California State Assembly

PUBLIC SAFETY

REGINALD BYRON JONES-SAWYER SR.
CHAIR

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AGENDA

Tuesday, April 13, 2021
1:30 p.m. -- State Capitol, Room 4202

REGULAR ORDER OF BUSINESS

LIMITED TESTIMONY FOR SUPPORT AND OPPOSITION

TWO WITNESSES PER SIDE - FIVE MINUTES TOTAL

HEARD IN FILE ORDER

1.	AB 731	Bauer-Kahan	County jails: recidivism: reports.
2.	AB 1356	Bauer-Kahan	Reproductive health care services.
3.	AB 764	Cervantes	Contempt of court: victim intimidation.
4.	AB 892	Choi	Sex offenders: registration: solicitation of a minor.
5.	AB 266	Cooper	Violent felonies: hate crimes.
6.	AB 700	Cunningham	PULLED BY THE AUTHOR
7.	AB 718	Cunningham	Peace officers: investigations of misconduct.
8.	AB 925	Megan Dahle	Sexual assault forensic examinations: reimbursement.
9.	AB 679	Friedman	Criminal trials: testimony of in-custody informants.
10.	AB 876	Gabriel	Firearms.
11.	AB 490	Gipson	Law enforcement agency policies: arrests: positional asphyxia.
12.	AB 254	Jones-Sawyer	Contraband in state prisons.
13.	AB 1337	Lee	Transportation: transit district policing responsibilities.
14.	AB 1475	Low	Law enforcement: social media.
15.	AB 1542	McCarty	County of Yolo: Secured Residential Treatment Program.
16.	AB 689	Petrie-Norris	Comprehensive Statewide Domestic Violence Program.
17.	AB 1351	Petrie-Norris	PULLED BY THE AUTHOR
18.	AB 717	Stone	Prisoners: identification cards.
19.	AB 1237	Ting	Information access: research institutions: firearms.
20.	AB 931	Villapudua	Peace officer training: duty to intercede.

COVID FOOTER

SUBJECT:

We encourage the public to provide written testimony before the hearing by visiting the committee website at https://apsf.assembly.ca.gov/. Please note that any written testimony submitted to the committee is considered public comment and may be read into the record or reprinted.

Due to ongoing COVID-19 safety considerations, including guidance on physical distancing, seating for this hearing will be very limited for press and for the public. All are encouraged to watch the hearing from its live stream on the Assembly's website at https://www.assembly.ca.gov/todaysevents.

The Capitol will be open for attendance of this hearing, but the public is strongly encouraged to participate via the web portal, Remote Testimony Station or phone. Any member of the public attending a hearing in the Capitol will need to wear a mask at all times while in the building. We encourage the public to monitor the committee's website for updates.

Date of Hearing: April 13, 2021
Counsel: Nikki Moore

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

AB 731 (Bauer-Kahan) – As Introduced February 16, 2021

SUMMARY: Requires the sheriff in each county to compile and send data to the Board of State and Community Corrections (BSCC) on antirecidivism programs and success rates in reducing recidivism, and report the data to the Legislature. Specifically, **this bill**:

1) States that on or before January 1, 2023, and annually thereafter, the sheriff in each county shall compile and submit the following data to the BSCC:

   a) Data on each of the antirecidivism programs they provide inmates in their county jail facilities; and,

   b) The success rates in reducing recidivism in each of those programs.

2) States that for statistical purposes, any individual who completes an antirecidivism program offered at the jail and recidivates shall be counted as part of the data collected about the success rate of that program.

3) Requires that, on or before July 1, 2023, and annually thereafter, the BSCC shall compile a report based upon the findings and submit the report to the Legislature.

4) Provides that this section shall remain in effect only until January 1, 2028, and as of that date is repealed.

EXISTING LAW:

1) Establishes, commencing July 1, 2012, BSCC and states that all references to the Board of Corrections or the Corrections Standards Authority shall refer to BSCC. (Pen. Code, § 6024, subd. (a).)

2) States that the mission of BSCC shall include providing statewide leadership, coordination, and technical assistance to promote effective state and local efforts and partnerships in California's adult and juvenile criminal justice system, including addressing gang problems. This mission shall reflect the principle of aligning fiscal policy and correctional practices, including, but not limited to prevention, intervention, suppression, supervision, and incapacitation, to promote a justice investment strategy that fits each county and is consistent with the integrated statewide goal of improved public safety through cost-effective, promising, and evidence-based strategies for managing criminal justice populations. (Pen. Code, § 6024, subd. (b).)

3) Provides that it shall be the duty of BSCC to collect and maintain available information and data about state and community correctional policies, practices, capacities, and needs, including, but not limited to, prevention, intervention, suppression, supervision, and incapacitation, as they relate to both adult corrections, juvenile justice, and gang problems. The board shall seek to collect and make publicly available up-to-date data and information reflecting the impact of state and community correctional, juvenile justice, and gang-related policies and practices enacted in the state, as well as information and data concerning promising and evidence-based practices from other jurisdictions. (Pen. Code, § 6027, subd. (a).)

4) Requires, commencing on and after July 1, 2012, BSCC, in consultation with the Administrative Office of the Courts, the California State Association of Counties, the California State Sheriffs' Association, and the Chief Probation Officers of California, shall support the development and implementation of first phase baseline and ongoing data collection instruments to reflect the local impact of Public Safety Realignment, specifically related to dispositions for felony offenders and postrelease community supervision. The board shall make any data collected pursuant to this paragraph available on the board's Internet Web site. It is the intent of the Legislature that the board promotes collaboration and the reduction of duplication of data collection and reporting efforts where possible. (Pen. Code, § 6027, subd. (b)(12).)

5) Authorizes BSCC to do either of the following:

   a) Collect, evaluate, publish, and disseminate statistics and other information on the condition and progress of criminal justice in the state; or,

   b) Perform other functions and duties as required by federal acts, rules, regulations, or guidelines in acting as the administrative office of the state planning agency for distribution of federal grants. (Pen. Code, § 6027, subd. (c).)

FISCAL EFFECT: Unknown.

COMMENTS:

1) **Author's Statement**: According to the author, "This bill will require county jail data collection aimed at understanding the spending and effectiveness of the county's rehabilitation programs. Counties have an outsized role in the criminal justice system, and understanding their rehabilitation programming, especially after realignment, should be a priority. This data will allow both state legislators and local government officials to craft better policy by creating a way to gauge what recidivism reduction programs are working.

2) **Purpose of this bill**: In describing the problem meant to be addressed with the bill, the author has explained, "Despite California allocating significant funding to counties for recidivism reduction programming, there has been no regular or consistent data collection on the part of the counties for evaluating programs' success. Existing research shows variations in recidivism outcomes post-AB 109. The differences in counties' success rates could be linked to variances in county capacity and experience providing recidivism reduction services. Additionally, some variation could be due to counties' differences in recidivism reduction strategy. The differences in approach create the potential for counties to learn from

each other over time. However, counties won't be able to learn from each other or quantify the success or failures of their programming without having a mechanism to capture the data."

According to the author, the bill "will require that county sheriffs compile and supply data on recidivism reduction programs and program results so that this data can be reported to the Legislature for critical evaluation of these programs. Counties will benefit by being able to evaluate the effectiveness of their programs as compared to others in the state. In short, governments will obtain for the first time statewide data showing what is working and what is not working, in order to plan the best path forward in achieving successful recidivism reduction."

3) **Governor's Veto:** Last year, the Governor vetoed a similar measure. He wrote, "This bill would require, from January 1, 2023 to January 1, 2027, the sheriff in each county to annually compile and submit the following data to the Board of State and Community Corrections: (1) data on each of the anti-recidivism programs they provide inmates in their county jail facilities; and (2) their success rates in reducing recidivism in each of those programs.

"Data collection on recidivism is important. Unfortunately, the broad nature of this bill leaves too much discretion to local governments to decide what is and what is not a recidivism program, and it could lead to a significant and costly mandate. For this reason, I am unable to sign this bill."

Based on the governor's veto, the Legislature might want to consider defining "recidivism" and further articulating the specific data points counties that should gather and report.

4) **Argument in Support**: According to the *California Public Defenders Association*, "AB 731 will require County Sheriffs to report the nature of their anti-recidivism programs, and those programs' success rates in reducing recidivism. Recidivism can be reduced through rehabilitation by addressing the criminogenic needs of individuals within the criminal justice system. Local Sheriffs are responsible for providing the services that address these individuals' needs. Looking at success rates will afford local and State decision makers with the knowledge necessary to efficiently allocate limited resources to those programs that best reduce recidivism and encourage rehabilitation.

"As public defenders, we are always urging our clients to participate in and complete whatever programs are available to them in the county jails. Without any data it's impossible to know which ones are actually benefitting our clients and their communities."

5) **Argument in Opposition**: According to the *California State Sheriffs' Association*, "Sheriffs across the state provide meaningful rehabilitative programming to jail inmates with the desire to enhance formerly incarcerated persons' re-entry into society and reduce the likelihood that people re-offend. Unfortunately, this bill imposes vague and burdensome data collection requirements without any guarantee of funding to cover the bill's costs.

"AB 731 requires sheriffs to report 'data on each of the anti-recidivism programs they provide inmates in their county jail facilities.' The scope of what is sought by this language is unclear and is likely to yield disparate responses from the field. Additionally, the bill fails to define 'reoffend'

and 'success' as it relates to recidivism and the offered programs. As a result, the bill could be interpreted as requiring county jails to ascertain from courts, other jails, or state prisons, potentially including such entities in other states, information as to subsequent arrests or convictions. Requiring such would be very expensive; a problem exacerbated by the fact that the bill provides no funding for its requirements."

6) **Prior Legislation**:

a) AB 2482 (Bauer-Kahan), of the 2019-2020 Legislative Session, was substantially similar to this bill. AB 2482 was vetoed by the Governor.

b) AB 152 (Gallagher), of the 2017-2018 Legislative Session, would have required the Board of State and Community Corrections (BSCC) to collect and analyze data regarding recidivism rates of all persons who receive a felony sentence or who are placed on postrelease community supervision. AB 152 was held on suspense in the Assembly Appropriations Committee.

c) AB 2521 (Hagman), of the 2013-2014 Legislative Session, would have required the data on recidivism rates to include, as it becomes available, recidivism rates for offenders one, two, and three years after their release in the community. AB 2521 was held on suspense in the Senate Appropriations Committee.

d) AB 1050 (Dickinson), Chapter 270, Statutes of 2014, required the Board of State and Community Corrections (BSCC) to develop definitions relevant to data collection and evidence-based programs and practices, as specified.

REGISTERED SUPPORT / OPPOSITION:

Support

California Public Defenders Association (CPDA)
Ella Baker Center for Human Rights
San Francisco Public Defender

Opposition

California State Sheriffs' Association
Los Angeles County Sheriff's Department

Analysis Prepared by: Nikki Moore / PUB. S. / (916) 319-3744

Date of Hearing: April 13, 2021
Counsel: Cheryl Anderson

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

AB 1356 (Bauer-Kahan) – As Amended March 25, 2021

SUMMARY: Increases penalties for current crimes under the California Freedom of Access to Clinic Act (Act), making them alternatively punishable as felonies; creates new crimes under the Act directed at videotaping, photographing, or recording patients or providers within 100 feet of the facility ("buffer" zone) or disclosing or distributing those images and makes these new crimes alternatively punishable as felonies; increases current misdemeanor hate crime penalties making them alternatively punishable as felonies; updates and expands online privacy laws and peace officer trainings relative to anti-reproduction-rights offenses. Specifically, **this bill**:

1) Makes the crime of posting personal information on the internet with the intent that another person imminently use that information to commit a crime involving violence or a threat of violence applicable to the personal information or image of a reproductive health care services patient, provider, assistant, or other individuals residing at the same home address, and increases the penalty by making the offense punishable by either imprisonment in a county jail for either one year as a misdemeanor or 16 months, or two or three years as a county jail felony, a fine of up to $10,000, or both that fine and imprisonment. If bodily injury occurs, the penalty is 16 months, two, or three years as a county jail felony, a fine of up to $50,000, or both that fine and imprisonment.

2) Defines "reproductive health care services patient, provider, or assistant[ant]" to mean a person or entity, including, but not limited to, employees, staff, volunteers, and third-party vendors, that is or was involved in obtaining, seeking to obtain, providing, seeking to provide, or assisting or seeking to assist another person, at that person's request, to obtain or provide any services in a reproductive health care services facility, or a person or entity that is or was involved in owning or operating or seeking to own or operate a reproductive health care services facility.

3) Defines "reproductive health care services facility" as including a hospital, clinic, physician's office, or other facility that provides or seeks to provide reproductive health care services and includes the building or structure in which the facility is located.

4) Defines "personal information" to mean information that identifies, relates to, describes, or is capable of being associated with a reproductive health care services patient, provider, or assistant, including, but not limited to, their name, signature, social security number, physical characteristics or description, address, telephone number, passport number, driver's license or state identification card number, license plate number, employment, employment history, and financial information. "Personal information" does not include publicly available information that is lawfully made available to the general public from federal, state, or local government records.

5) Defines "social media" to mean an electronic service or account, or electronic content, including, but not limited to, videos or still photographs, blogs, video blogs, podcasts, instant and text messages, email, online services or accounts, or internet website profiles or locations.

6) Creates a "buffer" zone by making it a new crime under the Act, to within 100 feet of the entrance to or within a reproductive health services facility, intentionally videotape, film, photograph, or record by electronic means a reproductive health services patient, provider, or assistant, as defined, because of that status and in order to intimidate a person or entity, or a class of persons or entities, from becoming or remaining a reproductive health services patient, provider, or assistant.

7) Makes it a new crime under the Act to intentionally disclose or distribute material obtained in violation of the "buffer" zone provision.

8) Makes a first violation of these new crimes under the Act punishable either as a misdemeanor by imprisonment in the county jail for a period of not more than one year, or as a felony by imprisonment in the county jail for 16 months, two or three years, a fine up to $10,000, or both that fine and imprisonment.

9) Makes a second or subsequent violation of these new crimes under the Act punishable as a felony by imprisonment in the county jail for 16 months, two or three years, a fine up to $25,000, or both that fine and imprisonment.

10) Increases the penalties for the existing crimes under the Act, including making some instances a felony and increasing fines, as follows:

    a) Makes a first violation involving nonviolent physical obstruction punishable either as a misdemeanor by imprisonment in the county jail for a period of not more than one year, or as a felony by imprisonment in the county jail for 16 months, two or three years, a fine up to $10,000, or both that fine and imprisonment;

    b) Makes a second or subsequent violation involving nonviolent physical obstruction punishable as a felony by imprisonment in the county jail for 16 months, two or three years, a fine up to $25,000, or both that fine and imprisonment;

    c) Makes a first violation involving force, threat of force, or physical obstruction that is a crime of violence or intentional property damage punishable as a felony by imprisonment in a county jail for 16 months, two or three years, a fine up to $25,000, or both that fine and imprisonment; and,

    d) Makes a second or subsequent violation involving force, threat of force, or physical obstruction that is a crime of violence or intentional property damage punishable as a felony by imprisonment in a county jail for 16 months, two or three years, a fine up to $50,000, or both that fine and imprisonment.

11) Makes the prohibition against knowingly publicly posting or publicly displaying information with the intent to incite a third person to cause imminent great bodily harm to the person or with the intent to threaten their personal safety applicable to publicly posting, displaying,

disclosing, or distributing in any manner and in any forum, including, but not limited to, internet websites and social media, the personal information or image of any reproductive health care services patient, provider, or assistant, or other individuals residing at the same home address with that intent. Makes similar updates to the language in related privacy provisions.

12) Removes the required written demand and sworn statement attesting to having been placed in reasonable fear in order to prohibit a person, business, or entity from publicly posting or displaying the personal information of a reproductive health care services patient, provider, or assistant.

13) Increases the penalty for injury or threat to a person or damage to property because of one or more of specified actual or perceived characteristics of the victim to either imprisonment in a county jail for either up to one year as a misdemeanor or 16 months, or two or three years as a county jail felony, a fine of up to $5,000, or both that fine and imprisonment.. (Pen. Code, §§ 422.6, subd. (a) & 422.55, subd. (a).)

14) Requires local law enforcement agencies to report, in a manner prescribed by the Attorney General, the number of anti-reproductive-rights crime-related calls for assistance, the total number of arrests for anti-reproductive-rights crimes, and the total number of cases in which the district attorney charged an individual, as specified. Beginning January 1, 2023, the Attorney General must annually report this information to the Legislature. Requires the advisory council to make two additional reports, the first by December 31, 2025, and the 2nd by December 31, 2029, for the same purposes.

15) Requires the Commission on Peace Officer Standards and Training (POST) to keep its anti-reproductive-rights crimes telecourse updated and to provide the updated course to prescribed entities.

16) Requires all law enforcement agencies to develop, adopt, and implement written policies and standards for responding to anti-reproductive-rights calls by January 1, 2023.

EXISTING LAW:

1) Prohibits a person, business, or association from knowingly publicly posting or displaying on the internet the home address or home telephone number of a provider, employee, volunteer, or patient of a reproductive health care services facility, or of persons residing at the same home address as a provider, employee, volunteer, or patient of a reproductive health care services facility, with the intent to do either of the following:

   a) Incite a third person to cause imminent great bodily harm to the person identified in the posting or display, or to a coresident of that person, if the third person is likely to commit this harm; or,

   b) Threaten the person identified in the posting or display, or a coresident of that person, in a manner that places the person identified or the coresident in objectively reasonable fear for the person's or coresident's personal safety. Establishes a cause of action for damages and declaratory relief for violations. (Govt. Code, § 6218, subd. (a).)

1) Provides that any reproductive health service provider, employee, volunteer, or patient who is placed in reasonable fear by the posting of their home address and phone number on an Internet website may make a written demand that such information be removed from the website, so long as the demand includes a sworn statement describing the reasonable fear and attesting that the person is a member of the group protected by the statute. Provides injunctive relief. (Govt. Code, § 6281, subd. (b).)

2) Makes it a misdemeanor, punishable by up to 6 months in a county jail, a fine of not more than $2,500, or both that fine and imprisonment, to post the home address, telephone number, or personally identifying information about a provider, employee, volunteer, or patient of a reproductive health service facility or other individuals residing at the same home address with the intent that another person imminently use that information to commit a crime involving violence or a threat of violence against that person or entity. If the violation leads to bodily injury of the person, it is a misdemeanor punishable by up to one year in a county jail, a fine of up to $5,000, or both that fine and imprisonment. (Govt. Code, § 6218.01.)

3) Defines "reproductive health care services" to mean health care services relating to the termination of a pregnancy in a reproductive health care services facility. (Govt. Code, § 6218.05, subd. (a).)

4) Defines "reproductive health care services provider, employee, volunteer, or patient" means a person who obtains, provides, or assists, at the request of another person, in obtaining or providing reproductive health care services, or a person who owns or operates a reproductive health care services facility. (Govt. Code, § 6218.05, subd. (b).)

5) Defines "reproductive health care services facility" includes a hospital, an office operated by a licensed physician and surgeon, a licensed clinic or a clinic exempt from licensure, or other licensed health care facility that provides reproductive health care services and includes only the building or structure in which the reproductive health care services are actually provided. (Govt. Code, § 6218.05, subd. (c).)

6) Defines "public post" or "publicly display" as meaning to intentionally communicate or otherwise make available to the general public. (Govt. Code, § 6218.05, subd. (d).)

7) Defines "image" as including, but not limited to, any photograph, video footage, sketch, or computer-generated image that provides a means to visually identify the person depicted. (Govt. Code, § 6218.05, subd. (e).)

8) Defines "crime of violence" as an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another. (Pen. Code, § 423.1, subd. (a).)

9) Defines "interfere with" as meaning to restrict a person's freedom of movement. (Pen. Code, § 423.1, subd. (b).)

10) Defines "intimidate" as meaning to place a person in reasonable apprehension of bodily harm to herself or himself or to another. (Pen. Code, § 423.1, subd. (c).)

11) Defines "nonviolent" as meaning to conduct that would not constitute a crime of violence. (Pen. Code, § 423.1, subd. (d).)

12) Defines "physical obstruction" as rendering ingress to or egress from a reproductive health services facility or to or from a place of religious worship impassable to another person, or rendering passage to or from a reproductive health services facility or a place of religious worship unreasonably difficult or hazardous to another person. (Pen. Code, § 423.1, subd. (e).)

13) Defines "reproductive health services" as meaning reproductive health services provided in a hospital, clinic, physician's office, or other facility and includes medical, surgical, counseling, or referral services relating to the human reproductive system, including services relating to pregnancy or the termination of a pregnancy. (Pen. Code, § 423.1, subd. (f).)

