help ease them back into society, but are also afforded an appropriate level of care and justice in the legal system.

4) **Argument in Support**: According to the *California District Attorneys Association*, "Human trafficking remains a lucrative criminal enterprise. The ability to sell a human body multiple times distinguishes it from the sale of other contraband, such as weapons and narcotics. Those who traffic in human flesh know very that they can inflict physical and mental terror upon their victims, making the crime difficult to prosecute. The traffickers also move their enterprise across various jurisdictions seeking to avoid detection.

The best way to attack these traffickers is through vertical prosecution units, supported by victim advocacy. Vertical units can better coordinate with other jurisdictions to track, apprehend, and prosecute offenders. Specially trained prosecution staff can focus on preventing and overcoming the physical and mental manipulation of trafficking victims. By creating grant funds to supplement existing vertical prosecution units, AB 1739 encourages the continued use of the vertical prosecution model and helps to hold offenders accountable, while also providing valuable victim services to the vulnerable victims of human

trafficking."

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

6) **Related Legislation**:

   a) SB 236 (Jones), is substantially similar to this bill. SB 236 is currently pending hearing in the Senate Appropriations Committee.

   b) AB 1602 (Alvarez), would add to the definition of disorderly conduct the attempt to engage in the crime of soliciting prostitution, the attempt to agree to engage in prostitution, or the attempt to engage in prostitution and requires the punishment for a victim of human trafficking to be an education class on the dangers of human trafficking and a referral to human trafficking support services. AB 1602 is pending hearing in this committee.

7) **Prior Legislation**:

   a) AB 178 (Budget Act) Chapter 45, Statutes of 2022, established within the Board of State and Community Corrections a grant program for the vertical prosecution of organized retail theft.

   b) AB 557 (Muratsuchi) Chapter 853, Statutes of 2022, established a vertical prosecution pilot program within the DOJ for the purpose of prosecuting hate crimes until July 1, 2029.

   c) AB 959 (Melendez), of the 2019-2020 Legislative Session, was substantially similar to this bill. AB 959 was held in the Assembly Appropriations Committee.

   d) AB 2124 (Rubio), of the 2017-2018 Legislative Session, was substantially similar to this bill. AB 2124 was held in the Senate Appropriations Committee.

   e) AB 229 (Baker), of the 2017-2018 Legislative Session, was substantially similar to this bill. AB 229 was held in Senate Appropriations Committee.

   f) AB 2202 (Baker), of the 2015-2016 Legislative Session, was substantially similar to this bill. AB 2202 was held in the Assembly Appropriations Committee.

REGISTERED SUPPORT / OPPOSITION:

Support

California District Attorneys Association

Opposition

None.

Analysis Prepared by: Mureed Rasool / PUB. S. / (916) 319-3744

Date of Hearing: April 11, 2023
Counsel: Cheryl Anderson

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Reginald Byron Jones-Sawyer, Sr., Chair

AB 1746 (Hoover) – As Amended March 20, 2023

SUMMARY: Provides that a person convicted of specific child endangerment or abuse crimes resulting in death of the child is ineligible to earn enhanced credits for participation as an inmate firefighter or after completing inmate firefighting training. Specifically, **this bill**:

1) Provides that a person incarcerated in state prison, who was convicted of child endangerment resulting in death or assault of a child under eight years of age resulting in death, is ineligible to earn two days of credit for every one day of service (two-for-one credits) at a California Department of Corrections and Rehabilitation (CDCR) conservation camp or after completing training for assignment to a conservation camp or to a correctional facility as an inmate firefighter.

2) Provides that a person incarcerated in the county jail, who was convicted of these offenses, is similarly ineligible to earn two-for-one credits for this service or training.

EXISTING LAW:

1) Allows for work time credits towards a state prison term to be earned, as specified. (Pen. Code, § 2933, subd. (a).)

2) Provides that for every six months of continuous incarceration, except as specified, a person incarcerated in state prison may earn a six-month work-time credit reduction from their term of confinement (one-for-one post-sentence credit). (Pen. Code, § 2933, subd. (b).)

3) Provides that a person who is assigned to a CDCR conservation camp and is eligible to receive one day of work-time credit for every one day of incarceration (one-for-one credits) shall instead receive two-for-one credits. The service performed must be after January 1, 2003. (Pen. Code, § 2933.3, subd. (a).)

4) Provides that a prisoner who has completed training for assignment to a conservation camp or to a correctional institution as an inmate firefighter or who is assigned to a correctional institution as an inmate firefighter and is eligible to earn one-for-one credits shall receive two two-for-one credits. Application is limited to prisoners who are eligible after July 1, 2009. (Pen. Code, § 2933.3, subd. (b).)

5) Allows an incarcerated person who has successfully completed training for a firefighter assignment to also receive a credit reduction from their confinement pursuant to regulations adopted by the secretary. Application is limited to prisoners who are eligible after July 1, 2009. (Pen. Code, § 2933.3, subd. (c).)

6) Provides that for time spent in the county jail, a term of four days will be deemed to have been served for every two days spent in actual custody. (Pen. Code, § 4019.)

7) Provides that a county jail inmate assigned to a conservation camp by a sheriff and who is eligible to earn day-for-day credits shall instead earn two-for-one credits. (Pen. Code, § 4019.2, subd. (a).)

8) Provides that a county jail inmate who has completed training for assignment to a conservation camp or to a state or county facility as an inmate firefighter or who is assigned to a county or state correctional institution as an inmate firefighter and who is eligible to earn day-for-day credits shall instead earn two-for-one credits. Application is limited to eligible inmates after October 1, 2011. (Pen. Code, § 4019.2, subd. (b).)

9) Allows county jail inmates who have successfully completed training for firefighter assignments to also receive a credit reduction from their term of confinement. Application is limited to eligible inmates after October 1, 2011. (Pen. Code, § 4019.2, subd. (d).)

10) States that a person convicted of a violent felony may not use work-time credits to reduce their term by more than 15%. (Pen. Code, § 2933.1.)

11) Prohibits a person convicted of murder from accruing work-time or program credit reductions. (Pen. Code, § 2933.2.)

12) Provides that any person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of that child to be injured, or willfully causes or permits that child to be placed in a situation where their person or health is endangered, shall be punished by imprisonment in a county jail not exceeding one year, or in the state prison for two, four, or six years. (Pen. Code, § 273a, subd. (a).)

13) Provides that any person who, under circumstances or conditions other than those likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of that child to be injured, or willfully causes or permits that child to be placed in a situation where their person or health may be endangered, is guilty of a misdemeanor. (Pen. Code, § 273a, subd. (b).)

14) Provides that any person convicted of child endangerment, who under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or injury that results in death, or having the care or custody of any child, under circumstances likely to produce great bodily harm or death, willfully causes or permits that child to be injured or harmed, and that injury or harm results in death, shall receive a four-year enhancement for each violation, in addition to the sentence provided for that conviction. This does not affect the applicability of murder or manslaughter laws. This section shall not apply unless the allegation is included within an accusatory pleading and admitted by the defendant or found to be true by the trier of fact. (Pen. Code, § 12022.95.)

15) Provides that any person, having the care or custody of a child who is under eight years of age, who assaults the child by means of force that to a reasonable person would be likely to produce great bodily injury, resulting in the child's death, shall be punished by imprisonment in the state prison for 25 years to life. This does not affect the applicability of murder or manslaughter laws. (Pen. Code, § 273ab, subd. (a).)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "Child abuse is always heartbreaking but when it results in death it is the worst kind of tragedy. Unfortunately, child abuse happens far too frequently in our country and usually at the hands of a parent or caretaker. Under California law, child abuse is considered a 'non-serious, non-violent' offense. That means when an individual is found guilty of this crime, the offender qualifies for early release programs. That is also true even when the abuse results in a child's death. This bill would prohibit a person whose abuse causes a child's death from being eligible to serve in a conservation/fire camp, which is the state's most generous early release program. Killing a child is a horrific crime and should be treated as such."