14) Defines "reproductive health services client, provider, or assistant" as a person or entity that is or was involved in obtaining, seeking to obtain, providing, seeking to provide, or assisting or seeking to assist another person, at that other person's request, to obtain or provide any services in a reproductive health services facility, or a person or entity that is or was involved in owning or operating or seeking to own or operate, a reproductive health services facility. (Pen. Code, § 423.1, subd. (g).)

15) States "reproductive health services facility" includes a hospital, clinic, physician's office, or other facility that provides or seeks to provide reproductive health services and includes the building or structure in which the facility is located. (Pen. Code, § 423.1, subd. (h).)

16) Provides that every person who, except a parent or guardian acting towards his or her minor child or ward, commits any of the following acts shall be subject to the punishment, as specified (Pen. Code, § 423.2, subds. (a)-(f)):

    a) By force, threat of force, or physical obstruction that is a crime of violence, intentionally injures, intimidates, interferes with, or attempts to injure, intimidate, or interfere with, any person or entity because that person or entity is a reproductive health services client, provider, or assistant, or in order to intimidate any person or entity, or any class of persons or entities, from becoming or remaining a reproductive health services client, provider, or assistant; or

    b) By force, threat of force, or physical obstruction that is a crime of violence, intentionally injures, intimidates, interferes with, or attempts to injure, intimidate, or interfere with any person lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship; or

    c) By nonviolent physical obstruction, intentionally injures, intimidates, or interferes with, or attempts to injure, intimidate, or interfere with, any person or entity because that person or entity is a reproductive health services client, provider, or assistant, or in order to intimidate any person or entity, or any class of persons or entities, from becoming or remaining a reproductive health services client, provider, or assistant; or

    d) By nonviolent physical obstruction, intentionally injures, intimidates, or interferes with, or attempts to injure, intimidate, or interfere with, any person lawfully exercising or

seeking to exercise the First Amendment right of religious freedom at a place of religious worship; or

e) Intentionally damages or destroys the property of a person, entity, or facility, or attempts to do so, because the person, entity, or facility is a reproductive health services client, provider, assistant, or facility; or

f) Intentionally damages or destroys the property of a place of religious worship. (Pen. Code, § 423.2.)

17) Makes a first violation involving nonviolent physical obstruction a misdemeanor, punishable by imprisonment in a county jail for a period of not more than six months and a fine not to exceed two thousand dollars ($2,000). (Pen. Code, § 423.3, subd. (a).)

18) Makes a second or subsequent violation involving violation involving nonviolent physical obstruction a misdemeanor, punishable by imprisonment in a county jail for a period of not more than six months and a fine not to exceed five thousand dollars ($5,000). (Pen. Code, § 423.3, subd. (b).)

19) Makes a first violation involving force, threat of force, or physical obstruction that is a crime of violence or intentional property damage a misdemeanor, punishable by imprisonment in a county jail for a period of not more than one year and a fine not to exceed twenty-five thousand dollars ($25,000). (Pen. Code, § 423.3, subd. (c).)

20) Makes a second or subsequent violation involving force, threat of force, or physical obstruction that is a crime of violence or intentional property damage a misdemeanor, punishable by imprisonment in a county jail for a period of not more than one year and a fine not to exceed fifty thousand dollars ($50,000). (Pen. Code, § 423.3, subd. (d).)

21) Provides that in imposing fines pursuant to this section, the court shall consider applicable factors in aggravation and mitigation set out in Rules of the California Rules of Court, and shall consider a prior violation of the federal Freedom of Access to Clinic Entrances Act of 1994 (18 U.S.C. Sec. 248), or a prior violation of a statute of another jurisdiction that would constitute a violation of Section 423.2 or of the federal Freedom of Access to Clinic Entrances Act of 1994, to be a prior violation of Section 423.2. (Pen. Code, § 423.3, subd. (e).)

22) States that this title establishes concurrent state jurisdiction over conduct that is also prohibited by the federal Freedom of Access to Clinic Entrances Act of 1994 (18 U.S.C. Sec. 248), which provides for more severe misdemeanor penalties for first violations and felony-misdemeanor penalties for second and subsequent violations. State law enforcement agencies and prosecutors shall cooperate with federal authorities in the prevention, apprehension, and prosecution of these crimes, and shall seek federal prosecutions when appropriate. (Pen. Code, § 423.3, subd. (f).)

23) No person shall be convicted under this article for conduct in violation of Section 423.2 that was done on a particular occasion where the identical conduct on that occasion was the basis for a conviction of that person under the federal Freedom of Access to Clinic Entrances Act of 1994 (18 U.S.C. Sec. 248). (Pen. Code, § 423.3, subd. (g).)

24) Requires the Attorney General, under the Reproductive Rights Law Enforcement Act to carry out certain functions relating to anti-reproductive-rights crimes in consultation with, among others, subject matter experts. The Attorney General must:

   a) Collect information relating to anti-reproductive-rights crimes, including, but not limited to, the threatened commission of these crimes and persons suspected of committing these crimes or making these threats;

   b) Direct local law enforcement agencies to provide to the Department of Justice (DOJ), in a manner that the Attorney General prescribes, any information that may be required relative to anti-reproductive-rights crimes, as specified; and,

   c) Develop a plan to prevent, apprehend, prosecute, and report anti-reproductive-rights crimes, and to carry out the legislative intent. (Pen. Code, § 13777, subds. (a) & (b).)

25) Requires the Attorney General to implement this section to the extent the Legislature appropriates funds in the Budget Act or another statute for this purpose. (Pen. Code, § 13777, subds. (c).)

26) Requires the Commission on the Status of Women and Girls to convene an advisory committee that consists of members of the organizations identified as subject matter experts. Requires the advisory committee to make two reports to specified legislative entities, the POST, and the Commission on the Status of Women and Girls, the first by December 31, 2007, and the 2nd by December 31, 2011, to evaluate the implementation of the act and making recommendations. (Pen. Code, § 13777.2, subd. (a)-(c).)

27) Requires POST to develop a two-hour telecourse on anti-reproductive-rights crimes and make the telecourse available to all California law enforcement agencies and to the advisory committee. (Pen. Code, §§ 13777.2, subd. (d) & 13778, subd. (a).)

28) Makes it a misdemeanor to, by force or threat of force, willfully injure, intimidate, interfere with, oppress, or threaten another person in the free exercise or enjoyment of a right or privilege secured by the Constitution or laws of this state or by the Constitution or laws of the United States, in whole or in part, because of one or more of specified actual or perceived characteristics of the victim, including disability, gender, religion, race, or sexual orientation. (Pen. Code, §§ 422.6, subd. (a) & 422.55, subd. (a).)

29) Makes it a misdemeanor to knowingly deface, damage, or destroy the real or personal property of another person for the purpose of intimidating or interfering with the free exercise or enjoyment of a right or privilege secured by the Constitution or laws of this state or by the Constitution or laws of the United States, in whole or in part, because of one or more of the same actual or perceived characteristics of the victim. (Pen. Code, §§ 422.6, subd. (b) & 422.55, subd. (a).)

FISCAL EFFECT: Unknown.

COMMENTS:

1) **Author's Statement**: According to the author, "Reproductive health clinics like Planned Parenthood are a last line of critical care, especially for young and low income women. These vulnerable patients and providers are facing an onslaught of organized harassment, being attacked online and in person. Our laws are insufficient to protect clinics from the assault against them. AB 1356 updates our outdated laws to protect the essential right to reproductive healthcare."

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

   "To achieve First Amendment protection, a plaintiff must show that [t]he[y] possessed: (1) a message to be communicated; and (2) an audience to receive that message, regardless of the medium in which the message is to be expressed." (*Hurley v. Irish-American Gay, Lesbian & Bisexual Group* (1995) 515 U.S. 557.) With personal filming devices being commonplace, more and more "news" is being gathered and disseminated by members of the public. The courts have found that freedom of the press applies to citizen journalists and documentarians, not just formal members of the press. (See, e.g., *Glik v. Cunniffe*,(1st Cir. 2011) 655 F.3d 78 ["plaintiff was exercising clearly-established First Amendment rights in filming the officers in a public space"].)

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

3) **Abortion Clinic Access and "Buffer" Zones**:

   While the handful of murders of abortion providers and clinic staff have attracted much media attention, family planning clinics report that they frequently experience other serious forms of antiabortion violence. These include bombings, arson and vandalism, as well as violent protests and blockades. In 1994, the federal government enacted the Freedom of Access to Clinic Entrances (FACE) Act, which prohibits intentional property damage and the use of 'force or threat of force or…physical obstruction' to 'injure, intimidate or interfere with' someone entering a health care facility.

   States have taken two approaches designed to protect abortion providers. Some states have enacted laws similar to the federal FACE Act that prohibit specific activities such as vandalism or obstruction at clinics. Other states have limited protests aimed at clinic patients by either creating 'buffer' zones around clinics that bar protestors entirely or establishing floating 'bubble zones' of several feet

> around a person who is within a specific distance of a clinic; protesters are prohibited from crossing into that "bubble zone" without the person's consent. In 2014, the U.S. Supreme Court struck down the Massachusetts law that placed a 35-foot buffer zone around clinic entrances. The impact of this ruling on the New Hampshire law is still to be determined, but the decision did not immediately affect the Court's 2000 ruling that upheld Colorado's floating 'bubble zone' law.

(https://www.guttmacher.org/state-policy/explore/protecting-access-clinics [as of April 3, 2021].)

The Massachussets "buffer" zone made it a "crime to knowingly stand on a 'public way or sidewalk' within 35 feet of an entrance or driveway to any 'reproductive health care facility,' defined as 'a place, other than within or upon the grounds of a hospital, where abortions are offered or performed.'" (*McCullen v. Cookley* (2014) 573 U.S. 474.) The Court held the law violated the First Amendment. (*Ibid.* [state law creating 35-foot buffer zones around all abortion clinics was not justified by congestion in front of one clinic on Saturday mornings].)

Last year, the United States Supreme Court declined to take up two "buffer" zone cases. (https://apnews.com/article/31d02c9336e9f3c2a5d9dea4a883e72c [as of April 3, 2021].)

4) **The California FACE Act:** In 2001, the Legislature enacted the California FACE Act, mirroring the federal FACE Act. The Act provides state criminal and civil penalties for interference with rights to reproductive health services and religious worship.

   In addition to the protections already provided under the Act, this bill would create a 100 foot "buffer" zone. Notably, this exceeds Massachussets's 35-foot "buffer" zone which was struck down by the United States Supreme Court. (*McCullen v. Cookley* (2014) 573 U.S. 474.)

   Unlike the Massachussets law that was overturned, this bill's "buffer" zone provision would make it a crime only if one intentionally videotaped, filmed, photographed, or recorded within the zone in order to intimidate a person or entity from becoming or remaining a reproductive health services patient provider, or assistant. "Intimidate" under the Act means to "place a person in reasonable apprehension of bodily harm" to themselves or another. (Pen. Code, § 423.1, subd. (c).) The disclose or distribute provision contains no similar objective to intimidate.

5) **Boundaries Imposed by the First Amendment on the Punishment of Threats**: A state may ban a "true threat." (*Virginia v. Black* (2003) 538 U.S. 343, 358.) "'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." (*Id.* at 359 [citations omitted].) Our Supreme Court has held, "When a reasonable person would foresee that the context and import of the words will cause the listener to believe he or she will be subjected to physical violence, the threat falls outside First Amendment protection." (*In re M.S.* (1995) 10 Cal.4th 698, 710; see also *People v. Toledo* (2001) 26 Cal.4th 221, 233.) "Violence and threats of violence . . . fall outside the protection of the First Amendment because they coerce by unlawful conduct, rather than persuade by expression, and thus play no part in the 'marketplace of ideas.' As such, they are punishable because of the state's interest in protecting individuals from the fear of violence,

the disruption fear engenders and the possibility the threatened violence will occur. [Citation.]" (*In re M.S., supra,* 10 Cal.4th at p. 714.)

The Ninth Circuit restated the objective test used to resolve the issue of whether a threat is a true threat, not protected by the First Amendment:

> "whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault." *United States v. Orozco-Santillan*, 903 F.2d 1262 (9th Cir.1990). Furthermore, "[a]lleged threats should be considered in light of their entire factual context, including the surrounding events and the reaction of the listeners." *Id.* (citing *United States v. Gilbert,* 884 F.2d 454, 457 (9th Cir.1989), cert. denied, 493 U.S. 1082, 110 S. Ct. 1140, 107 L. Ed. 2d 1044 (1990) and *United States v. Mitchell*, 812 F.2d 1250, 1255 (9th Cir. 1987)); accord *United States v. Kelner*, 534 F.2d 1020 (2d Cir.) ("So long as the threat on its face and in the circumstances in which it is made is so unequivocal, unconditional, immediate and specific * * * as to convey a gravity of purpose and imminent prospect of execution, the statute may properly be applied."), cert. denied, 429 U.S. 1022, 97 S. Ct. 639, 50 L. Ed. 2d 623 (1976).

(*Lovell v. Poway Unified School District* (9th Cir. 1996) 90 F.3d 367, 372.)

"Thus, a true threat exists if the target of the speaker reasonably believes that the speaker has the ability to act him or herself or to influence others to act at a level less than incitement it is the perception of a reasonable person that is dispositive, not the actual intent of the speaker." (*Planned Parenthood v. American Coalition* (D. Or. 1996) 945 F. Supp. 1355, 1372.)

The true threats standard encompasses statements made with the intent to intimidate. (*Virginia v. Black supra*, 538 U.S. at p. 360 [intimidation is a type of threat outside First Amendment protection "where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death"]; see also https://repository.uchastings.edu/hastings_constitutional_law_quaterly/vol39/iss3/6/ [as of April 4, 2021].)

The "buffer" zone provision of the bill includes an "in order to intimidate" element rather than a specific intent to intimidate element. Under the Act, intimidate is defined as placing a person in reasonable apprehension of bodily harm. Under this provision of the bill, there is also no requirement that the individual actually be intimidated.

The disclose and distribute provision contains no requirement that the disclosure or distribution be done with an objective or intent to cause any harm whatsoever or that the individual suffer any harm. In fact, the person disclosing or distributing may not even know the material was obtained in violation of the "buffer" zone provision.

6) **Jail Overcrowding**: In January 2010, a three-judge panel issued a ruling ordering the State of California to reduce its prison population to 137.5% of design capacity because overcrowding was the primary reason that CDCR was unable to provide inmates with constitutionally adequate healthcare. (*Coleman/Plata vs. Schwarzenegger* (2010) No. Civ S-90-0520 LKK JFM P/NO. C01-1351 THE.) The United State Supreme Court upheld the

decision, declaring that "without a reduction in overcrowding, there will be no efficacious remedy for the unconstitutional care of the sick and mentally ill" inmates in California's prisons. (*Brown v. Plata* (2011) 131 S.Ct. 1910, 1939; 179 L.Ed.2d 969, 999.)

AB 109, The Criminal Justice Realignment Act, was implemented in 2011 in response to prison overcrowding. In part, it shifted to county jails the responsibility for incarcerating lower-level offenders previously incarcerated in state prison. (Pen. Code, § 1170, subd. (h).) This, however, increased the pressure on county jails to house larger populations and to make difficult decisions about how to manage their growing jail populations. These pressures manifest differently by county based on a number of factors including jail capacity and whether the county jail system is operating under a court-mandated population cap. Such caps have been in place in some counties long before *Brown v. Plata* addressed state prison overcrowding. (Sarah Lawrence, *Court-Ordered Population Caps in California County Jails* (Dec. 2014) https://law.stanford.edu/search-sls/?q_as=california%20county%20jails [as of April 9, 2021].)

The Covid-19 pandemic and need to social-distance has underscored the pressures on county jail populations and created chaos. (https://theintercept.com/2021/03/02/covid-jails-los-angeles-court-dates/ [as of April 3, 2021].)

This bill creates new county jail felonies under the FACE Act, as well as making current misdemeanor hate crimes alternatively punishable as county jail felonies. The increased incarceration time will put additional pressure on an overburdened jail system.

7) **Arguments in Support**: According to *Planned Parenthood Affiliates of California*, the sponsor of this bill, "Acts of violence and harassment against abortion providers have persisted in the decades since *Roe v. Wade* and clinics are seeing an increase in threats and security incidents as anti-abortion extremists have faced little retribution for their escalating tactics. Extremists have blockaded abortion clinics, broken into clinic property, murdered doctors, bombed clinics, harassed patients and providers, and doxed volunteers and providers online. There is a cultural complacency around anti-abortion terrorism that has helped normalize their activity, and a long-standing belief that those who protest abortion are peaceful protestors with moral differences, which is not always, nor has it ever been, the case as the anti-abortion movement is long rooted in white supremacy. In 2019, Planned Parenthood Affiliates in California experienced 1 act of arson, 5 bomb threats, 146 calls to law enforcement, 259 incidences of patient and staff harassment, 2,642 incidences of protester activity, 12 suspicious packages, 35 health center vandalizations, and 173 other disturbances.

"With the rise in aggressive tactics, personal security, and new opportunities to harass online, it is necessary that we modernize and update our laws to ensure greater protections for people seeking and providing critical health care services. Doxing, identifying information about an individual on the internet with malicious intent, and other forms of online harassment puts new threats on reproductive health care employees, patients, volunteers, and their families at risk. The personal information shared online and in anti-abortion hate groups could be life-threatening. AB 1356 will update and expand online privacy laws related to reproductive health care providers to better conform with the current security concerns faced by reproductive health care providers and patients today. This bill will also update penalties for the Freedom of Access to Clinic Entrances (FACE) Act and will prohibit photographing and

videotaping individuals outside of a reproductive health center, that are often posted online and used to identify and intimidate reproductive health care providers, volunteers, and patients."

According to *NARAL Pro-Choice of American,* "Even when anti-choice protesters do not threaten death and harm, acts of vandalism can cost tens of thousands of dollars to clinics. The presence of anti-choice extremists can also cause delays in care. At just one health center this year, the presence of a protester has caused a 50% drop-off in patients arriving for their appointment. Protestors have also started using the internet to target providers, patients, and volunteers. There are a variety of websites that list abortion provider information, including where they practice, their photo, and other personal information. Anti-choice extremists commonly take photos of providers and patients, and post them online, calling them out by name and location. These practices are not only intimidating but also pose serious personal risk."

8) **Arguments in Opposition**: According to the *California Public Defenders Association*, "CPDA strongly supports everyone's rights, and our membership is made up of criminal defense practitioners who passionately devote themselves to protecting the rights of their clients in courtrooms across the state every day .While we would like to applaud any effort to protect our community's rights, AB 1356 is misguided because it is bad public policy. To protect our community, there is no need to further criminalize and incarcerate. Anyone violating these laws can be appropriately punished….

"…Any activity covered by AB 1356 that is violent is punishable by a number of already existing assault and battery crimes."

According to the *American Civil Liberties Union*, "[T]he bill proposes to eliminate from section 6218 the current requirement that a person make their demand in writing and under oath. This requirement should be preserved because the scope of potential liability under the bill is so broad: anyone can be sued for innocently disclosing or distributing any image or any information about a patient or provider – even if they did not take the image or the personal information, and even if they had no bad intentions toward the subject – any time they receive a demand not to do so. Under existing law, that demand must include a sworn declaration from the patient or provider describing a reasonable fear for that person's safety. If we are going to restrict the rights of people to innocently share neutral information, there is no good reason to weaken the predicate for doing so. Without a requirement that the demand by written and sworn, there is no end to the potential mischief this bill would create by permitting people to be sued for significant financial penalties on the basis of disputed oral statements that may not actually be received.

"Further, the bill creates a new crime with significant penalties for recording a patient or provider because that person is a patient or provider, regardless of any other bad act or intention by the person making the recording. Simply recording a person because of who they are, and whether they are at or near a clinic, would be a crime punishable by imprisonment for one year or more and a fine of ($10,000), or both. While it may not be a crime to take a selfie photograph of one's partner at a family planning visit because they would presumably have consented, it would apparently be a crime to inadvertently capture anyone in the background. To our knowledge, no other law prohibits the usual right to record any other person or class of people in a public place. Moreover, the 100-feet limitation runs

afoul of McCullen v. Coakley, 573 U.S. 464 (2014) which invalidated a 35-feet restriction. In addition to the apparent lack of an intent requirement in section 423.2(g), we are also concerned about the same problem in subdivision (h)."

9) **Related Legislation**:

a) AB 600 (Arambula), clarifies that "immigration status" is included in the scope of a "hate crime" based on "nationality," and provides that this is declarative of existing law. AB 600 is pending before the Assembly Committee on Appropriations.

b) AB 28 (Chau), expands the definition of hate crime, making a criminal act committed, in whole or in part, because of actual or perceived characteristics of a person other than the victim a hate crime. AB 28 is pending in this committee.

c) AB 1440 (Bauer-Kahan), would also increase the penalty for a hate crime, making it an alternate county jail felony or misdemeanor. AB 1440 is pending in this committee.

10) **Prior Legislation**:

a) AB 3140 (Bauer-Kahan), of the 2019-2020 Legislative Session, would have created additional crimes under the Act and increased penalties. AB 3140 was not heard in this committee.

b) AB 2330 (Olsen), of the 2011-2012 Legislative Session, would have abolished the Commission on the Status of Women. AB 2330 failed passage in the Assembly Business, Professions, and Consumer Protection Committee.

c) SB 1770 (Padilla), Chapter 206, Statutes of 2008, (1) extended the sunset on the Reproductive Rights Law Enforcement Act from January 1, 2009 to January 1, 2014, (2) required the Advisory Committee responsible for reporting on the implementation of, and the effectiveness of, the Attorney General plan for Reproductive Rights Law Enforcement Act to submit a second report to the Legislature by December 31, 2011, (3) required POST to prepare guidelines for law enforcement response to anti-reproductive rights crimes, as specified, and (4) amended the existing specifications for law enforcement training on anti-reproductive rights crimes to require that POST distribute training bulletins to law enforcement agencies on this topic, as specified.

d) AB 2251 (Evans), Chapter 486, Statutes of 2006, sought to protect the personal safety of reproductive health care providers, employees, volunteers, and patients by prohibiting the posting of such people's personal information on the Internet under specified circumstances.

e) SB 603 (Ortiz), Chapter 481, Statutes of 2006, required the Commission on the Status of Women to convene an advisory committee that would be responsible for reporting, as specified, to the Legislature and specified agencies on the implementation of the Reproductive Rights Law Enforcement Act and the effectiveness of the plan developed by the Attorney General.

f) SB 780 (Ortiz), Chapter 899, Statutes of 2001, created the Act, which provided state criminal and civil penalties for interference with rights to reproductive health services and religious worship.

REGISTERED SUPPORT / OPPOSITION:

Support

Planned Parenthood Affiliates of California (Sponsor)
American College of Obstetricians and Gynecologists District Ix
California Academy of Family Physicians
Essential Access Health
Naral Pro-choice California

Opposition

American Civil Liberties Union
California Public Defenders Association (CPDA)
Pacific Justice Institute

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

Date of Hearing: April 13, 2021
Counsel: Matthew Fleming

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

AB 764 (Cervantes) – As Amended March 24, 2021

SUMMARY: Increases the maximum punishment for the misdemeanor offense of contempt of court that applies when a person who has previously been convicted of stalking, willfully contacts a victim by social media, electronic communication, or electronic communication device, from six months in jail to one year in jail. Specifically, **this bill**:

1) Provides that unlawful contact with a victim in violation of a court order for purposes of the one-year misdemeanor include social media, electronic communication, or electronic communication device, instead of being limited to direct contact, telephone, or mail.

2) Defines terms for the purposes of this bill as follows:

   a) "Social media" means an electronic service or account, or electronic content, including, but not limited to, videos or still photographs, blogs, video blogs, podcasts, instant and text messages, email, online services or accounts, or Internet Web site profiles or locations;

   b) "Electronic communication device" includes, but is not limited to, telephones, cellular telephones, computers, video recorders, fax machines, or pagers; and,

   c) "Electronic communication" means any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce, but does not include any wire or oral communication; any communication made through a tone-only paging device, any communication from a tracking device, as specified, or electronic funds transfer information stored by a financial institution in a communications system used for the electronic storage and transfer of funds.

EXISTING LAW:

1) Provides that any person who willfully, maliciously, and repeatedly follows or willfully and maliciously harasses another person and who makes a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family is guilty of the crime of stalking, and punishes stalking as an alternate felony/misdemeanor (a "wobbler"). (Pen. Code, § 649.6, subd. (a).)

2) Requires the court, when sentencing a person for the offense of stalking to also consider issuing an order restraining the defendant from any contact with the victim, for up to 10 years. ((Pen. Code, § 649.6, subd. (k)(1).)

3) Provides that any person who commits the offense of stalking when there is a temporary restraining order, injunction, or any other court order in effect prohibiting stalking against the same party, shall be punished by imprisonment in the state prison for two, three, or four years. (Pen. Code, § 649.6, subd. (b).)

4) Provides that willful disobedience of the terms as written of any process or court order or out-of-state court order, lawfully issued by a court, including orders pending trial is a misdemeanor. (Pen. Code, § 166, subd. (a)(4).)

5) Provides that except where a different punishment is prescribed, every offense declared to be a misdemeanor is punishable by imprisonment in the county jail not exceeding six months. (Pen. Code, § 19.)

6) Provides that willfully contacting a victim by telephone or mail, or directly, in violation of a court order when the person has previously been convicted of stalking, is a misdemeanor punishable by one year in jail. (Pen. Code, § 166, subd. (b)(1).)

7) Provides that a person who has suffered harassment, as specified, may seek a temporary restraining order and an order after notice and hearing for up to five years prohibiting the harassment. (Civ. Code, § 527.6, subds. (a)(1) and (j)(1).)

8) Specifies that the offense of stalking constitutes harassment for purposes of a temporary restraining order or an order after notice and hearing for up to five years. (Civ. Code, § 527.6, subds. (b)(3) and (b)(7).)

9) Provides that any intentional and knowing violation of a harassment restraining order is a misdemeanor, punishable by up to one year in jail. (Pen. Code, § 273.6, subd. (a).)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "Existing law provides only incomplete protection to survivors to whom the courts have provided a protective order against a convicted perpetrator of stalking. As currently written, the law only punishes violations of such a protective order that are made in person, over the telephone, or using physical mail. This loophole clearly does not reflect the reality of the 21st Century. Prohibited contacts are now also attempted using social media, text messaging, email, or other electronic means. This loophole has only become more apparent during the COVID-19 pandemic, as public health mitigation measures such as stay-at-home orders and physical distancing have only made harassment of survivors over social media and other electronic means more prevalent.

   "Assembly Bill 746 will close this loophole by adding social media and other electronic means of communication to the statutory list of prohibited forms of contact. This will provide survivors of stalking who have a court-ordered protective order with the security they both need and deserve."

2) **Stalking Offenses, Restraining Orders, Contempt of Court**: In California, a stalking offense can be committed in one of two ways. (*People v. Heilman* (1994) 25 Cal. App. 4th

391, 399). First, the willful, malicious, repeated following of a victim constitutes stalking. Additionally, willful, malicious harassment of a victim is stalking as well. Harassment is defined as a "course of conduct" which in turn is defined as "a series of acts over a period of time, however short, evidencing a continuity of purpose." (*Ibid.*) Both varieties of stalking require multiple acts to complete the offense. Stalking is punishable as either a misdemeanor or a felony.

Once a person has been convicted of stalking, the court is required to consider imposing a restraining order against the defendant. The purpose of the restraining order is to prohibit the defendant from having any contact with the victim. The court can impose such an order for up to ten years. Courts routinely impose these restraining orders upon a conviction for stalking. With a restraining order in place, if the defendant commits the offense of stalking again, they can be prosecuted for a felony stalking offense, punishable by up to 4 years in state prison. If the defendant makes contact with the victim in a manner that falls short of a new stalking offense, they can be prosecuted for contempt of court for willful disobedience of the court's restraining order.

Typically, willful disobedience of a court order is a contempt of court offense that is punishable as a misdemeanor with a maximum punishment of 6 months in county jail. That maximum punishment is increased to one year in county jail (a "gross misdemeanor") with a higher maximum fine if the defendant was convicted of stalking and they initiate contact with the victim directly, by telephone, or by mail. This bill would include contact by social media, electronic communication device or electronic communication in the conduct that qualifies for an increased, one-year maximum punishment. It therefore increases the punishment for a small number of offenders who contact their victims electronically following a stalking offense, in such a way that does not rise to the level of a new stalking charge. Under the code of civil procedure, a stalking victim is also able to acquire a civil restraining order against their stalker. If they do so, and the order specifies no contact by electronic means then the defendant can also be charged with a gross misdemeanor, and punished by a sentence of up to one year in the county jail.

This bill includes "social media," "electronic communication," and "electronic communication device" in the prohibitive conduct and provides cross-references to definitions for each. The definitions appear to be rather redundant. It's difficult to imagine how a person could contact someone via social media without using an electronic communication device, which is defined to include, but not be limited to cell phones, computers and other devices. It is also hard to imagine how someone could engage in "electronic communication" without an "electronic communication device." It may be worth simplifying the bill to eliminate some of this redundancy.

3) **Argument in Support**: According to the *San Diego County District Attorney's Office*: "California law provides for various protections for victims who have been subjected to the crime of stalking. These crimes are some of the most emotionally and psychologically damaging, resulting in lasting impacts long after the actual crime has been committed. Penal Code section 166(b)(1) provides protections for stalking victims after a court order has been issued protecting a victim from further contact by the perpetrator. However, the language related to contacts using "telephone and mail" are rather outdated. AB 764 simply updates the language of the statute to include "social media, electronic communication, or electronic communication devices."

"Stalking, by its very nature, involves repeated behavior of unwanted contacts that are threatening to the victim's safety and that the perpetrator intentionally knows is threatening to that person. These dangerous fixations can lead to unwanted and often escalating contact, even after a protective order has been put in place to protect the stalking victim. Often times the contacts, violations, or threats are made via social messaging and social media platforms, such as through Facebook, Instagram, Snapchat, other similar applications, or text messages or email. While Penal Code section 166(b)(1) specifically addresses behaviors that are violations of the court order, the use of the terms: contacting a victim "by telephone or mail" does not reflect current society. This legislation will clarify and reflect the more current means of communication in order to better protect stalking victims from further contact and harassment from their stalkers.

4) **Prior Legislation**:

a) AB 2791 (Gabriel), of the 2019 – 2020 Legislative Session would have expanded the definition of stalking and would have increased the penalties for a conviction of that offense. AB 2791 did not receive a hearing in this committee.

b) AB 2337 (Burke), Chapter 355, Statutes of 2016, required employers to provide written notice to each employee of the employee's statutory rights to take time off from work when they are a victim of domestic violence, sexual assault, or stalking.

c) AB 2425 (Corbett), Chapter 669, Statutes of 2000, increased the penalties for the offense of stalking where the defendant has prior convictions for stalking or other domestic violence offenses.

d) AB 2224 (Kuehl), of the 1995 – 1996 Chapter 904, Statutes of 1996, expanded the list of court orders to include contact by telephone which, if violated, carry an increased punishment.

REGISTERED SUPPORT / OPPOSITION:

Support

California State Sheriffs' Association
San Diego County District Attorney's Office

Opposition

None

Analysis Prepared by: Matthew Fleming / PUB. S. / (916) 319-3744

Date of Hearing: April 13, 2021
Counsel: Matthew Fleming

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

AB 892 (Choi) – As Amended March 2, 2021

SUMMARY: Requires a person convicted of misdemeanor solicitation of a minor for prostitution to register as a sex offender if the defendant knew or should have known that the person who was solicited was a minor at the time of the offense.

EXISTING LAW:

1) Makes it a misdemeanor for an individual to solicit, agree to engage in, or engage in, any act of prostitution with another person who is a minor in exchange for the individual providing compensation, money, or anything of value to the minor. An individual agrees to engage in an act of prostitution when, with specific intent to so engage, he or she manifests an acceptance of an offer or solicitation by someone who is a minor to so engage, regardless of whether the offer or solicitation was made by a minor who also possessed the specific intent to engage in an act of prostitution. (Pen. Code, § 647, subd. (b)(3).)|

2) Requires that if a person committed the offense of solicitation of a minor, and the person who was solicited was a minor at the time of the offense, and if the defendant knew or should have known that the person who was solicited was a minor at the time of the offense, the violation is punishable by imprisonment in a county jail for not less than two days and not more than one year. (Pen. Code, § 647, subd. (l).)

3) Provides that as of January 1, 2021, there will be a three-tiered registration system for sex offender registration and a person will be required to register for at least 10 years, at least 20 years or for their lifetime depending on what crime is requiring registration. (Pen. Code, § 290.)

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

5) States that the provisions of the Sex Offender Registry Act are applicable to every person described in the Act, without regard to when his or her crime or crimes were committed or his or her duty to register pursuant to the Act arose, and to every offense described in the Act, regardless of when it was committed. (Pen. Code, § 290.023.)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "AB 892 seeks to have all sex offenders be held accountable by requiring any individual who preys upon minors by soliciting sexual acts be required to register as a sex offender. This bill will ensure that any individual who is convicted of soliciting, agreeing to, or engaging in, the prostitution of a minor will have to register as a sex offender. This bill also helps identify to local authorities and agencies those who are convicted of the solicitation of a minor for prostitution. AB 892 will further help deter child sex trafficking in California by requiring the adult soliciting these criminal acts register as a sex offender."

2) **Solicitation of a Minor and Penal Code 647**: Penal Code Section 647(b)(3) makes it a misdemeanor offense to solicit, agree to engage in, or engage in, any act of prostitution with another person who is a minor. This offense can be charged whether or not the defendant knew or should have known that the person was a minor. A person can be convicted of this offense regardless of which person performs the act of solicitation. Solicitation of a minor is a misdemeanor, punishable by 6 months in the county jail.

   Penal code section 647(l) is a sentencing modification statute. Under Section 647(l), a solicitation of a minor offense becomes punishable by one year in the county jail, instead of six months, and it requires that the defendant knew or should have known the other person was a minor.

   In addition to prostitution offenses, California criminalizes and punishes a broad range of conduct under Penal Code section 647. The statute generally pertains to disorderly conduct, which includes adult prostitution offenses, being under the influence in public, voyeurism, and unlawful loitering.

3) **Sex Offender Registration**: Until recently, California was one of the few states that requires lifetime sex offender registration for all registerable offenses, with no discernment for the type of offense. As of January 1, 2021, California has implemented SB 384 (Wiener) Chapter 541, Statutes of 2017, which provides for a sex offender registry with three tiers. Tier 1 sex offenders are required to register for a period of ten years, tier 2 sex offenders are required to register for a period of 20 years, and tier 3 sex offenders are required to register for life. Tier 1 and 2 registrants who have been on the registry for 10 and 20 years, respectively, are now able to petition to be removed from the registry.

   In a 2010 report, the California Sex Offender Management Board (CSOMB) recommended moving to a tiered registration system in California: "Recommended Changes to California Law on Sex Offender Registration and Internet Notification. It's recommended that California amend its law on duration of registration, which should depend on individual risk assessment, history of violent convictions, and sex offense recidivism. The proposed changes to California law take into consideration the seriousness of the offender's criminal history, the empirically assessed risk level of the offender, and whether the offender is a recidivist or has violated California's sex offender registration law. Duration of registration would range from ten (10) years to lifetime (10/20/life). For purposes of the tiering scheme." (<http://www.casomb.org/docs/CASOMB% 20Report%20Jan%202010_Final%20Report.pdf .)

In its 2016 annual report to the Legislature, CSOMB noted, "[t]he state now has over 97,000 registered sex offenders. Close to 75,000 of them live in California communities. Most of the others are in custody." (http://www.casomb.org/docs/2016_CASOMB_Annual_Report-FINAL.PDF, pp. ii, 42.) In its report, CSOMB noted that its highest priority for 2017 was advocating for a system of tiered registry, because "The proposed change in the law would allow law enforcement, with their limited resources, to focus on those sex offenders who pose the higher risk of reoffending." (*Id.* at p. ii.) In response, the Legislature passed SB 384 (Wiener) Chapter 541, Statutes of 2017, which took effect January 1, of this year.

This bill would require a person convicted of solicitation of a minor under Penal Code Section 647 (l) to register as a sex offender for 10 years. The effect would be to add numerous additional persons to the registry when it is already overburdened, thereby undermining efforts to allow law enforcement to focus on high risk sex offenders. The Attorney General's 2016 report providing crime statistics states that there were 7,236 arrests of adults for misdemeanor prostitution. (See *Crime in California*, p. 31, https://openjustice.doj.ca.gov/resources/publications .) While the crime of solicitation applies to both the purchaser and the provider, and while only some of these arrests will have involved a minor, nevertheless, the number of offenders who would be required to register under the provisions of this bill would be significant. Given that California has only just begun to allow lower level sex offenders to petition to come off the registry, it may be worth carefully considering whether it makes sense to simultaneously add large numbers of low-level offenders back on to the registry.

It should be noted that under current law if a person actually engages in a sex act with a minor, there are a multitude of crimes for which the person may be convicted and required to register as a sex offender, depending on the circumstances. (*See* Pen. Code §§, 286, 287, 288, 289, 290, subd. (c).) Moreover, under existing law a court has discretion to require sex offender registration for any offense if it finds that the person committed the offense as a result of sexual compulsion or for the purposes of sexual gratification. (Pen. Code, § 290.006, subd. (a).) The California Department of Justice informed this Committee in June, 2018, that at that time there were more than 2,000 registrants registering pursuant to this provision. By its very nature, the solicitation of an act of prostitution would be committed for the purposes sexual gratification. Therefore, the court already has discretion to order registration in an appropriate case.

This bill may also have unintended consequences. Pursuant to penal code section 290.023, any changes to the sex offender registration scheme retroactively apply to all offenders. Under the provisions of this bill, all persons who have convicted of violating section 647 (l) will be required to register, but 647 (l) had not always pertained to solicitation of a minor. From 2011 to 2019, penal code section 647(l) was a sentencing modification statute that pertained to the offense of invasion of privacy, not solicitation of a minor. The Legislature has never required sex offender registration for invasion of privacy, but this bill would change that by requiring certain persons convicted of an invasion privacy offense between 2011 and 2019 to register. That, in turn, could result in an unconstitutional equal protection violation (*See In re Eric J.* (1979) 25 Cal. 3d 522, equal protection clause is implicated when "the state has adopted a classification that affects two or more similarly situated groups in an unequal manner.")

4) **Argument in Support**: According to the *Peace Officer's Research Association of California*: "Existing law provides that an individual who solicits, or who agrees to engage in, or who engages in, any act of prostitution with another person who is a minor in exchange for the individual providing compensation, money, or anything of value to the minor is guilty of disorderly conduct, a misdemeanor. Existing law requires persons convicted of specified sex offenses and certain acts of human trafficking for purposes of committing various sex offenses or extortion, or attempts to commit those offenses, to register with local law enforcement agencies while residing in the state or while attending school or working in the state. Willful failure to register, as required, is a misdemeanor, or a felony, depending on the underlying offense. This bill would require a person convicted of disorderly conduct, as described above, to register as a sex offender.

"PORAC strongly believes that individuals who victimize minors through prostitution, sex offenses and/or human trafficking need to be held accountable for their actions. Sexual crimes against innocent youth cannot be tolerated. By requiring individuals who commit these horrendous acts to register as sex offenders is important in ensuring victims and potential victims of this abuse are protected."

5) **Argument in Opposition**: According to the *Pacific Juvenile Defender Center*: "This bill is troubling for a variety of reasons. First, this bill would mandate sex offender registration for conduct that has not been defined as felonious as a 647(b) is a misdemeanor and carries up to a maximum of one year in the county jail. Mandatory sex offender registration would be disproportionate to the crime.

"Second, the bill does not appear to recognize or account for transitional age youth, often young women under 25, from falling into this category of targeted persons. Young people but especially young women are often pressured, threatened, or coerced into soliciting or recruiting other young people to engage in prostitution. Ask any victim advocate and they will tell you it often takes years to even get these young women to recognize they were victims themselves and ended up victimizing others. Rather than recognizing many of the defendants would actually be victims themselves, this law would result in their being placed on the sex offender registry and create a web of negative consequences they would struggle to get out of. As the law continues to catch up with the science and we discuss the possibility of raising the legal age of a juvenile to include young people in their 20s, this bill does not appear to contemplate the population it would likely impact most.

"Thirdly, given communities of color are already overpoliced and overly criminalized, we have serious concerns that this will result in more Brown and Black people being labeled as sex offenders, and prevent their ability to move past their misdemeanor criminal conduct and record clearances so they may fully reintegrate into society. Misdemeanors often do not carry a requirement of 'formal probation.' Thus, if formal supervision is not required, why would we require someone to be placed on the sex offender registry?