2) **Conservation (Fire) Camps:** According to CDCR's website: "The primary mission of the Conservation Camp Program is to support state, local and federal government agencies as they respond to emergencies such as fires, floods, and other natural or manmade disasters.

   "CDCR, in cooperation with the California Department of Forestry and Fire Protection (CAL FIRE) and the Los Angeles County Fire Department (LACFD), jointly operates 35 conservation camps, commonly known as fire camps, located in 25 counties across California. All camps are minimum-security facilities and all are staffed with correctional staff." (https://www.cdcr.ca.gov/facility-locator/conservation-camps/) The conservation camp can be a vital part of a person's rehabilitation. "They perform a vital service and give back to the community while they serve their sentences with CDCR." (*Ibid.*)

   As of March 2023, more than 1,600 incarcerated persons are housed in conservation camps. The participants are volunteers and must have "minimum custody" status – i.e., the lowest classification for an incarcerated person based on behavior and following rules while in prison and when participating in rehabilitative programing. Additionally, minimum custody status notwithstanding, certain convictions automatically make a person ineligible for a conservation camp assignment. (https://www.cdcr.ca.gov/facility-locator/conservation-camps/)

   Persons are excluded from fire camp based on any of the following: a conviction requiring sex offender registration; a life sentence; a sentence for escape within the last 10 years; an arson conviction; a felony hold; validated active or inactive prison gang membership or association; a public interest case; current or prior convictions of murder, rape, or kidnap (violent felonies); or a pattern of excessive misconduct or disruption of the orderly operations of the institution. (https://www.cdcr.ca.gov/facility-locator/conservation-camps/fire_camp_expungement/)

   This bill would provide that incarcerated persons in state prison, who have been convicted of

specified child endangerment and abuse offenses resulting in the child's death, may not earn enhanced credits for their service as an inmate firefighter or after completing inmate firefighting training.

3) **Constitutional Authority to Award Credits Given to CDCR in Proposition 57**: Proposition 57 was passed by the electorate (Ballot Pamp., Gen. Elec. Nov. 8, 2016) and implemented as Article I, section 32 of the California Constitution. Section 32, subdivision (a)(2) of Article I states: "Credit Earning: The Department of Corrections and Rehabilitation shall have authority to award credits earned for good behavior and approved rehabilitative or educational achievements." Thus Proposition 57 gave CDCR the authority to create its own credit rules. (https://www.capolicylab.org/wp-content/uploads/2022/08/Three-Strikes-in-California.pdf at p. 8.)

   Under current CDCR regulations, full-time conservation workers and people training for these jobs may earn credits at a rate of 66.6% (two-for-one credits). However, if the person has a violent felony conviction, they may only earn credits at a rate of 50% (one-for-one credits). (https://www.cdcr.ca.gov/proposition57/)

   This bill would arguably not affect CDCR's authority to nonetheless grant enhanced credits for an inmate's post-sentence participation in these programs or training, pursuant to Proposition 57. "By its plain terms, article I, section 32, subdivision (a)(2) authorizes the Department to award—or to not award—conduct credits as it sees fit." (*In re Canady* (2020) 57 Cal.App.5th 1022, 1034, citing *Brown v. Superior Court* (2016) 63 Cal.4th 335, 359, 361 (dis. opn. of Chin, J.) "The broad and permissive language of article I, section 32, subdivision (a)(2) suggests that the voters intended for the Department to have substantial discretion in determining how credits are applied to early parole consideration...." (*In re Canady, supra,* 57 Cal. App.5th at p. 1034.)