"Finally, this bill is untimely. SB 384, which allows for tiered registration, received bipartisan support. As you probably know, one of the primary arguments for revamping the sex registry is that in its form, the registry is inefficient, unwieldy, and basically useless to law enforcement as it placed equal priority on low-level offenders and violent, high-risk offenders. In fact, Senator Wiener stated, 'Law enforcement responsible for policing sex offenders estimates that 60% of officers' time is spent on monthly or annual paperwork for

low-risk offenders, which is time spent at the expense of being active in the community monitoring high-risk offenders.'

"One district attorney (Alameda County DA Nancy E. O'Malley) even stated:

> "'SB 384 takes an antiquated, ineffective 70 year old system and replaces it with an evidence-based and updated method to monitor sex offenders." "This proposed law will better protect the public from sexual predators by enabling law enforcement to focus on those who have committed the most serious sexual assault crimes and who pose the greatest danger of recidivism. [SB 384] stems from five years of research and drafting with the goal of ensuring that all Californians are protected from those most at risk of reoffending.'

"This bill is not rooted in evidence-based research, neglects to consider some of the people that will land on the registry are in fact, victims themselves, is not gender-responsive, and will result in net-widening of communities of color."

6) **Related Legislation**:

a) AB 1193 (Rubio), would make solicitation of a minor defendant knew or should have known that the person who was solicited was a minor at the time of the offense punishable as an alternate felony/misdemeanor (a "wobbler") punishable by a year in county jail or by 16 month, 2, or 3 years in state prison. AB 1193 is pending hearing in this committee.

b) AB 307 (Nazarian), would expand the offense of revenge porn and require a person convicted of such an offense to register as a sex offender for ten years. AB 307 is pending hearing in this committee.

7) **Prior Legislation**:

a) AB 444 (Choi), of the 2019 – 2020 Legislative Session, was identical to this bill. AB 444 did not receive a hearing in this committee.

b) AB 1738 (Cunningham), of the 2017 – 2018 Legislative Session, would have required a person 18 years or older, who is convicted of soliciting a minor for prostitution to register as a sex offender for 20 years, if the person knew or reasonably should have known that the minor was both underage and a victim of human trafficking. AB 1738 failed passage in this committee.

c) SB 757 (Glazer), of the 2017 – 2018 Legislative Session, would have required a person convicted of misdemeanor solicitation of a minor for prostitution to register as a sex offender for ten years. SB 757 failed passage in this committee.

d) SB 303 (Morell) of the 2017 – 2018 Legislative Session, would have increased the penalty for human trafficking of a minor and solicitation of a minor. SB 303 did not receive a hearing the Senate Public Safety Committee.

e) AB 1912 (Achadjian), of the 2015-2016 Legislative Session, would have required a person convicted of soliciting a minor, who the person knew or reasonably should have known, was both a minor and a victim of human trafficking to register as a sex offender for a period of five years after a first conviction, 10 years after a second conviction, and 20 years after a third or subsequent conviction. AB 1912 failed passage in this committee.

f) AB 733 (Chavez), of the 2015-2016 Legislative Session, would have required sex offender registration for a person convicted of the offense of solicitation of a minor. AB 733 failed passage in this committee.

g) SB 384 (Wiener) Chapter 541, Statutes of 2017, established a three-tiered sex offender registry, requiring the most serious sex offenders (tier 3) to register for life, requiring tier 2 sex offenders to register for 20 years, and requiring tier 1 sex offenders to register for 10 years.

REGISTERED SUPPORT / OPPOSITION:

Support

Peace Officers Research Association of California (PORAC)

Oppose

American Civil Liberties Union/northern California/southern California/san Diego and Imperial Counties
California Public Defenders Association (CPDA)
Pacific Juvenile Defender Center

Analysis Prepared by: Matthew Fleming / PUB. S. / (916) 319-3744

Date of Hearing: April 13, 2021
Counsel: Cheryl Anderson

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

AB 266 (Cooper) – As Introduced January 15, 2021

SUMMARY: Adds felony hate crimes to the list of violent felonies. Specifically, **this bill**:

1) Adds felony hate crimes to the list of violent felonies.

2) Finds and declares that violent offenses, as specified, merit special consideration when imposing a sentence to display society's condemnation for these extraordinary crimes of violence against the person.

EXISTING LAW:

1) Defines a "violent felony" as any of the following:

   a) Murder or voluntary manslaughter;

   b) Mayhem;

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

   d) Sodomy by force or fear of immediate bodily injury on the victim or another person or with a child under the age of 14 years, as specified;

   e) Oral copulation by force or fear of immediate bodily injury on the victim or another person or with a child under the age of 14 years, as specified;;

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

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

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

   i) Any robbery;

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

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

l) Sexual penetration accomplished against the victim's will by means of force, menace or fear of immediate bodily injury on the victim or another person or of a child under the age of 14 years, as specified;

m) Attempted murder;

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

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

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

q) Kidnapping;

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

s) Continuous sexual abuse of a child;

t) Carjacking, as defined;

u) Rape, spousal rape, or sexual penetration, in concert;

v) Felony extortion;

w) Threats to victims or witnesses, as specified;

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

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

z) Possession, development, production, and transfers of weapons of mass destruction. (Pen. Code § 667.5, subd. (c).)

3) Provides that where one of the new offenses is one of the specified violent felonies, in addition and consecutive to any other prison terms, the court must impose a three-year term for each prior separate prison term served by the defendant where the prior offense was one of the specified violent felonies. However, no additional term shall be imposed for any prison term served prior to a period of 10 years in which the defendant remained free of both prison custody and the commission of an offense which results in a felony conviction. (Pen. Code, § 667.5, subd. (a).)

4) Provides that where the new offense is any felony for which a prison sentence or a sentence of imprisonment in a county jail under realignment is imposed or is not suspended, in addition and consecutive to any other sentence therefor, the court shall impose a one-year term for each prior separate prison term for a sexually violent offense, as defined, provided that no additional term shall be imposed under this subdivision for any prison term served

prior to a period of five years in which the defendant remained free of both the commission of an offense which results in a felony conviction, and prison custody or the imposition of a term of jail custody imposed under realignment or any felony sentence that is not suspended. (Pen. Code, § 667.5, subd. (b).)

5) Defines "hate crime" as any criminal act committed, in whole or in part, because of one or more of the following actual or perceived characteristics of the victim:

   a) Disability;

   b) Gender;

   c) Nationality;

   d) Race or ethnicity;

   e) Religion;

   f) Sexual orientation; and,

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

2) Provides that it is a hate crime to violate or interfere with the exercise of civil rights, or knowingly deface, destroy, or damage property because of actual or perceived characteristics of the victim that fit the hate crime definition. (Pen. Code, § 422.6, subds. (a) and (b).)

3) Provides that a conviction for violating or interfering with the civil rights of another on the basis of actual or perceived characteristics of the victim that fit the hate crime definition shall be punished by imprisonment in a county jail not to exceed one year, or by a fine not to exceed five thousand dollars ($5,000), or by both the above imprisonment and fine, and the court shall order the defendant to perform a minimum of community service, not to exceed 400 hours, to be performed over a period not to exceed 350 days, during a time other than his or her hours of employment or school attendance. (Pen. Code, § 422.6, subd. (c).)

4) Makes any other hate crime that is not punishable by imprisonment in the state prison a wobbler, misdemeanor or county jail felony, if the crime is committed against the person or property of another for the purpose of intimidating or interfering with that other person's free exercise or enjoyment of any right secured to him or her by the Constitution or laws of this state or by the Constitution or laws of the United States under any of the following circumstances, which shall be charged in the accusatory pleading:

   a) The crime against the person of another either includes the present ability to commit a violent injury or causes actual physical injury;

   b) The crime against property causes damage in excess of nine hundred fifty dollars ($950); or,

c) The person charged with a crime under this section has been convicted previously of a hate crime or conspiracy to commit a hate crime, as specified. (Pen. Code, § 422.7)

5) Provides that the term for an offense, otherwise punishable as a county jail felony, must be served in state prison if the offense is on the violent felony list. (Pen. Code, § 1170, subd. (h)(3).)

6) Provides that a person who commits a felony that is a hate crime by virtue of the fact it was committed in whole or in part because of actual or perceived characteristics that fit the hate crime definition, or attempts to do so, shall receive an additional term of one, two, or three years in the state prison, at the court's discretion. (Pen. Code, § 422.75, subd. (a).)

7) Provides that a person who commits a felony that is a hate crime by virtue of the fact it was committed in whole or in part because of actual or perceived characteristics that fit the hate crime definition, or attempts to do so, except as specified, and who voluntarily acted in concert with another person in the commission of the crime shall receive an additional term of two, three, or four years in the state prison, at the court's discretion. (Pen. Code, § 422.75, subd. (b).)

8) Provides that a person who commits first-degree murder that is a hate crime shall be punished by imprisonment in the state prison for life without the possibility of parole. (Pen. Code, § 190.03, subd. (a).)

9) States that any person convicted of a nonviolent felony offense and sentenced to state prison shall be eligible for parole consideration after completing the full term for his or her primary offense. (Cal. Const., Art. I, § 32.)

10) Specifies that the California Department of Corrections (CDCR) shall have authority to award credits earned for good behavior and approved rehabilitative or educational achievements. (Cal. Const., Art. I, § 32.)

11) Limits the award of presentence conduct and post sentence worktime credits to 15 percent of actual confinement time on a violent felony prison term. (Pen. Code, § 2933.1.)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "I[n] California's most densely populated areas violent acts of hate are at their highest rates since 2008. These increases are more prominent against those in the Jewish, Asians, Middle Eastern and Transgender communities.

   "The ideology of hate can take years of indoctrination to build up driving an individual to commit acts of violence based on intolerance. Conversely, it could take years through proper rehabilitation to rid an individual of their hatred. In the worse cases of violence, the perpetrator needs more time for rehabilitation, not less."

2) **Hate Crime Laws:** Hate crimes, referred to in some jurisdictions as "bias crimes," are generally defined as crimes that are "committed not out of animosity toward the victim as an

individual, but out of hostility toward the group to which the victim belongs." (Pendo, *Recognizing Violence Against Women: Gender and the Hate Crimes Statistics Act* (1994) 17 Harv. Women's L.J. 157, 159.) Looking at a more specific definition, a hate crime is defined as "a crime in which the defendant intentionally selects a victim because of the *actual or perceived* race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person." (Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, 108 Stat. 1796 Section 280003 (1994) emphasis added (codified in part at 28 U.S.C. Section 994 (1994).)

According to Los Angeles County's 2019 Hate Crime Report, hate crimes have been rising incrementally in the last several years. (https://www.nbclosangeles.com/news/local/la-county-report-hate-crimes-increase/2448765/ [as of March 31, 2021].) In 2019, the county had 524 reported hate crimes, compared to 523 in 2018. "This is the largest number reported since 2009. For the past 6 years, hate crimes have been trending upwards and since 2013 there has been a 36% rise." (https://hrc.lacounty.gov/wp-content/uploads/2020/10/2019-Hate-Crime-Report.pdf [as of March 31, 2021] at p. 8.)

3) **Three Strikes Implications**: In general, violent felonies as specified in Penal Code 667.5 are considered "strikes" for purposes of California's Three Strikes law. However, Proposition 36, which was passed by California voters on November 6, 2012 specifies that only the crimes that were included in the "violent felonies" list prior to November 7, 2016 shall be treated as strikes for purposes of the Three Strikes law.

> "Notwithstanding subdivision (h) of Section 667, for all offenses committed on or after November 7, 2012, all references to existing statutes in subdivisions (c) to (g), inclusive, of Section 667 (Three Strikes Law), are to those statutes as they existed on November 7, 2012." (Pen. Code, § 667.1.)

This bill would not make felony hate crimes a "strike" under California law because the bill would not amend the date which defines the list of strikes to include the provisions of this bill.

4) **Credit Limitations for Violent Felonies with State Prison Sentences**: Penal Code section 2933.1, subdivision (c) provides, "Notwithstanding Section 4019 [which authorizes presentence conduct credit] or any other provision of law, the maximum credit that may be earned against a period of confinement in, or commitment to, a county jail, industrial farm, or road camp, or a city jail, industrial farm, or road camp, following arrest and prior to placement in the custody of the Director of Corrections, shall not exceed 15 percent of the actual period of confinement for any person specified in subdivision (a)." Penal Code section 2933.1, subdivision (a) provides, "Notwithstanding any other law, any person who is convicted of a felony offense listed in subdivision (c) of Section 667.5 shall accrue no more than 15 percent of worktime credit, as defined in Section 2933 [which authorizes post-sentence worktime credit.

Proposition 57 also gave incarcerated persons in state prison the ability to earn additional credits for good behavior and for approved rehabilitative or educational achievements. A violent felony limits those credits to 20 percent of the incarceration time. (See https://www.cdcr.ca.gov/blog/proposition-57-credit-earning-for-inmates-frequently-asked-questions-faq/ [as of April 7, 2021].)

Though this bill would not make felony hate crimes strikes, it would add them to the list of violent felonies in Penal Code section 667.5, subdivision (c). This would make all felony hate crimes punishable in state prison, even those that would have otherwise been punishable as county jail felonies. (Pen. Code, § 1170, subd. (h)(3) [provides that the term for an offense, otherwise punishable as a county jail felony, must be served in state prison if the offense is on the violent felony list].) As such, they would be subject to violent felony credit limitations. This would be so even if the felony hate crime involved no actual physical violence or injury. (See e.g., Pen. Code, § 422.7, subd. (b) [property damage in excess of $950].)

5) **Proposition 57**: Former Governor Brown "developed Proposition 57, which "increased parole chances for felons convicted of nonviolent crimes, as defined in state law, and gave them more opportunities to earn sentence-reduction credits for good behavior." (https://ballotpedia.org/California_Proposition_20,_Criminal_Sentencing,_Parole,_and_DNA_Collection_Initiative_(2020) [as of March 31, 2011].) The Proposition received overwhelming support from California voters. (*Ibid.*; https://www.cdcr.ca.gov/proposition57/ [as of March 31, 2021].)

As explained by the California Department of Corrections and Rehabilitation (CDCR):

> Under Proposition 57, CDCR incentivizes inmates to take responsibility for their own rehabilitation with credit-earning opportunities for sustained good behavior, as well as in-prison program and activities participation. Proposition 57 also moves up parole consideration of nonviolent offenders who have served the full-term of the sentence for their primary offense and who demonstrate that their release to the community would not pose an unreasonable risk of violence to the community. These changes will lead to improved inmate behavior and a safer prison environment for inmates and staff alike, and give inmates skills and tools to be more productive members of society once they complete their incarceration and transition to supervision.

(https://www.cdcr.ca.gov/proposition57/, *supra.*) For purposes of nonviolent parole consideration under Proposition 57, violent offenses are those specified in Penal Code section 667.5, subdivision (c). (Cal. Code Regs., tit. 15, §§ 3490, subd. (c) & 3495, subd. (c) [for purposes of Proposition 57, a "['v]iolent felony' is a crime or enhancement as defined in subdivision (c) of section 667.5"]; see also § 667.5, subd. (c).)

This bill would make all felony hate crimes violent offenses under Penal Code section 667.5, subdivision (c) and subject to a state prison term, including offenses otherwise punishable as a county jail felony. (Pen. Code, § 1170, subd. (h)(3).) Accordingly, all felony hate crimes would be excluded from CDCR's nonviolent parole consideration process. This would be so even if the felony hate crime involved no actual physical violence or injury. (See e.g., Pen. Code, § 422.7, subd. (b) [property damage in excess of $950].) As discussed *post*, it would also limit the sentence-reduction credits that an incarcerated person could earn.

6) **Credit Limitations for Violent Felonies with State Prison Sentences**: Penal Code section 2933.1, subdivision (c) provides, "Notwithstanding Section 4019 [which authorizes presentence conduct credit] or any other provision of law, the maximum credit that may be

earned against a period of confinement in, or commitment to, a county jail, industrial farm, or road camp, or a city jail, industrial farm, or road camp, following arrest and prior to placement in the custody of the Director of Corrections, shall not exceed 15 percent of the actual period of confinement for any person specified in subdivision (a)." Penal Code section 2933.1, subdivision (a) provides, "Notwithstanding any other law, any person who is convicted of a felony offense listed in subdivision (c) of Section 667.5 shall accrue no more than 15 percent of worktime credit, as defined in Section 2933 [which authorizes post-sentence worktime credit.

Proposition 57, as referenced *ante*, also gave incarcerated persons in state prison the ability to earn additional credits for good behavior and for approved rehabilitative or educational achievements. But a violent felony limits those credits to 20 percent of the total incarceration time. (See https://www.cdcr.ca.gov/blog/proposition-57-credit-earning-for-inmates-frequently-asked-questions-faq/ [as of April 7, 2021].)

Though this bill would not make felony hate crimes strikes, it would add them to the list of violent felonies in Penal Code section 667.5, subdivision (c). This would make all felony hate crimes punishable in state prison, even those that would have otherwise been punishable as county jail felonies. (Pen. Code, § 1170, subd. (h)(3) [provides that the term for an offense, otherwise punishable as a county jail felony, must be served in state prison if the offense is on the violent felony list].) As such, they would be subject to violent felony credit limitations. Again, this would be so even if the felony hate crime involved no actual physical violence or injury. (See e.g., Pen. Code, § 422.7, subd. (b) [property damage in excess of $950].)

7) **Proposition 20**: Proposition 20 was a ballot initiative which, among other things, would have defined 51 crimes and sentence enhancements as violent in order to exclude them from Proposition 57's nonviolent offender parole program. Hate crimes were on this list. Californians voters overwhelming rejected Proposition 20, by almost 62 percent. (https://ballotpedia.org/California_Proposition_20,_Criminal_Sentencing,_Parole,_and_DNA_Collection_Initiative_(2020), *supra.*)

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

After continued litigation, on February 10, 2014, the federal court ordered California to reduce its in-state adult institution population to 137.5% of design capacity by February 28, 2016, as follows: 143% of design bed capacity by June 30, 2014; 141.5% of design bed capacity by February 28, 2015; and, 137.5% of design bed capacity by February 28, 2016.

CDCR's February 2021 monthly report on the prison population notes that the state prison population is 105.4% of design capacity. (https://www.cdcr.ca.gov/3-judge-court-update/ [as of March 31, 2021].)

Thus, while CDCR is currently in compliance with the three-judge panel's order on the prison population, the state needs to maintain a "durable solution" to prison overcrowding "consistently demanded" by the court. (Opinion Re: Order Granting in Part and Denying in Part Defendants' Request For Extension of December 31, 2013 Deadline, NO. 2:90-cv-0520 LKK DAD (PC), 3-Judge Court, *Coleman v. Brown*, *Plata v. Brown* (2-10-14).)

Notably, Proposition 57, as discussed *ante*, was a response to federal court orders requiring California to implement measures to reduce its prison population. (Voter Information Guide, Gen. Elec. (Nov. 8, 2016) argument in favor of Prop. 57, p. 58.)

Creating new violent felonies, which will then be excluded from Proposition 57's nonviolent parole process and impose credit limitations, is inconsistent with the goal of maintaining a durable solution to prison overcrowding.

9) **Argument in Support**: According to the Office of the San Diego County District Attorney: "The District Attorney's Office recognizes the distinctive fear and stress typically suffered by victims of hate crimes, the potential for reprisal and escalation of violence, and the far-reaching negative consequences that hate crimes have on our community. Our Office considers hate crimes to be very serious, and is committed to prosecuting hate crimes aggressively through vertical prosecution by the Hate Crimes Unit within the Special Operations Division.

"In 2019 and 2018, the District Attorney's Office filed hate crimes charges against 30 people. The number represents a continued increase from cases filed in previous years. Historically, race-based hate crimes make up between 50- and 60-percent of all hate crimes in the County. Earlier this year, our Office set up a new online form and hotline where the public can report suspected hate crimes they've witnessed. The tool is partly in response to reports of hate-related incidents aimed at the Asian community across the nation in the wake of COVID-19 pandemic, as well as the arrest of a 66-year-old man in San Diego, who physically attacked a man he perceived to be Chinese-American."

10) **Argument in Opposition**: According to the California Public Defenders Association, "While CPDA stands in solidarity with communities of color and immigrants who bear the brunt of hate crimes, increasing punishment is not a solution to this societal problem. In fact, increasing punishment is counterproductive. We have already witnessed how the failed policy of mass incarceration has made our communities less safe and diverted scarce resources from schools, health care, mental health treatment and housing to instead building and filling more prisons.

"AB 266 would make all hate crimes violent. But many hate crimes are not, in themselves, violent. The most obvious examples is vandalism by writing racial slurs that results in 'property … damage in excess of nine hundred fifty dollars.' This is a hate crime but it is not violent.

"AB 266 is not necessary. Under the existing Penal Code sections '422' series of statutes, hate crimes do get extra punishment. Pursuant to Section 422.7, they are generally considered aggravating factors for punishment, and pursuant to Section 422.75 they generally get

enhanced punishment. For example, great bodily injuries are already punishable under Penal Code section 667.5, subdivision (b)(8).

"Other obvious examples are found by considering the breadth of Penal Code section 422.75, subdivision (a), which says that (except for crimes listed in Penal Code section 422.7), 'a person who commits [or attempts to commit] a felony that is a hate crime shall receive an additional term of one, two, or three years in the state prison.'"

11) **Related Legislation**:

a) AB 600 (Arambula), would clarify that "immigration status" is included in the scope of a "hate crime" based on "nationality," and provides that this is declarative of existing law. AB 600 is pending before the Assembly Committee on Appropriations.

b) AB 292 (Stone), would direct the California Department of Corrections and Rehabilitation (CDCR) to use its constitutional authority to award custody credits to specified inmates serving a sentence for a violent felony or a nonviolent second- or third-strike felony at a rate of a one day credit for every day in custody (50% credit). AB 292 is pending before the Assembly Committee on Appropriations.

c) AB 28 (Chau), would expand the definition of hate crime, making a criminal act committed, in whole or in part, because of actual or perceived characteristics of a person other than the victim a hate crime. AB 28 is pending in this committee.

d) AB 1356 (Bauer-Kahan), would elevate the penalty for a hate crime, making it an alternate county jail felony or misdemeanor, among other things. AB 1356 is scheduled to be heard in this committee on April 13, 2021.

e) AB 1440 (Bauer-Kahan), would increase the penalty for a hate crime, making it an alternate county jail felony or misdemeanor. AB 1440 is pending in this committee.

12) **Prior Legislation**:

a) AB 786 (Kiley), of the 2019-2020 Legislative Session, would have added the crime of human trafficking, as specified, to the list of violent felonies and made it a "strike" under California's Three Strikes Law. AB 786 failed passage in this committee.

b) AB 197 (Kiley), of the 2017-2018 Legislative Session, would have added several offenses to the list of violent felonies and specifies that they are "strikes" under California's Three-Strikes Law. AB 197 was never heard in this committee.

c) AB 67 (Rodriguez), of the 2017-2018 Legislative Session, would have added human sex trafficking and specified sexual assault offenses to the list of violent. AB 67 was held on Suspense File in the Assembly Appropriations Committee.

d) AB 27 (Melendez), of the 2017-2018 Legislative Session, would have added specified sexual assault offenses to the list of violent felonies codified in the Penal Code. AB 27 was held on Suspense File in the Assembly Appropriations Committee.

e) SB 75 (Bates), of the 2017-2018 Legislative Session, would have added vehicular manslaughter, human trafficking involving a minor, assault with a deadly weapon, solicitation of murder, rape under various specified circumstances, and grand theft of a firearm as violent felonies for purposes of imposing specified sentence enhancements. SB 75 was held in the Senate Public Safety Committee.

f) SB 652 (Nielsen), of the 2017-2018 Legislative Session, would have defined the unlawful possession of a firearm by a person previously convicted of a violent felony. SB 652 was held in the Senate Public Safety Committee.

g) SB 770 (Glazier), of the 2017-2018 Legislative Session, would have added human trafficking, elder and dependent adult abuse, assault with a deadly weapon, rape under specified circumstances, discharge of a firearm at an occupied building, and specified crimes against peace officers and witnesses, as violent felonies. SB 770 was held in the Senate Public Safety Committee.

h) SB 1269 (Galgiani), of the 2015-2016 Legislative Session, would have included human trafficking in the list of violent felonies, for which Three Strike sentencing, sentencing credit limits, enhancements for prior violent felony prison terms and other consequences apply. SB 1269 failed passage in the Senate Public Safety Committee.

REGISTERED SUPPORT / OPPOSITION:

Support

California District Attorneys Association
California Narcotic Officers' Association
California State Sheriffs' Association
Peace Officers Research Association of California (PORAC)
San Diego County District Attorney's Office

Opposition

American Civil Liberties Union
California Public Defenders Association (CPDA)
San Francisco Public Defender

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

Date of Hearing: April 13, 2021
Chief Counsel: Gregory Pagan

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

AB 718 (Cunningham) – As Introduced February 16, 2021

SUMMARY: Requires a law enforcement agency conducting an administrative investigation into an allegation of misconduct by a peace officer to complete its investigation and make a finding, as specified, regardless of whether the officer voluntarily separates from the agency before the investigation is completed. Specifically, **this bill**:

1) Provides, commencing January 1, 2022, if a law enforcement agency or oversight agency initiates an administrative investigation into an allegation of an incident involving the discharge of a firearm at a person by a peace officer or custodial officer, or an incident in which the use of force by a peace officer or custodial officer against a person resulted in death or great bodily injury, the agency shall complete its investigation and reach a finding, either sustained, not sustained, exonerated, or unfounded, regardless of whether the officer voluntarily separates from the agency before the investigation is completed.

2) States, commencing January 1, 2022, if a law enforcement agency or oversight agency initiates an administrative investigation into an allegation of sexual assault as defined in this chapter, the agency shall complete its investigation and reach a finding, either sustained, not sustained, exonerated, or unfounded, regardless of whether the officer voluntarily separates from the agency before the investigation is completed.

3) Provides if a law enforcement agency or oversight agency initiates an administrative investigation into an allegation of dishonesty by a peace officer or custodial officer directly relating to the reporting, investigation, or prosecution of a crime, or directly relating to the reporting of, or investigation of misconduct by, another peace officer or custodial officer, including, but not limited to, any sustained finding of perjury, false statements, filing false reports, destruction, falsifying, or concealing of evidence, the agency shall complete its investigation and reach a finding, either sustained, not sustained, exonerated, or unfounded, regardless of whether the officer voluntarily separates from the agency before the investigation is completed.

4) States if any agency other than an officer's employing agency conducts an investigation into any of the above misconduct, that agency shall disclose its findings with the employing agency no later than the conclusion of the investigation.

5) Defines "exonerated" to mean that the investigation clearly established that the actions of the peace officer or custodial officer that formed the basis of the complaint are not violations of law or department policy.

6) Defines "Not sustained" to mean an investigation failed to produce sufficient evidence to prove or disprove the allegations the allegations made in the complaint.

EXISTING LAW:

1) Requires peace officers to meet all of the following minimum standards (Gov. Code, § 1031):

   a) Be a citizen of the United States or a permanent resident alien who is eligible for and has applied for citizenship, except as specified;

   b) Be at least 18 years of age;

   c) Be fingerprinted for purposes of search of local, state, and national fingerprint files to disclose a criminal record;

   d) Be of good moral character, as determined by a thorough background investigation;

   e) Be a high school graduate, pass the General Education Development Test or other high school equivalency test approved by the State Department of Education that indicates high school graduation level, pass the California High School Proficiency Examination, or have attained a two-year, four-year, or advanced degree from an accredited college or university;

   f) Be found to be free from any physical, emotional, or mental condition that might adversely affect the exercise of the powers of a peace officer:

      i) Physical condition shall be evaluated by a licensed physician and surgeon;

      ii) Emotional and mental condition shall be evaluated by either of the following:

         (1) A physician and surgeon who holds a valid California license to practice medicine, has successfully completed a postgraduate medical residency education program in psychiatry, and has a specified amount of experience; or,

         (2) A psychologist licensed by the California Board of Psychology with a specified amount of experience.

2) Specifies that the peace officer requirements do not preclude the adoption of additional or higher standards, including age. (Gov. Code, § 1031, subd. (g).)

3) Specifies that the following persons are disqualified from being peace officer, except as specified:

   a) Any person who has been convicted of a felony;

   b) Any person who has been convicted of any offense in any other jurisdiction which would have been a felony if committed in this state;

   c) Any person who has been convicted of a crime based upon a verdict or finding of guilt of a felony by the trier of fact, or upon the entry of a plea of guilty or nolo contendere to a

felony. This paragraph shall apply regardless of whether, the court declares the offense to be a misdemeanor or the offense becomes a misdemeanor by operation of law;

d) Any person who has been charged with a felony and adjudged by a superior court to be mentally incompetent;

e) Any person who has been found not guilty by reason of insanity of any felony;

f) Any person who has been determined to be a mentally disordered sex offender; or,

g) Any person adjudged addicted or in danger of becoming addicted to narcotics, convicted, and committed to a state institution as specified. (Govt. Code, § 1029, Subd. (a)(1)-(7).)

4) States that each law enforcement agency shall make a record of any investigations of misconduct involving a peace officer in his or her general personnel file or a separate file designated by the department or agency. (Pen. Code, § 832.12, subd. (a).)

5) Requires a peace officer seeking employment with a law enforcement agency to give written permission for the hiring department or agency to view his or her general personnel file and any separate file designated by a law enforcement agency. (Pen. Code, § 832.12, subd. (a).)

6) States that for purposes of performing a thorough background investigation for applicants not currently employed as a peace officer, an employer shall disclose employment information relating to a current or former employee, upon request of a law enforcement agency, if all of the following conditions are met (Gov. Code, § 1031.1.):

a) The request is made in writing;

b) The request is accompanied by a notarized authorization by the applicant releasing the employer of liability; and,

c) The request and the authorization are presented to the employer by a sworn officer or other authorized representative of the employing law enforcement agency.

7) Requires every peace officer candidate be the subject of employment history checks through contacts with all past and current employers over a period of at least ten years, as listed on the candidate's personal history statement. (Code of Regulations, Title 11, § 1953, subd. (e)(6).)

8) Requires proof of the employment history check be documented by a written account of the information provided and source of that information for each place of employment contacted. All information requests shall be documented. (Code of Regulations, Title 11, § 1953, subd. (e)(6).)

9) States that if a peace officer candidate was initially investigated in accordance with all current requirements and the results are available for review, a background investigation update, as opposed to a complete new background investigation, may be conducted for either of the following circumstances: (Code of Regulations, Title 11, § 1953, subd. (f)(a).)

a) The peace officer candidate is being reappointed to the same POST-participating department. Per regulations, a background investigation update on a peace officer who is reappointed within 180 days of voluntary separation is at the discretion of the hiring authority; or,

b) The peace officer candidate is transferring, without a separation, to a different department; however, the new department is within the same city, county, state, or district that maintains a centralized personnel and background investigation support division.

10) Requires each department or agency in this state that employs peace officers to establish a procedure to investigate complaints by members of the public against the personnel of these departments or agencies, and shall make a written description of the procedure available to the public. (Pen. Code, § 832.5, subd. (a)(1).)

11) Requires complaints and any reports or findings relating to these complaints be retained for a period of at least five years. (Pen. Code, § 832.5, subd. (b).)

12) Specifies prior to any official determination regarding promotion, transfer, or disciplinary action by an officer's employing department or agency, the complaints, as specified, shall be removed from the officer's general personnel file and placed in separate file designated by the department or agency, in accordance with all applicable requirements of law. (Pen. Code, § 832.5, subd. (b).)

13) States that each law enforcement agency shall annually furnish to DOJ, a report of all instances when a peace officer employed by that agency is involved in any of the following: (Government Code, § 12525.2, subd. (a).)

a) An incident involving the shooting of a civilian by a peace officer;

b) An incident involving the shooting of a peace officer by a civilian;

c) An incident in which the use of force by a peace officer against a civilian results in serious bodily injury or death; and,

d) An incident in which use of force by a civilian against a peace officer results in serious bodily injury or death.

FISCAL EFFECT: Unknown.

COMMENTS:

1) **Author's Statement**: According to the author, "Government officials, including police officers, should not be able to resign in order to avert responsibility and keep potential misconduct hidden from the public's view," said Cunningham. "Bad actors must be held accountable if we are to restore the public's trust in our institutions. Completing investigations into claims of officer misconduct is an important component to rooting out those who wish to abuse their positions of power."

2) **Argument in Support**: According to the *California Public Defenders Association*, "Under current law, a police agency will generally conduct an investigation when one of its employee-officers is accused of engaging in professional misconduct. Under California's police transparency laws, if the investigation results in a sustained finding of serious misconduct, the misconduct becomes a matter of public record, discoverable by the community in which that officer works. (Pen. Code § 832.7.)

"The problem is that the transparency law only applies when a complaint has been *sustained,* meaning that if, for any reason, the investigation is not completed, the misconduct will remain hidden from the public *and* other police agencies. (*Ibid.*) Guilty officers who are being investigated will therefore quit before a sustained finding is made, know this will cause their current employer to immediately end the investigation. These officers will then apply to a *different* police agency, who will hire the officer without knowing about the officer's history of misconduct.

"AB 718 addresses this problem by requiring police agency employers to complete misconduct investigations, even if the accused officer quits prior to its conclusion. By requiring police agencies to actually determine whether the officer has engaged in misconduct even when the officer tries to hide that finding by resigning early, AB 718 promotes transparency and deters officers who might otherwise engage in misconduct with relative impunity."

REGISTERED SUPPORT / OPPOSITION:

Support

California Attorneys for Criminal Justice
California News Publishers Association
California Public Defenders Association
California State Sheriffs' Association
League of Women Voters
Santa Barbara County District Attorney

Opposition

None

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

Date of Hearing: April 13, 2021
Chief Counsel: Gregory Pagan

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

AB 925 (Megan Dahle) – As Amended March 9, 2021

SUMMARY: Authorizes a law enforcement agency to seek reimbursement from the Office of Emergency Services (OES), to offset the costs of a medical evidentiary exam of a sexual assault victim who at the time of the examination has decided not to report to law enforcement, and reimburses the law enforcement agency at the same established rate for victims who have decided to report an assault at the time of the examination.

EXISTING LAW:

1) Provides that the cost of a medical evidentiary examination performed by a qualified health care professional, hospital, or other emergency medical facility for a victim of a sexual assault shall be treated as a local cost and charged to and reimbursed within 60 days by the local law enforcement agency in whose jurisdiction the alleged offense was committed. (Pen. Code § 13823.95, subd. (c).)

2) States the local law enforcement agency may seek reimbursement from the OES to offset the cost of conducting the medical evidentiary examination of a sexual assault victim who is undecided at the time of an examination whether to report to law enforcement. (Pen. Code § 13823.95, subd. (c)(2).)

3) Provides that the OES shall use the discretionary funds from federal grants awarded to the agency pursuant to the federal Violence Against Women and Department of Justice Reauthorization Act of 2005 and the federal Violence Against Women Reauthorization Act of 2013 through the federal Office of Violence Against Women, specifically, the STOP (Services, Training, Officers, and Prosecutors) Violence Against Women Formula Grant Program, to offset the cost of the medical evidentiary examination. (Pen. Code § 13823.95, subd. (d)(1).)

4) Provides that the OES shall use the discretionary funds from federal grants awarded to the agency pursuant to the federal Violence Against Women and Department of Justice Reauthorization Act of 2005 and the federal Violence Against Women Reauthorization Act of 2013 through the federal Office of Violence Against Women, specifically, the STOP (Services, Training, Officers, and Prosecutors) Violence Against Women Formula Grant Program, to offset the cost of the medical evidentiary examination. (Pen. Code § 13823.95, subd. (d)(1).)

5) Provides that the OES shall use the discretionary funds from federal grants awarded to the agency pursuant to the federal Violence Against Women and Department of Justice Reauthorization Act of 2005 and the federal Violence Against Women Reauthorization Act of 2013 through the federal Office of Violence Against Women, specifically, the STOP

(Services, Training, Officers, and Prosecutors) Violence Against Women Formula Grant Program, to offset the cost of the medical evidentiary examination. (Pen. Code § 13823.95, subd. (d)(1).)

6) Requires the OES to establish a protocol for the examination and treatment of victims of sexual assault and attempted sexual assault, including child molestation, and the collection and preservation of evidence therefrom, which includes recommended methods for meeting the standards specified in Pen. Code, § 13823.11. (Pen. Code, § 13823.5(a).)

7) Requires the OES to adopt a standard and a complete form or forms for the recording of medical and physical evidence data disclosed by a victim of sexual assault or attempted sexual assault, including child molestation. (Pen. Code, § 13823.5(c).)

8) Requires a "qualified health care professional," as specified, who conducts an examination for evidence of a sexual assault or an attempted sexual assault, including child molestation, use the standard form or forms adopted as specified. (Pen. Code, § 13823.5(c).)

9) Defines a "qualified health care professional" to include:

   a) a physician and surgeon currently licensed pursuant to Chapter 5 (commencing with Section 2000) of Division 2 of the Business and Professions Code; and,

   b) a nurse currently licensed pursuant to Chapter 6 (commencing with Section 2700) of Division 2 of the Business and Professions Code and working in consultation with a physician and surgeon who conducts examinations or provides treatment as described in Section 13823.9 in a general acute care hospital or in a physician and surgeon's office. (Pen. Code, § 13823.5(e).)

10) Provides that the standard form established to report sexual assault shall be used to satisfy the reporting requirements specified in Penal Code Sections 11160 and 11161 in cases of sexual assault, and may be used in lieu of the form specified in Section 11168 for reports of child abuse.

11) Sets forth the minimum standards for the examination and treatment of victims of sexual assault or attempted sexual assault, including child molestation and the collection and preservation of evidence. (Pen. Code, § 13823.11.)

12) In conducting the physical examination, the specified procedures shall be followed, and includes obtaining consent for a physical examination, treatment, and collection of evidence shall be obtained as specified, and provides that a victim of sexual assault shall be informed that they may refuse to consent to an examination for evidence of sexual assault, including the collection of physical evidence, but that a refusal is not a ground for denial of treatment of injuries and for possible pregnancy and sexually transmitted diseases, if the person wishes to obtain treatment and consents thereto. (Pen. Code, § 13823.11, subds. (b) and (c).)

13) Each adult and minor victim of sexual assault who consents to a medical examination for collection of evidentiary material shall have a physical examination, as specified. (Pen. Code, § 13823.11, subd. (f).)

14) Requires the collection of physical evidence to conform to the specified procedures, as specified. (Pen. Code, § 13823.11, subd. (g).)

15) Requires the evidence be turned over to the proper law enforcement agency. (Pen. Code, § 13823.11, subd. (h)(4).)

FISCAL EFFECT: Unknown.

COMMENTS:

1) **Author's Statement**: According to the author, "AB 925 will increase the availability and affordability of Acute Adult/Adolescent Sexual Assault Medical Forensic/Evidentiary Examinations for victims of sexual assault by increasing the amount that providers of these exams are reimbursed. Currently, providers receive minimal reimbursement that only covers a fraction of the cost they incur. These exams can take hours to perform, and low reimbursement rates make it difficult for clinics to offer this service, especially in rural districts where access is scarce. In some rural counties, victims seeking these exams are forced to travel up to three hours in some cases wearing the same clothing in which they were assaulted for multiple days as they await availability for an exam. As rates of sexual violence are increasing due to the COVID-19 pandemic, it is imperative that California provide committed funding to reimburse providers for these exams, which are a critical avenue for justice for victims and an essential healthcare service."

2) **Argument in Support**: According to the *Rural County Representatives of California*, "Currently there are two avenues for partial reimbursement available to qualified healthcare professionals that provide these exams. For victims that at the onset of the examination do not wish to participate in the criminal justice system, the provider of the exam may seek partial reimbursement, through the California Office of Emergency Services (Cal OES). Reimbursement is paid out of federal funding received pursuant to the Violence Against Women Act. For victims who cooperate with law enforcement at the onset of the exam, the cost incurred by the provider of the exam is treated as a local cost and charged to and reimbursed within 60 days by the local law enforcement agency in whose jurisdiction the alleged offense was committed. All medical evidentiary examinations are reimbursed at the locally negotiated rate, which varies by county.

   "AB 925 would authorize the local law enforcement agency to seek reimbursement from Cal OES for cost of conducting the medical evidentiary examination for victims who have opted *not* to report the assault at time of the examination. Furthermore, AB 925 would also authorize the local law enforcement agency to seek reimbursement from Cal OES at an established rate for victims who have determined to report the assault at the time of the examination. In addition, the bill would allow Cal OES to offset reimbursement costs with federal funding from the Violence Against Women Act."

REGISTERED SUPPORT / OPPOSITION:

Support

Peace Officer Research Association of California
Rural County Representatives of California

Opposition

None

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

Date of Hearing: April 13, 2021
Counsel: David Billingsley

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

AB 679 (Friedman) – As Amended April 7, 2021

SUMMARY: Prohibits the use of testimony by in-custody informants. Specifically, **this bill**:

1) States that in a prosecution for any crime, testimony by, or information obtained by, an in-custody informant regarding a statement made by the defendant, while the defendant was in custody, shall not be admissible as evidence against the defendant.