   Further, anyone convicted of assault of a child under eight years of age resulting in death is currently excluded from participation in Conservation (Fire) Camp by virtue of the life sentence. (See Pen. Code, § 273ab.) If the death of the child results in a murder conviction, the incarcerated person is also excluded.

4) **Sheriff Fire Camp Programs:** Under Penal Code section 4019.2, persons incarcerated in a county jail may similarly earn credits for participation in a sheriff's conservation camp or successful completion of training for assignment to a conservation camp or as an inmate firefighter. An inmate eligible to earn one day of credit for every day of incarceration (one-for-one credits) would instead be able to earn two days of credit for every one day served (two-for-one credits).

   The use of such programs, as well as standards and training, can vary by county. For example, the San Bernardino County Fire Department and Sheriff's Department have partnered to form a County Inmate Hand Crew. "To qualify for the crew, inmates must be a low-level offender (no criminal history of violent, sexual, or serious violations); must have 15-18 months sentence left to serve; no documented gang affiliation; no prior discipline; and must not be a flight risk. Inmates remain under constant supervision while deployed in the field." (https://sbcfire.org/inmatehandcrew/)

   This bill would prohibit persons convicted of specified child endangerment and abuse

offenses resulting in death of the child from earning enhanced credits for their service as an inmate firefighter or after completing inmate firefighting training.

5) **Argument in Support**: According to the *Peace Officers' Research Association of California*, "This bill, Ryla's Law, would make a person convicted of specific child abuse crimes ineligible to earn 2 days of credit for every one day served as an inmate firefighter or after completing inmate firefighting training. By reducing the amount of credits an inmate sentenced to county jail can earn, this bill would create a state-mandated local program."

6) **Argument in Opposition**: According to *Californians for Safety and Justice*, "Fire camp programming within CDCR is an intense physically and mentally strenuous program where wildland firefighters are called upon to respond to various emergency situations throughout the state. While its main purpose is to support fire departments in times of active fire, many incarcerated workers are often put at the frontline of these wildfires in life-threatening conditions. Reports of incarcerated wildland firefighter deaths and injuries are a testament to the grueling conditions that individuals are subject to. During the off-season, the work of these incarcerated workers does not cease. Fire camps provide labor for various state and municipal departments to prevent threats of fire through brush clearance and maintenance, which can be equally as demanding as an active fire incident.

   "In 2016, Proposition 57 was passed with 64% of the vote. It included credits for fire campers as a way to recognize the hard labor that incarcerated residents are put through while completing the program. It is not an "easy out," but a transactional exchange from both the state and the individual. Incarcerated individuals accept these arduous working conditions as a service to their community, in the name of justice.

   "AB 1746 undermines the purpose of Proposition 57 and unreasonably discriminates against someone who may be eligible for such transformative programming, and lacks justification as to why this bill serves the public's interest. Prohibiting individuals convicted of child abuse crimes from fire camp does not promote justice, rehabilitation, nor accountability for the individual."

7) **Related Legislation**: AB 945 (Reyes), would require courts to report specified data to the Department of Justice regarding petitions for expungement relief filed on the basis of having successfully participated as an incarcerated fire camp member or at an institutional firehouse. AB 945 is pending hearing in this committee today.

8) **Prior Legislation**:

   a) AB 17 1st Ext. (Blumenfield), Chapter 12, Statutes of 2011, Criminal Justice Realignment of 2011, as relevant here, conformed county jail custody credits to the equivalent state prison inmate custody credits, including fire camp.

   b) AB 3000 (Budget Committee), Chapter 1124, Statutes of 2002, as relevant here, provided provide that any inmate assigned to a conservation camp shall earn two days of work-time credit for every day of service.

REGISTERED SUPPORT / OPPOSITION:

Support

Peace Officers Research Association of California (PORAC)

Opposition

Anti Recidivism Coalition
California for Safety and Justice
California Public Defenders Association (CPDA)
Initiate Justice
Initiate Justice Action

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