2) Defines "in-custody informant" as "a person, other than a codefendant, accomplice, coconspirator, or percipient witness to the offense for which the defendant is on trial, whose testimony or information is based upon statements made by the defendant while both the defendant and informant were in custody or the informant reasonably appeared to the defendant to be in custody."

EXISTING LAW:

1) Defines an "in-custody informant" as "a person, other than a codefendant, percipient witness, accomplice, or coconspirator whose testimony is based upon statements made by the defendant while both the defendant and the informant are held within a correctional institution." (Pen. Code, § 1127a, subd. (a).)

2) Requires the court to provide a jury instruction, directing the jury to view the testimony of an in-custody witness with caution, upon the request of a party, in any criminal trial or proceeding in which an in-custody informant testifies as a witness. (Pen. Code, § 1127a, subd. (b).)

3) Requires the prosecution, when calling an in-custody informant as a witness in a criminal trial, to file with the court a written statement setting out any and all consideration, as defined, promised to, or received by, the in-custody informant. (Pen. Code, § 1127a, subd. (c).)

4) Defines "consideration" as "any plea bargain, bail consideration, reduction or modification of sentence, or any other leniency, benefit, immunity, financial assistance, reward, or amelioration of current or future conditions of incarceration in return for, or in connection with, the informant's testimony in the criminal proceeding in which the prosecutor intends to call him or her as a witness."

5) Provides that a law enforcement or correctional official shall not give, offer, or promise to give any monetary payment in excess of fifty dollars in return for an in-custody informant's testimony in a criminal proceeding. (Pen. Code, § 4001.1, subd. (a).)

6) States that no law enforcement agency and no in–custody informant acting as an agent for the agency, may take some action, beyond merely listening to statements of a defendant, that is deliberately designed to elicit incriminating remarks. Pen. Code, § 4001.1, subd. (b).)

7) Specifies that a jury or judge may not convict a defendant, find a special circumstance true, or use a fact in aggravation based on the uncorroborated testimony of an in-custody informant. (Pen. Code, § 1111.5, subd. (a).)

8) Defines "in-custody informant" as "a person, other than a codefendant, percipient witness, accomplice, or coconspirator, whose testimony is based on statements allegedly made by the defendant while both the defendant and the informant were held within a city or county jail, state penal institution, or correctional institution." (Pen. Code, § 1111.5, subd. (b).)

9) States that relevant evidence shall not be excluded in any criminal proceeding, including pretrial and post conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense. Cal. Const., Art. I, Section 28, subd. (f)(2).

FISCAL EFFECT: Unknown.

COMMENTS:

1) **Author's Statement**: According to the author, "Our state has long recognized that incentivized jailhouse informant testimony has led to convicting the innocent. While we have instituted safeguards to reduce those risks, they prove ineffective. Justice Liu of our Supreme Court just last year called upon the legislature to do something about law enforcements' use of incentivized informants because of the practice's threat to constitutional protections and public safety. AB 679 is our state's best foot forward to ending this practice in the highest stakes cases to protect the innocent and the integrity of prosecutions for victims and survivors of crime. "

2) **Reliability of In-Custody Informants**: Due to the nature of being incarcerated, in-custody informants are subject to pressures that may undermine the reliability of their testimony and the information that they provide. In-custody informants are motivated to leverage their information for consideration such as sentence reductions, financial assistance, and other benefits. These forms of consideration may incentivize informants to fabricate information or solicit information wrongfully, such as trading information between informants, pretending to be jailhouse lawyers for confessions, and even stealing legal documents from the cells of other inmates. (http://articles.latimes.com/1989-04-16/news/mn-2497_1_veteran-jailhouse-informants-jailhouse-snitches)

   Furthermore, there is a history of exploitation of in-custody informants by law enforcement, prosecution, and corrections officers. In-custody informants, once they are deemed cooperative, can become serial informants. While it is legal for law enforcement to use these informants, it is illegal for them to be deployed to coax incriminating statements from a defendant who's already been charged and has the constitutional right to an attorney and to remain silent. (*Massiah v. U.S.* (1964) 377 U.S. 201, 204; Pen. Code, § 4001.1, subd. (b).). A recent scandal in Orange County has demonstrated this exact type of abuse and exploitation. Several informants were allegedly moved in order to neighbor specific cells and wrongfully draw confessions from other inmates. In addition, the system in place lacked the transparency

for defendants to know about these serial informants and how this information was gathered. This discovery has had severe consequences, causing demands for new trials, plea deals, and dropped charges. (http://abc7.com/news/jailhouse-informant-scandal-rocking-oc-criminal-justice-system/1046811/)

This bill seeks address the unreliability of in-custody witnesses by eliminating their use.

3) **Proposition 8 (Victim's Bill of Rights) Requires Relevant Evidence to be Admitted:** Proposition 8 was passed by the voters in 1982. Proposition 8 included a provision referred to as "Truth in Evidence." The "Truth in Evidence" provision of Prop. 8 requires that all relevant information be admitted during a criminal trial. Courts cannot exclude any "relevant evidence" even if gathered in a manner that violates the rights of the accused. Courts are still required to exclude evidence if such exclusion is required by the U.S. Constitution.

   Any statutory change by the Legislature which limits the introduction of relevant evidence must be passed by a two-thirds vote. This bill would prohibit the testimony of in-custody informants. Such testimony (if relevant) to the defendant's guilt is currently admissible in a criminal trial. This bill requires a two-thirds vote of the Legislature.

4) **Current Law Places Limitations on the Use of In Custody Informants, But Does Not Prohibit the Use of Their Testimony or Information:** Existing law requires the court to provide a jury instruction, directing the jury to view the testimony of an in-custody witness with caution, upon the request of a party, in any criminal trial or proceeding in which an in-custody informant testifies as a witness.

   When a prosecutor uses an in-custody informant as a witness in a criminal trial, the prosecutor file with the court a written statement setting out any and all consideration, as defined, promised to, or received by, the in-custody informant. Existing law also limits the amount of money law enforcement can promise or give in return for an in-custody informant's testimony in a criminal proceeding. In spite of those laws, time and time again it has been demonstrated that innocent individuals have been convicted on the basis of false testimony by in-custody informants.

   Arguably, the limitations on in-custody informants have been ineffective in addressing the miscarriage of justice which have resulted from the use of in-custody informants.

5) ***Perkins* Informants:** Los Angeles County (and other counties) makes use of a type of in-custody informant referred to a *Perkins* informants. *Perkins* refers to the U.S. Supreme Court Case of *Illinois v. Perkins* (1990), 496 U.S. 292. In *Perkins*, police placed an undercover agent in jail with a suspect to elicit incriminating statements from the suspect. Incriminating statements were elicited by the undercover agent and used to convict the suspect/defendant.

   Normally, Miranda warnings are required for a questioning of a suspect that is in custody. In *Perkins*, the U.S. Supreme Court held that conversations between suspects and undercover agents do not implicate the concerns underlying *Miranda*. "The essential ingredients of a "police-dominated atmosphere" and compulsion are not present when an incarcerated person speaks freely to someone whom he believes to be a fellow inmate. (*Id.* at 296.)

The government may not use an undercover agent to circumvent the Sixth Amendment right to counsel once a suspect has been charged with the crime. In *Perkins,* no charges had been filed against the suspect, to the Sixth Amendment was not applicable.

A *Perkins* informant seeks to capitalize on the gap between the protections of the 5th Amendment of the U.S. Constitution (right to be silent after arrest) and the 6th Amendment (right of a defendant to counsel/and not to be questioned). The 5th Amendment applies at arrest. If an arrested individual invokes their right to remain silent, they cannot be questioned by law enforcement. Once the individual is charged with a criminal case and is appointed counsel, the defendant can't be engaged in questions about the offense by law enforcement or an agent of law enforcement. The gap exists because the 5th Amendment doesn't apply to individuals such as in-custody witnesses acting as agents of police who try to question a suspect/defendant about the alleged crime. The 5th Amendment doesn't apply in this case, because even though the suspect/defendant invoked their right to remain silent with the police, the 5th amendment doesn't apply to agents of the police that the suspect/defendant doesn't realize are acting on behalf of the police. The 6th Amendment doesn't apply because even the defendant has been arrested, the 6th amendment right to counsel protections don't kick in until the defendant makes his/her initial appearance.

California Supreme Court Justice, Goodwin Liu, has urged the Legislature to address the issue of Perkins informants. In *People v. Valencia*, 2019 Cal. LEXIS 9091, the defendant was arrested and given the Miranda admonition. In response to police questioning the defendant invoked his right to remain silent. The defendant was placed in county jail. The next day an undercover officer placed in the jail elicited incriminating statements from the defendant. The case was upheld by a California Appellate Court and appealed to the California Supreme Court. The California Supreme Court declined to hear the case, but Justice Liu issued a dissent in which he urged the Legislature to address the issue of *Perkins* informants.

Justice Liu noted that if undercover officer had worn his uniform while eliciting Valencia's confession, this scheme would have clearly violated *Miranda*. Valencia invoked his right to silence and right to counsel, and any further questioning by police outside the presence of counsel would have been unlawful. Justice Liu expressed his concern that "deceptive schemes to continue questioning a suspect who has invoked *Miranda* rights appears to be a common police practice throughout California." (*Id.*)

Justice Liu went on to state:

> "I urge the Legislature to examine whether additional safeguards are necessary to restore *Miranda*'s core purpose of ensuring that any statement made by a suspect to the police is 'truly … the product of his free choice.' (*Miranda, supra*, 384 U.S. at p. 458.) Compliance with *Miranda* is not a game, and the Legislature, if not this court, should make that clear." (*Id.*)

Liu said the police tactic "integrates official questioning and surreptitious questioning into a single coordinated scheme to exhaust defendants into confessing" after they have invoked Miranda to remain silent and ask for a lawyer.

This bill would eliminate the practice of using *Perkins* informants.

6) **Argument in Support**: According to the *California Innocence Coalition*, The use of incentivized in-custody informants has proven to be a significant cause of wrongful convictions. Incentivized jailhouse informant testimony has been a contributing factor in nearly 17% of known wrongful convictions nationwide since 1989. In California alone, of the 212 exonerations that have occurred since 1989, 19 of these cases have involved in-custody informants. Of these 19 innocent men and women, 18 of them were sentenced to life behind the claims of informants and collectively, they lost over 300 years wrongfully incarcerated.

   "In-custody informants are incentivized to testify with a grant or promise of immunity from prosecution, a reduced sentence, money or other benefits. An informant's own self-interests, especially when it comes to gaining their own freedom, has led to their false testimony resulting in wrongful convictions. Their false claims were used to convict nearly 170 innocent men and women in our country since 1989 and they still testify today. In a parallel scheme, law enforcement pays formerly incarcerated individuals and places them in cells with inmates to elicit incriminating information from these individuals, tip-toeing around constitutional rights that protect the integrity of a criminal prosecution. Both practices have threatened public safety and the integrity of our criminal legal system by leading to wrongful convictions and leaving victims and survivors of crime with no justice.

   "While our state has made efforts to regulate the use of incentivized in-custody informants, this has not deterred the practice. Despite scandals dating back to 1989 and, more recently, in Orange County that revealed the constitutional implications of the use of informants and their apparent ability to lie, the practice continues."

7) **Argument in Opposition:** According to the *Los Angeles County Sheriff's Department*, "Unfortunately, if AB 679 were to become law, it would have a very serious unintended consequences. AB 679 would take away an extremely powerful and useful tool my investigators use to solve the most horrific and brutal murders in Los Angeles County. That tool, is the Perkins Operation. Unfortunately, the language of AB 679 does not recognize the difference between a jailhouse informant and a highly trained Perkins Agent.

   "A Perkins Agent is defined as an individual working at the request of law enforcement that is placed in proximity to a target in order to obtain information. The Perkins Agent engages in conversation with the target in an attempt to obtain information.

   "A Perkins Agent differs from a jailhouse informant in the following ways: any operation involving Perkins Agents are instigated by law enforcement; the Perkins Agent always works at the request of law enforcement; and the conversations between Perkins Agents and targets are always recorded by audio recording, an oftentimes by both audio and video. Reliability concerns inherent in jailhouse informant situation are nonexistent in a Perkins Operation."

8) **Prior Legislation**:

   a) SB 1064 (Skinner), of the 2019-2020 Legislative Session, would have limited the use of confidential, uncorroborated information reported about a state prisoner by CDCR of the

Board of Parole Hearings. SB 1064 was vetoed by the Governor.

b) AB 359 (Jones-Sawyer), of the 2017-2018 Legislative Session, would have increased disclosures when the prosecution sought to use information from and in custody informant and would have placed additional limitations on benefits a prosecutor or law enforcement could provide to an in custody informant. AB 359 was never heard on the Senate Floor.

c) AB 276 (Floyd), Chapter 901, Statutes of 1989, defines "in-custody informant" and provides guidelines for the use of an in-custody informant's testimony, including a limitation on compensation for testimony.

REGISTERED SUPPORT / OPPOSITION:

Support

California Innocence Coalition: Northern California Innocence Project, California Innocence Project, Loyola Project for The Innocent (Sponsor)
California Attorneys for Criminal Justice (Co-Sponsor)
American Civil Liberties Union/northern California/southern California/san Diego and Imperial Counties
Asian Solidarity Collective
California Coalition for Women Prisoners
California Public Defenders Association (CPDA)
Ella Baker Center for Human Rights
Initiate Justice
Pillars of The Community
San Francisco Public Defender
San Mateo County Participatory Defense
Showing Up for Racial Justice (SURJ) Bay Area
Showing Up for Racial Justice (SURJ) San Diego
Showing Up for Racial Justice North County
Smart Justice California
Team Justice
Think Dignity
We the People - San Diego

Oppose

California District Attorneys Association
California State Sheriffs' Association
Los Angeles County Sheriff's Department
Peace Officers Research Association of California (PORAC)

Analysis Prepared by: David Billingsley / PUB. S. / (916) 319-3744

Date of Hearing: April 13, 2021
Chief Counsel: Gregory Pagan

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

AB 876 (Gabriel) – As Amended April 7, 2021

SUMMARY: Requires, commencing July 1, 2023, all handguns, with the exception of revolvers, purchased or acquired by any state, county, city, or city and county law enforcement agency be equipped with microstamping technology within 90 days of acquisition. Specifically, **this bill**:

1) Commencing July 1, 2023, all handguns, with the exception of revolvers, purchased or acquired by an state, county, city, or city and county law enforcement agency shall within 90 days of acquisition be equipped with a microscopic array of characters used to identify the make, model, and serial number of the handgun, etched or otherwise imprinted in one or more places on the interior surface or internal workings parts of the handgun, and transfers the imprint to each cartridge case when the firearm is fired.

2) Provides that the above mandate applies to any handgun, with the exception of revolvers, used, possessed, or otherwise carried by any state, county, city, or city and county peace officer while on duty.

3) Requires all law enforcement handguns, with the exception of revolvers, within 90 days of acquisition, be entered as an institutional weapon into the Automated Firearms System (AFS) via the California Law Enforcement Telecommunications System (CLETS) by any state. County, city, or city and county law enforcement agency.

4) Provides that any law enforcement agency that does not have access to AFS shall arrange for the sheriff of the county in which the agency is located to input the handgun information into AFS.

5) Reinstates until July 1, 2022, a previous requirement under the Unsafe Handgun Act (UHA) that microscopic characters be imprinted on two or more places on the interior of all semiautomatic handguns, and those characters are transferred to each cartridge when the firearm is fired.

6) Precludes a firearm from being on the Department of Justice (DOJ) roster of not unsafe handguns if it does not have a chamber load indicator or magazine disconnect mechanism, and was not on the roster as of 2006.

EXISTING LAW:

1) Requires commencing July 1, 2022 for all semiautomatic pistols that are not already listed on the roster of not unsafe handguns, be designed and equipped with a microscopic array of characters that identify the make, model, and serial number of the pistol, etched or otherwise

imprinted in one or more places on the interior surface or internal working parts of the pistol, and that are transferred by imprinting the characters on each cartridge case when the firearm is fired. (Pen. Code, § 31910, subd. (b)(6)(A).)

2) Requires commencing July 1, 2022 for all semiautomatic pistols that are not already listed on the DOJ roster of not unsafe handguns be equipped with a chamber load indicator and a magazine disconnect mechanism if it has a detachable magazine. (Pen. Code § 31910, subd. (b)(5) & (6).)

3) Provides that the DOJ shall, for each newly added semiautomatic pistol added to the roster of not unsafe handguns, remove from the roster exactly three semiautomatic pistols lacking a chamber load indicator, magazine disconnect mechanism, or microstamping technology. Each semiautomatic pistol removed from the roster shall be considered an unsafe handgun. The Attorney General (AG) shall remove semiautomatic pistols from the roster in reverse order of their date of addition to the roster. (Pen. Code, § 31910, subd. (b)(7).)

4) Requires commencing January 1, 2001, that any person in California who manufactures or causes to be manufactured, imports into the state for sale, keeps for sale, offers or exposes for sale, gives, or lends any unsafe handgun shall be punished by imprisonment in a county jail not exceeding one year. (Pen. Code, § 32000, subd. (a).) Specifies that this section shall not apply to any of the following:

   a) The manufacture in California, or importation into this state, of any prototype pistol, revolver, or other firearm capable of being concealed upon the person when the manufacture or importation is for the sole purpose of allowing an independent laboratory certified by the DOJ to conduct an independent test to determine whether that pistol, revolver, or other firearm capable of being concealed upon the person is prohibited, inclusive, and, if not, allowing the department to add the firearm to the roster of pistols, revolvers, and other firearms capable of being concealed upon the person that may be sold in this;

   b) The importation or lending of a pistol, revolver, or other firearm capable of being concealed upon the person by employees or authorized agents of entities determining whether the weapon is prohibited by this section;

   c) Firearms listed as curios or relics, as defined in federal law; and,

   d) The sale or purchase of any pistol, revolver, or other firearm capable of being concealed upon the person, if the pistol, revolver, or other firearm is sold to, or purchased by, the Department of Justice, any police department, any sheriff's official, any marshal's office, the Youth and Adult Correctional Agency, the California Highway Patrol, any district attorney's office, or the military or naval forces of this state or of the United States for use in the discharge of their official duties. Nor shall anything in this section prohibit the sale to, or purchase by, sworn members of these agencies of any pistol, revolver, or other firearm capable of being concealed upon the person. (Pen. Code, § 32000, subd. (b).)

5) Specifies that violations of the unsafe handgun provisions are cumulative with respect to each handgun and shall not be construed as restricting the application of any other law.

(Pen. Code, § 32000, subd. (c).)

6) Defines "unsafe handgun" as "any pistol, revolver, or other firearm capable of being concealed upon the person, as specified, which lacks various safety mechanisms, as specified." (Pen. Code, § 31910.)

7) Requires any concealable firearm manufactured in California, imported for sale, kept for sale, or offered for sale to be tested within a reasonable period of time by an independent laboratory, certified by the state Department of Justice (DOJ), to determine whether it meets required safety standards, as specified. (Pen. Code, § 32010, subd. (a).)

8) Requires DOJ, on and after January 1, 2001, to compile, publish, and thereafter maintain a roster listing all of the pistols, revolvers, and other firearms capable of being concealed upon the person that have been tested by a certified testing laboratory, have been determined not to be unsafe handguns, and may be sold in this state, as specified. The roster shall list, for each firearm, the manufacturer, model number, and model name. (Pen. Code, § 32015, subd. (a).)

9) Provides that DOJ may charge every person in California who is licensed as a manufacturer of firearms, as specified, and any person in California who manufactures or causes to be manufactured, imports into California for sale, keeps for sale, or offers or exposes for sale any pistol, revolver, or other firearm capable of being concealed upon the person in California, an annual fee not exceeding the costs of preparing, publishing, and maintaining the roster of firearms determined not be unsafe, and the costs of research and development, report analysis, firearms storage, and other program infrastructure costs, as specified. (Pen. Code § 32015, subd. (b)(1).)

10) Provides that the Attorney General (AG) may annually test up to 5 percent of the handgun models listed on the roster that have been found to be not unsafe. (Pen. Code, § 30020, subd. (a).)

11) States that a handgun removed from the roster for failing the above retesting may be reinstated to the roster if all of the following are met:

    a) The manufacturer petitions the AG for reinstatement of the handgun model;

    b) The manufacturer pays the DOJ for all the costs related to the reinstatement testing of the handgun model, including purchase of the handgun, prior to reinstatement testing;

    c) The reinstatement testing of the handguns shall be in accordance with specified retesting procedures;

    d) The three handguns samples shall only be tested once. If the sample fails it may not be retested;

    e) If the handgun model successfully passes testing for reinstatement, as specified, the AG shall reinstate the handgun model on the roster of not unsafe handguns;

f) Requires the handgun manufacturer to provide the AG with the complete testing history for the handgun model; and,

g) Allows the AG, at any time, to further retest any handgun model that has been reinstated to the roster. (Pen. Code, § 32025, subds. (a)-(g).)

12) Provides that a firearm may be deemed to be listed on the roster of not unsafe handguns if a firearm made by the same manufacturer is already listed and the unlisted firearm differs from the listed firearm in one or more of the following features:

a) Finish, including, but not limited to bluing, chrome plating or engraving;

b) The material from which the grips are made;

c) The shape or texture of the grips, so long as the difference in grip shape or texture that does not in any way alter the dimensions, material, linkage, or functioning of the magazine well, the barrel, the chamber, or any of the components of the firing mechanism of the firearm; and,

d) Any other purely cosmetic feature that does not in any way alter the dimensions, material, linkage, or functioning of the magazine well, the barrel, the chamber, or any of the components of the firing mechanism of the firearm. (Pen Code, § 32030, subd. (a).)

13) Requires any manufacturer seeking to have a firearm listed as being similar to an already listed firearm to provide the DOJ with the following::

a) The model designation of the listed firearm; and,

b) The model designation of each firearm that the manufacturer seeks to have listed on the roster of not unsafe handguns;

c) Requires a manufacturer to make a statement under oath that each unlisted firearm for which listing is sought differs from the listed firearm in only one or more specified ways, and is otherwise identical to the listed firearm. (Pen Code, § 32030, subd. (b).)

FISCAL EFFECT: Unknown.

COMMENTS:

1) **Author's Statement**: According to the author, "For too long, gun manufacturers have prioritized ideology over safety and fought commonsense efforts to incorporate microstamping technology into new firearms. AB 876 will allow California to use its market power to overcome this obstinance and dramatically expand the use of this important technology. In so doing, we'll create new markets for microstamped guns, help law enforcement solve violent crimes, ensure our police are equipped with better and safer firearms, and bring more accountability and transparency to situations where there has been an officer-involved shooting."

2) **Attorney General Certification**: AB 1471 (Feuer), Chapter 573, Statutes of 2007, required, effective January 1, 2010, semiautomatic pistols not already designated as a safe handgun, to be equipped with microscopic identifying markings which are transferred to each cartridge case when the firearm is fired in order for the firearm to be placed on the roster of not unsafe handguns. The implementation of AB 1471 was delayed until the AG certified that the technology used to create the imprint is available to more than one manufacturer unencumbered by any patent restrictions.

   On May 17, 2013, the DOJ certified the microstamping technology required by AB 1471 (2013-BOF-03). The DOJ stated, "The purpose of this bulletin is to inform California licensed firearms dealers, California DOJ certified laboratories, firearm manufacturers with firearms listed on the Roster of Handguns Certified for Sale in California, and all other interested persons/entities of the DOJ's certification on May 17, 2013 pursuant to Penal Code Section 31910, subd. (b)(7)(A) that the microstamping technology is available to more than one manufacturer unencumbered by any patent restrictions."

3) **Argument in Support**: According to *March for Our Lives California,* "Microstamping has been the law in California, since 2007: The Unsafe Handgun Act (UHA) requires that all new semiautomatic pistol models incorporate microstamping technology. Unfortunately, the gun industry has effectively boycotted this law by refusing to develop new handgun models for sale in California.

   "Additionally, a significant portion of law enforcement is exempt from these requirements, and there are concerns that some officials have used their UHA exemption to purchase handguns that lack microstamping technology and then sold these handguns, illegally, to the general public.

   "AB 876 will increase law enforcement transparency, ensure California's officers lead on firearm advancements, and set the stage for widespread microstamping by prospectively requiring microstamping technology for all handguns owned by any state, county, city, city, and county, or other law enforcement agency, as well as other used, possessed, or otherwise carried by a state, county, city, city, and county, or other peace officers while on duty.

   "This bill will improve accountability by ensuring we have timely results in any officer-involved shootings. This bill also gives law enforcement agencies the chance to lead the state on safer firearm use, a critical issue where we must look to those who uphold the law to exemplify best practices. Finally, AB 876 will provide the gun industry with a stronger financial incentive to incorporate lifesaving microstamping technology into weapons used by California citizens."

4) **Argument in Opposition**: According to the *California State Sheriffs' Association,* "Assembly Bill 876, which would require all law enforcement handguns purchased or acquired on or after July 1, 2023 to be microstamped within 90 days of purchase or acquisition. This requirement would apply not only to any handgun owned by any law enforcement agency but also any handgun used, possessed, or otherwise carried by a state, county, city, city and county, or other peace officer while on duty.

   "This bill, independent of the policy it seeks to achieve, will result in costly and burdensome mandates to law enforcement agencies and includes no funding. The mandate applies to all

agencies when they acquire new handguns, irrespective of whether the agency is buying many handguns or only a few and whether handguns had recently been replaced or have been in service for some time. This bill also ignores the reality that the performance of the firearm is not only crucial to the agency, but different considering whether sufficient choices will exist in the market by the time the bill takes effect. If only one manufacturer produces a compliant handgun, law enforcement agencies will be required to keep their current firearms or buy the only option available.

"It is unclear that sufficient firearms will be available to meet the mandate imposed by AB 876. Even if there are, this unfunded obligation will unnecessarily create costs that will be shouldered by law enforcement agencies and state and local governments that have better uses for limited resources. Requiring law enforcement to do something should not be used as an attempt to drive markets or industries. For these reasons, CSSA respectfully oppose AB 876."

REGISTERED SUPPORT / OPPOSITION:

Support

Team Enough (Sponsor)
Brady Campaign (Co-Sponsor)
Brady Campaign California (Co-Sponsor)
Friends Committee on Legislation of California
March for Our Lives Action Fund
San Diegans for Gun Violence Prevention
The Coalition to Stop Gun Violence
Women Against Gun Violence

Oppose

California State Sheriffs' Association
Gun Owners of California, INC.
Palos Verdes Police Officers Association
Peace Officers Research Association of California (PORAC)
Riverside Sheriffs' Association
Santa Ana Police Officers Association

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

Date of Hearing: April 13, 2021
Counsel: Nikki Moore

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

AB 490 (Gipson) – As Amended March 18, 2021

SUMMARY: Prohibits a law enforcement agency from authorizing techniques and transport methods that involve a substantial risk of positional asphyxia. Specifically, **this bill**:

1) Defines "positional asphyxia" to mean "situating a person in a manner that compresses their airway and reduces the likelihood that they will be able to breathe normally."

2) Provides that this includes any physical restraint technique, device, or position that causes a person's respiratory airway to be compressed or impairs the person's breathing or respiratory capacity, including any technique in which pressure or body weight is unreasonably applied against a restrained person's neck, torso, or back, or positioning a restrained person in a prone or supine position without proper monitoring for signs of asphyxia.

EXISTING LAW:

1) Prohibits a law enforcement agency from authorizing the use of a carotid restraint or choke hold by any peace officer employed by that agency. (Gov. Code, § 7286.5, subd. (a).)

2) Defines "carotid restraint" to mean "a vascular neck restraint or any similar restraint, hold, or other defensive tactic in which pressure is applied to the sides of a person's neck that involves a substantial risk of restricting blood flow and may render the person unconscious in order to subdue or control the person." (Gov. Code, § 7286.5, subd. (b)(1).)

3) Defines "choke hold" to mean "any defensive tactic or force option in which direct pressure is applied to a person's trachea or windpipe." (Gov. Code, § 7286.5, subd. (b)(2).)

4) Requires each law enforcement agency to maintain a policy that provides a minimum standard on the use of force which includes: deescalation techniques, crisis intervention tactics, and other alternatives to force when feasible; a requirement that an officer may only use a level of force that they reasonably believe is proportional to the seriousness of the suspected offense or the reasonably perceived level of actual or threatened resistance; a requirement that officers report potential excessive force to a superior officer when present and observing another officer using force that the officer believes to be beyond that which is necessary, as determined by an objectively reasonable officer under the circumstances based upon the totality of information actually known to the officer. (Gov. Code, § 7286, subd. (b).)

5) Defines "deadly force" to mean any use of force that creates a substantial risk of causing death or serious bodily injury. Deadly force includes, but is not limited to, the discharge of a firearm. (Gov. Code, § 7286, subd. (a)(1).)

6) Defines "feasible" to mean "reasonably capable of being done or carried out under the circumstances to successfully achieve the arrest or lawful objective without increasing risk to the officer or another person." (Gov. Code, § 7286, subd. (a)(2).)

FISCAL EFFECT: Unknown.

COMMENTS:

1) **Author's Statement**: According to the author, "Last year, after the high profile death of George Floyd by law enforcement in Minneapolis, social unrest sprawled around the nation. With the support of many beside me, I championed landmark legislation to ban law enforcement from using chokeholds. While designed to incapacitate or render subjects unconscious, the holds were proven in practice to be dangerous and often lethal. However, there is still work to be done - the technique used by law enforcement on Floyd regarded a 'knee-to-neck' restraint, encompassed by the term 'positional asphyxia.' In December of last year, Angelo Quinto, a Navy veteran from Northern California, was tragically killed by police. Quinto had been suffering from a mental health episode when his family called the police for help in order to de-escalate the situation. While Quinto lay face down and bloodied with hand cuffs behind his back, a responding officer knelt on Quinto's neck for nearly five minutes while another officer restrained his legs. Quinto lost and never regained consciousness – he died in hospital three days later. The circumstances of Angelo Quinto's death are a stark parallel to George Floyd's, which both exposed gray area and loopholes in use-of-force policies. AB 490 will create a uniform statewide policy on positional asphyxia restraints, which encompass the knee-to-neck and other similarly dangerous techniques that are not currently banned, to ensure that they can no longer be improperly applied on Californians. This bill is an extension of last year's effort and is even more critical."

2) **Need for this bill:** According to the author, "Last year, after the high profile death of George Floyd by law enforcement in Minneapolis, social unrest sprawled around the nation. California was able to pass its own landmark legislation to ban law enforcement from using chokeholds. While designed to incapacitate or render subjects unconscious, the holds were proven in practice to be dangerous and often lethal.

"Chokeholds (also called airway holds) are a defensive tactic or force option in which direct pressure is applied to a person's trachea or windpipe to restrict oxygen or blood flow. Carotid restraints (sleeper holds) were one of the most commonly used strangleholds. To perform this hold, a police officer would apply pressure on either side of the windpipe—but not on the windpipe—to slow or stop the flow of blood to the brain via the carotid arteries.

"As of Jan. 1, 2021, California law (GC § 7286.5.) provides that a law enforcement agency shall not authorize the use of a carotid restraint or choke hold by any peace officer employed by that agency.

"However, the technique actually used by law enforcement on Floyd regarded a 'knee-to-neck' restraint, encompassed by the term 'positional asphyxia.' Police never actually applied the chokehold in this case – Office Derek Chauvin knelt on Floyd's neck, and he did so for more than nine minutes until Floyd lay lifeless.

"Despite the name, positional asphyxia is not just about the position of the subject's body.

There are precipitating factors that make positional asphyxia deadly. These factors include intoxication due to alcohol, drug use, obesity, psychiatric illnesses, and physical injury. Additionally, in-custody death is one of the great tragedies in law enforcement, and one of the most common causes is positional asphyxia.

"In December of last year, Angelo Quinto, a Navy veteran from Northern California, was tragically killed by police. Quinto had been suffering from a mental health episode when his family called the police for help in order to de-escalate the situation. While Quinto lay facedown and bloodied with hand cuffs behind his back, a responding officer knelt on Quinto's neck for nearly five minutes while another officer restrained his legs. Quinto lost and never regained consciousness – he died in hospital three days later.

"The circumstances of Angelo Quinto's death are a stark parallel to George Floyd's, which both exposed gray area and loopholes in use-of-force policies."

3) **Potential Amendments**: The Consumer Attorneys of California, who support the bill, suggested additional amendments to clarify the scope of the bill. They write:

> "CAOC supported last year's AB 1196 regarding chokeholds and feel AB 490 is an important next step to close a loophole and address asphyxiation. AB 490 is necessary to ensure dangerous behavior does not slip through the cracks. Medically, positional asphyxia is limited, so prohibiting 'positional asphyxia' leaves a lot of other ways a person dies of asphyxia during the course of restraint open for use. In order to be legally and medically clear, we suggest the below bold italicized language be added into the references to asphyxia:
>
> > 7286.5. (a) (1) A law enforcement agency shall not authorize the use of a carotid restraint or choke hold by any peace officer employed by that agency.
> >
> > (2) A law enforcement agency shall not authorize techniques or transport methods that involve a substantial risk of positional *compression or mechanical* asphyxia."

Additionally, the author has raised with the committee a potential clarifying amendment that might be taken with respect to the definition of positional asphyxia, underlined below:

"'Positional asphyxia' means situating a person in a manner that compresses an individual's airway and reduces the likelihood that an individual will be able to breathe. This includes, but is not limited to, the use of a physical restraint technique that intentionally obstructs a person's respiratory airway or impairs the person's breathing or respiratory capacity, including techniques in which a law enforcement officer unreasonably applies pressure or body weight against the person's neck, torso, or back, and *either* leaves a subject in control restraints lying on their back or stomach, or keeps a subject waiting for transportation in a restrained position, as described in this paragraph, without proper monitoring for signs of asphyxia."

4) **Argument in Support**: According to the *California Public Defenders Association*, "AB 490 would prohibit law enforcement agencies in the State of California from authorizing the use of techniques or transport methods that involve a substantial risk of asphyxia including

situating a person in a manner that compresses their airway and reduces the likelihood that they will be able to breathe normally.

"The recent news coverage of excessive force incidents by law enforcement officers involving this type of restraint including the death of George Floyd demonstrates the urgent need for this legislation.

"CPDA members can attest that many of our clients have suffered excessive force during detentions, arrests, while incarcerated in local county jails, and within the California prison system. The passage of AB 490 would be a significant step towards protecting California's citizens from excessive force during a detention, an arrest, while pending trial, and during any potential incarceration after sentencing.

"Since the death of George Floyd occurred at the hands of the Minneapolis police on video, around a dozen of the hundreds of law enforcement agencies within California have reviewed their use of force policies regarding choke holds. Obviously, a mere dozen is not enough. A statewide ban that is consistent throughout all law enforcement agencies is urgently necessary to protect the people of California."

5) **Argument in Opposition**: According to the *California State Sheriffs' Association*, "We appreciate the concerns that are the genesis of this measure, but we fear the language of AB 490 is overly broad and neglects situations in which a subject creates a threat of death or serious bodily injury to an officer or another person.

"The bill's inclusion of 'any technique in which pressure or body weight is unreasonably applied against a restrained person's neck, torso, or back' as violative of the measure is overly broad. Further, reasonableness will be difficult to judge from situation to situation. The restriction regarding placing a restrained person in a supine position would ostensibly include a person restrained to or on a gurney.

"Limiting the use of appropriate physical restraint techniques by trained officers decreases options along the spectrum of appropriate force and could increase reliance on other tools including electric or impact devices."

6) **Related Legislation**: AB 48 (Gonzalez), would prohibit the use of kinetic energy projectiles or chemical agents, as defined, by any law enforcement agency to disperse any assembly, protest, or demonstration, except in compliance with specified standards. AB 48 is currently pending before the Assembly Appropriations Committee.

7) **Prior Legislation**: AB 1196 (Gipson), Chapter 324, Statutes of 2020, prohibited law enforcement agencies from authorizing carotid restraint holds, choke holds, and techniques or transport methods that involve a substantial risk of positional asphyxia.

REGISTERED SUPPORT / OPPOSITION:

Support

California Attorneys for Criminal Justice
California Public Defenders Association (CPDA)

Consumer Attorneys of California

Opposition

California State Sheriffs' Association**Analysis Prepared by**: Nikki Moore / PUB. S. / (916) 319-3744

Date of Hearing: April 13, 2021
Counsel: Matthew Fleming

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

AB 254 (Jones-Sawyer) – As Amended April 6, 2021

SUMMARY: Requires The Department of Corrections and Rehabilitation (CDCR) to revise its policies to include comprehensive searches of all persons entering CDCR adult facilities. Specifically, **this bill**:

1) Requires CDCR policies related to contraband interdiction efforts to include comprehensive searches of all persons entering CDCR adult facilities, including the search of personal property brought inside the facility.

2) Specifies that comprehensive searches may include the use of full-body scanners and baggage and parcel x-ray devices to detect contraband.

3) Requires CDCR to conduct an evaluation of its contraband interdiction policy and report to the Legislature on January 1 each year, starting on January 1, 2023 that includes all of the following:

   a) An assessment of the relative cost-effectiveness in reducing inmate drug use of each contraband interdiction strategy used in the policy;

   b) Data on and analysis of instances of contraband entering the prison, including, but not limited to, the following:

      i) How the contraband was brought or attempted to be brought into the prison;

      ii) When the violation occurred;

      iii) Whether the person who is alleged to have committed the violation is an inmate, staff member, visitor, volunteer, contractor, or other;

      iv) The type of contraband involved;

      v) How the violation was discovered; and,

      vi) Data on and analysis of arrests resulting from the violation, including, but not limited to, the number and type of arrests.

   c) An assessment of whether the policy caused declines in or any other observable impact on visitation;

d) An assessment of whether the policy caused changes in the prevalence of violence or lockdowns in the prison; and,

e) Any other data the department determines has probative value as to the efficacy of the pilot program.

EXISTING LAW:

1) Prohibits unreasonable searches and seizures. (U.S. Const. 4th Amend; Cal. Const. Art. I, § 13.)

2) Requires CDCR to develop policies related to the department's contraband interdiction efforts for individuals entering CDCR detention facilities. (Pen. Code, § 6402.)

3) Requires CDCR's contraband interdiction policies to include:

a) Application to all individuals, including visitors, all department staff, including executive staff, volunteers, and contract employees;

b) Use of methods to ensure that profiling is not practiced during random searches or searches of all individuals entering the prison at that time;

c) Establishment of unpredictable, random search efforts and methods that ensures that no one, except department employees specifically designated to conduct the random search, shall have advance notice of when a random search is scheduled;

d) All visitors attempting to enter a CDCR detention facility shall be informed that they may refuse to be searched by a passive alert dog;

e) All visitors attempting to enter a CDCR detention facility who refuse to be searched by a passive alert dog shall be informed of options, including, but not limited to, the availability of a noncontact visit;

f) All individuals attempting to enter a CDCR detention facility, who have a positive alert for contraband by an electronic drug detection device, a passive alert dog, or other technology, shall be informed of further potential search or visitation options;

g) Establishment of a method by which an individual may demonstrate an authorized health-related use of a controlled substance when a positive alert is noted by an electronic drug detection device, a passive alert dog, or other technology;

h) Establishment of specific requirements for additional search options when multiple positive alerts occur on an individual employee within a specified timeframe; and,

i) In determining which additional search options to offer visitors and staff, CDCR shall consider the use of full-body scanners.

4) States that any person, who knowingly brings or sends into, or knowingly assists in bringing into, or sending into, any state prison, prison road camp, prison forestry camp, or other prison camp or prison farm or any other place where prisoners of the state are located under the custody of prison officials, officers or employees, or into any county, city and county, or city jail, road camp, farm or other place where prisoners or inmates are located under custody of any sheriff, chief of police, peace officer, probation officer or employees, or within the grounds belonging to the institution, any controlled substance, as specified, any device, contrivance, instrument, or paraphernalia intended to be used for unlawfully injecting or consuming a controlled substance, is guilty of a felony punishable by for two, three, or four years in county jail. (Pen. Code, § 4573.)

5) States that any person who knowingly brings into any state **prison** or other institution under the jurisdiction of CDCR, or other detention facilities, as specified, any alcoholic beverage, any drugs, other than controlled substances, in any manner, shape, form, dispenser, or container, or any device, contrivance, instrument, or paraphernalia intended to be used for unlawfully injecting or consuming any drug other than controlled substances, without having authority so to do by the rules of CDCR, the rules of the **prison,** institution, camp, farm, place, or jail, or by the specific authorization of the warden, superintendent, jailer, or other person in charge of the **prison,** jail, institution, camp, farm, or place, is guilty of a felony. (Penal Code Section 4573.5.)

6) States any person in a local correctional facility who possesses a wireless communication device, including, but not limited to, a cellular telephone, pager, or wireless Internet device, who is not authorized to possess that item is guilty of a misdemeanor, punishable by a fine of not more than $1,000. (Pen. Code, § 4575, subd. (a).)

7) States a person who possesses with the intent to deliver, or delivers, to an inmate or ward in the custody of the department any cellular telephone or other wireless communication device or any component thereof, including, but not limited to, a subscriber identity module (SIM card) or memory storage device, is guilty of a misdemeanor, punishable by imprisonment in the county jail not exceeding six months. (Pen. Code, § 4576.)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "While all visitors at any CDCR facility are thoroughly screened through a variety of search tools upon entry, CDCR employees are not currently required to undergo daily searches leaving a significant security loophole. Efforts to ensure the safety of incarcerated persons, visitors, and staff are jeopardized when security loopholes are not addressed. This bill will require entry-searches equitably apply to all persons entering adult CDCR facilities to help prevent the entry of contraband in prisons."

2) **Background**: The following information was also submitted by the author: "Unlawful contraband items such as weapons and drugs directly impact the safety of incarcerated persons, staff, and the public. According to a 2017 report on CDCR's contraband interdiction efforts, correctional institutions have struggled to limit the flow of contraband into California's prisons as well as the trading and use of contraband among staff and incarcerated persons.

"Currently in California, while all visitors at any CDCR facility are screened through a variety of search tools (metal detectors, millimeter wave scanner, etc.) upon entry of a facility, CDCR employees are not currently required to undergo daily entry searches. Department policy requires intensive searches of incarcerated persons which include clothed or unclothed searches and can lead to isolated Contraband Surveillance Watch if they are suspected of contraband use.

"As specified by CDCR Guidelines, CDCR staff are only subject to searches when an official deems it necessary or during random searches performed at minimum once a month. Most recently, fraud investigations involving CDCR and the Employment Development Department (EDD) have highlighted issues with cellphone contraband use within prisons even while pandemic safety policies have paused physical visitations. In 2020 budget report, CDCR saw an increase of drugs discovered at its institutions when compared to previous years and recovered nearly 12,000 cellphones. This finding further elevates concerns on how contraband enters facilities that are heavily surveilled.

"The safety and wellness of incarcerated persons and staff are put at risk when drug contraband enters prisons. California's nearly three dozen penal institutions recorded 997 overdoses in 2018, more than double the number just three years earlier. Forty prisoners died from overdoses in California in 2017, a rate three times the average nationwide. Efforts to ensure the safety of incarcerated persons, visitors, and staff are jeopardized when security loopholes are not addressed.

"This bill would require the screening of every person, including CDCR staff, and their property upon entry to a prison facility. This bill would also require CDCR to provide an annual evaluation report to the Legislature addressing the efficacy of contraband interdiction efforts at CDCR adult facilities.

"The California Legislature provided CDCR with $10.4 million over two years, beginning in fiscal year (FY) 2014-2015, to implement an Enhanced Drug and Contraband Interdiction program at 11 of California's prisons. The intervention introduced random monthly drug testing of incarcerated persons at all participating institutions and enhanced used of k-9 detection teams and ion spectrometry scanning technology to search visitors, staff, incarcerated people and packages. According to an April 2017 evaluation study completed by the University of California - California Policy Lab, when some staff had contraband discovered on them the amounts of contraband were substantial (Raphael, Lofstrom, & Martin, 2017, p. 12). Evaluators of the study recommended complementary strategies that reduce demand through positive incentives, including providing incarcerated people with a weekly call allowance free of charge and assess whether this leads to substitution away from cellphones (*Ibid.* p. 37).

"The California Legislature provided CDCR with $9.1 million General Fund in FY 2018-2019 and $8.3 million in FY 2019-2020 to implement a two-year pilot Contraband Interdiction Program at the California Substance Abuse Treatment Facility and State Prison (SAFT). The intervention introduced contraband interdiction devices at the front entrance areas, employed staff to operate the devices, expanded SAFT's canine teams, conducted enhanced vehicle and institution searches, and instituted a drug program. Specifically, the pilot program required the entrance screening be conducted on every individual and package

entering the prison 24 hours per day/ 7 days a week and required CDCR to provide the Legislature with an evaluation report. According to a January 2021 evaluation study completed by California State University, Fresno, of the 253 total entry screening violations at SATF, staff had the highest rate of violations with 49% or 124 violations (Clement, Kieckhaefer, Marshall, 2021, p. 40). Millimeter Wave Full Body Scanner and Baggage and Parcel x-ray devices together accounted for 89% of entry screening contraband discoveries. The study found Cellphones and the "other" category account for the majority of contraband discovered (Ibid, p. 43). It's important to note that 2020 saw the highest amount of items not scanned, due to a variety of self-reported issues, one shift missing data on 400-500 items (*Ibid*, p. 44-48).

Table 25: Individuals Contraband Recovered From via Entry Screening, SATF (Nov. 2018-June 2020)

SATF	Count	Percent
Staff	124	49.0
Visitor	104	41.1
N/A	20	7.9
Contractor	3	1.2
Volunteer	2	.8
Total	253	100.0

"Recently, CDCR has submitted a budget change proposal to the California Legislature of $1.8 million general fund dollars in 2021-2022 and ongoing to maintain an existing Managed Access System at 18 institutions for the implementation of a cellular interdiction program. During an Assembly Budget Subcommittee 5 hearing on that proposal, CDCR reported data showing a significant increase in drug contraband during 2020, even while outside visitations were halted. As demonstrated in the table below, Marijuana, methamphetamines, and tobacco were increasingly discovered when compared to 2019. It's important to note that while cellular telephones discovered decreased, a total of 11,778 were still confiscated at institutions. When asked several questions about these statistics CDCR stated, 'We have to recognize that only staff were coming in for many, many months and we have to do a better job at coming up with strategies to stop [contraband] before it comes in.' (Budget Subcommittee 5, 2/22/2021 at 1:53:00)."

Contraband Discovered in Institutions from

January 01, 2017 - December 31, 2020.

Type of Contraband	2017	2018	2019	2020
Cellular Telephones	16,175	16,091	13,450	11,778
Heroin (lbs)	30.5	34.8	37.5	27.6
Marijuana (lbs)	104.9	147.7	73.3	100.8
Methamphetamines (lbs)	45.4	51.3	54.0	60.3
Tobacco (lbs)	730.1	649.5	481.2	544.1

"Data obtained from CDCR's Office of Research"

Based on the studies and data provided by the author, it appears that CDCR staff is responsible for a significant amount of the contraband that ultimately winds up inside of CDCR prisons. In addition, all visitation was canceled at CDCR facilities statewide on March 1, 2020, due to the COVID-19 pandemic. (CDCR COVID-19 Timelines, available at: https://www.cdcr.ca.gov/covid19/updates/#March-2020-CDCR-COVID-TIMELINE, [as of April 8, 2021].) Nonetheless, during the year of 2020, the number of cell phones and drugs that were seized in CDCR facilities remained stubbornly high.

3) **Fourth Amendment Considerations**: This bill would require comprehensive searches of all adult persons and their personal property upon entering a CDCR facility. The bill contemplates the use of full body scanners and x-ray machines, similar to those used in airports in order to effectuate the search. The bill would also require an annual report to the Legislature that provides an evaluation of the contraband interdiction policy.

Both the United States Constitution and the California Constitution prohibit unreasonable searches and seizures. This bedrock principle comes from the Fourth Amendment to the United States Constitution. In general, in order to be considered "reasonable" a search must be supported by a warrant or probable cause. Occasionally, the Supreme Court has suspended the requirement of probable cause when confronted with a compelling governmental need. (*See e.g. Nat'l Treasury Employees Union v. Von Raab* (1989) 489 U.S. 656, 665-66 ("[N]either a warrant nor probable cause, nor, indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance.") One such example is known as an administrative search.

Searches that take place at prison facilities are normally analyzed under the administrative search doctrine. (*E.g. Estes v. Rowland* (1993) 14 Cal. App. 4th 508.) When analyzing whether an administrative search is reasonable, the court must "balance the need to search against the invasion the search entails." (*People v. Hyde* (1974) 12 Cal. 3d 158, *quoting Camara v. Municipal Court* (1967) 387 U.S. 523, 536-5.) In *Estes*, the court found held that

a policy of conducting random searches of prison visitor's vehicles was reasonable in order to stem the flow of illegal drugs into the prison. (*Estes, supra,* 14 Cal. App. 4th.)

If this bill were challenged in court on Fourth Amendment grounds, the legal question presented would likely be whether the governmental interest in keeping contraband out of prisons is justified in light of the mandatory body scan and x-ray search of hand bags, backpacks or other personal items. Given that similar kind of searches have been upheld as to CDCR visitors, the central factual question may become whether CDCR staff are significantly responsible for bringing contraband into CDCR institutions. If so, then it is likely that any search legally valid search of a prison visitor would likely be just as valid when conducted on CDCR staff.

4) **SB 1066 and Veto Message**: AB 1006 (Oropeza) of the 2009 – 2010 Legislative Session would have required CDCR to oversee and conduct periodic and random searches of all employees and vendors entering all state prisons under CDCR's jurisdiction for contraband. SB 1066 was vetoed by Governor Schwarzenegger. In his veto message the Governor said:

> "This bill would require the California Department of Corrections and Rehabilitation (CDCR) to conduct monthly random searches for contraband of staff and vendors entering each State prison. This bill requires the CDCR to provide advance notice to the Office of the Inspector General (OIG) of these random searches and requires the Inspector General to oversee at least 11 searches per year. In addition, SB 1066 requires the CDCR to submit a quarterly report to the OIG detailing the results of these searches, as specified.
>
> "This measure is unnecessary as California law already authorizes CDCR to search staff and vendors and provides the necessary flexibility needed to conduct its operations within existing budget constraints. SB 1066 removes this flexibility and instead codifies a cumbersome, bureaucratic process that will impede the Department's current and future efforts. Moreover, I cannot approve a measure that will mandate such searches while the Legislature fails to approve laws to give the proper tools to law enforcement to prosecute individuals when contraband such as wireless communications devices are found."

5) **Argument in Support**: According to the *Amador District Attorney*: "During my career, I've found that contraband is introduced into state prison by visitors, via the mail, by civilians who deposit packages in the minimum security areas of the prison or in offsite areas where inmates have access, by drone technology, by vendors, and by CDCR employees.

"In the past two years, MCSP has suffered several deaths due to overdoses of fentanyl, heroin, and methamphetamine smuggled into the facility. CDCR employees smuggle in the vast majority of cell phones and sell them to inmates. The going price at MCSP for a cell phone pre-pandemic was $1,000 to $1,200. During the pandemic, these cell phone have sold for two to three times that amount.

"Statewide, inmates have used these phones to order murders, organize escapes, facilitate drug deals, control street gangs, access social network sites, defraud EDD, and intimidate witnesses and victims. In speaking with former CDCR Secretaries, they acknowledge the significant role that rogue CDCR employees have in contributing to the illicit contraband

trade with the prison system. This underground economy creates its own brand of chaos and safety concerns for everyone within the institution and the public.

"All airlines require their employees and customers to undergo security screening. All courtroom users must be screened. Concert goers and professional sport attendees have gotten used to such screenings. It is high time that all visitors who enter CDCR facilities, including CDCR employees undergo a security screening. I can think of no justification to delay doing the right thing any longer."

6) **Related Legislation**: AB 990 (Bonta) would make visitation at CDCR facilities a civil right and, among other provisions, would prohibit the screening of minors by a correctional officer unless the parent, or the minor who is 13 years of age or older, consents to that screening. AB 990 is pending hearing on April 20 in this committee.

7) **Prior Legislation**:

   a) SB 139 (Alquist), of the 2011 – 2012 Legislative Session, would have required CDCR to oversee and conduct periodic and random searches of employees and vendors entering the secure perimeter of a state prison for contraband. SB 139 was vetoed by the Governor.

   b) SB 1066 (Oropeza) of the 2009 – 2010 Legislative Session would have required CDCR to oversee and conduct periodic and random searches of all employees and vendors entering all state prisons under CDCR's jurisdiction for contraband. SB 1066 was vetoed by Governor Schwarzenegger.

   c) SB 655 (Margett), Chapter 655, Statutes of 2007, prohibited possession or use of wireless communication devices by inmates under the jurisdiction of the CDCR.

REGISTERED SUPPORT / OPPOSITION:

Support

Amador District Attorney

Opposition

None

Analysis Prepared by: Matthew Fleming / PUB. S. / (916) 319-3744

Date of Hearing: April 13, 2021
Counsel: Cheryl Anderson

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

AB 1337 (Lee) – As Amended April 7, 2021

SUMMARY: Extends the authority of specified transit district entities to issue prohibition orders to include the property, facilities, and vehicles upon which it owes policing responsibilities to a local government, and expands current law to make entering or remaining on those properties without permission a misdemeanor. Specifically, **this bill**:

1) Provides that a person who enters or remains on any property, facilities, or vehicles on which the applicable transit entity owes policing responsibilities to a local government pursuant to an operations and maintenance agreement or similar interagency agreement without permission, or whose entry, presence, or conduct on that property interferes with, interrupts, or hinders the safe and efficient operation of the transit-related facility, is guilty of a misdemeanor. Extends the transit entity's authority to issue prohibitions and the scope of the prohibition orders to include these properties.

2) Authorizes a transit district's ordinance to be enforced outside of the transit district's jurisdiction only where the local jurisdiction has adopted the ordinance by reference as authorized by the local jurisdictions' governing body.

EXISTING LAW:

1) Provides that any person who enters or remains upon the property of any railroad without the permission of the owner of the land, the owner's agent, or the person in lawful possession and whose entry, presence, or conduct upon the property interferes with, interrupts, or hinders, or which, if allowed to continue, would interfere with, interrupt, or hinder the safe and efficient operation of any locomotive, railway car, or train is guilty of a misdemeanor. (Pen. Code, § 369i, subd. (a).)

2) Defines "property of any railroad" as any land owned, leased, or possessed by a railroad upon which is placed a railroad track and the land immediately adjacent thereto, to the distance of 20 feet on either side of the track, which that is owned, leased, or possessed by a railroad. (Pen. Code, § 369i, subd. (a).)

3) Provides that any person who enters or remains upon any transit-related property without permission or whose entry, presence, or conduct upon the property interferes with, interrupts, or hinders the safe and efficient operation of the transit-related facility is guilty of a misdemeanor. (Pen. Code, § 369i, subd. (b).)

4) Defines "transit-related property" as any land, facilities, or vehicles owned, leased, or possessed by a county transportation commission, transportation authority, or transit district,

as specified, that are used to provide public transportation by rail or passenger bus or are directly related to that use. (Pen. Code, § 369i, subd. (b).)

5) Specifies that these provisions do not prohibit picketing in the immediately adjacent area of the property of any railroad or transit-related property or any lawful activity by which the public is informed of the existence of an alleged labor dispute. (Pen. Code, § 369i, subd. (c).)

6) Authorizes Sacramento Regional Transit District (SacRT), the Fresno Area Express, Los Angeles County Metropolitan Transportation Authority (Metro), or the San Francisco Bay Area Rapid Transit District (BART) to issue a prohibition order to any person who, on at least three separate occasions within a period of 90 consecutive days, is cited for an infraction committed in or on a vehicle, bus stop, or light rail station of the transit district for any of the following acts:

   a) Interfering with the operator or operation of a transit vehicle, or impeding the safe boarding or alighting of passengers;

   b) Committing any act or engaging in any behavior that may, with reasonable foreseeability, cause harm or injury to any person or property;

   c) Willfully disturbing others on or in a transit facility or vehicle by engaging in boisterous or unruly behavior;

   d) Carrying an explosive, acid, or flammable liquid in a public transit facility or vehicle;

   e) Urinating or defecating in a transit facility or vehicle, except in a lavatory;

   f) Willfully blocking the free movement of another person in a transit facility or vehicle; or,

   g) Defacing with graffiti the interior or exterior of the facilities or vehicles of a public transportation system. (Pub. Util. Code, § 99171, subd. (a)(1)(A).)

7) Authorizes a prohibition order to be issued to a person arrested or convicted for any misdemeanor or felony committed in or on a vehicle, bus stop, or light rail station of the transit district, for acts involving violence, threats of violence, lewd or lascivious behavior, or possession for sale or sale of a controlled substance. (Pub. Util. Code § 99171, subd. (a)(1)(B).)

8) Authorizes a prohibition order to be issued to a person convicted of loitering with the intent to commit specified drug offenses or loitering with intent to commit prostitution. (Pub. Util. Code § 99171, subd. (a)(1)(C).)

9) Prohibits a person subject to a prohibition order from entering the property, facilities, or vehicles of the transit district for a period of time deemed appropriate by the transit district, provided that the duration of the prohibition order does not exceed the following specified time limits:

a) 30 days for a first order, 90 days for a second order within one year, and 180 days for a third order within one year related to infractions; or,

b) 30 days if issued pursuant to an arrest for a misdemeanor or felony offense. Upon conviction for the offense, the order may be extended to a total of 180 days for a misdemeanor and one year for a felony. (Pub. Util. Code § 99171, subd. (a)(2)).

10) Specifies prohibition processes, notification procedures, and hearing and appeal procedures. (Pub. Util. Code § 99171, subds. (a)(3), (b) & (c).)

11) Requires the transit district to establish an advisory committee and to ensure that personnel charged with issuance and enforcement of prohibition orders receive training as emphasized and as recommended by the advisory committee. Tasks the advisory committee with responsibilities, as specified. Authorizes existing advisory committees to be used if appropriate. (Pub. Util. Code, § 99172.)

12) Defines "transit district" to mean the Sacramento Regional Transit District, the Los Angeles County Metropolitan Transportation Authority, the Fresno Area Express, or the San Francisco Bay Area Rapid Transit District. (Pub. Util. Code, § 99171, subd. (e).)

13) Establishes categories of peace officers with varying powers and authority to make arrests and carry firearms. (Pen. Code, § 830.33.)

14) Provides that a member of the San Francisco Bay Area Rapid Transit District Police Department is a peace officer whose authority extends to any place in the state for the purpose of enforcing the law in or about the properties owned, operated, and administered by the San Francisco Bay Area Rapid Transit District, when performing necessary duties with respect to patrons, employees, and properties of the district, or when making an arrest if there is immediate danger to a person or property or of an escape of the perpetrator of an offense. (Pen. Code, § 830.33.)

15) Makes it an infraction for a person to do any of the following with respect to the property, facilities, or vehicles of a transit district;

a) Operate, interfere with, enter into, or climb on or in the property, facilities, or vehicles of the transit district without permission;

b) Interfere with the operator or operation of a transit vehicle, or impede the safe boarding or alighting of passengers;

c) Extend any portion of the body through a window opening of a transit vehicle in a manner that may cause harm or injury;

d) Throw an object from a transit vehicle;

e) Commit an act or engage in a behavior that may, with reasonable foreseeability, cause harm or injury to any person or property;

f) Violate a notice, prohibition, instruction, or direction on a sign that is intended to provide for the safety and security of transit passengers, or the safe and secure operation of the transit system;

g) Knowingly give false information to a district employee, or contracted security officer, engaged in the enforcement of a district ordinance or a state law, or otherwise obstruct the issuance of a citation for the violation of a district ordinance or a state law, or,

h) Violate any of the conditions established by a transit district ordinance under which a passenger may board a transit vehicle with a bicycle and where that bicycle may be stowed on the transit vehicle. (Pub. Util. Code, § 99170.)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "The Silicon Valley Berryessa Extension expanded BART service into Santa Clara County in June 2020. The extension included two new stations - Milpitas and Berryessa/North San Jose. BART Police patrol areas under the District's jurisdiction such as train cars, station platforms, and concourse areas. Valley Transportation Authority (VTA) has opted to contract with the Santa Clara County Sheriff's Department and the City of San Jose to provide law enforcement services in areas under their jurisdiction such as parking garages, intermodal areas, and station plazas. The County Sheriff is the contracted law enforcement agency for the Milpitas station, and the City of San Jose as well as the Sheriff's Department are jointly contracted for the Berryessa/North San Jose station.

   "Given VTA ownership of the property, AB 1337 will clarify, BART Police have authority to issue prohibition orders at the Milpitas and Berryessa/North San Jose stations. Code sections related to BART's general policing authority (Penal Code) and the prohibition order program (Public Utilities Code) are not uniform and may not fully account for the unique operations agreement between BART and VTA."

2) **Transit District Policing Responsibilities**: Through a series of legislation beginning with SB 1561 (Steinberg), Chapter 528, Statutes of 2008, specified transit districts have been authorized to issue prohibition orders denying passengers committing certain illegal behaviors entry onto transit vehicles and facilities. Currently, the transit districts with this authority are the SacRT, the Fresno Area Express, the Metro, and BART. (Pub. Util. Code, § 99171, subd. (e).) This authority applies to property, facilities, or vehicles of a transit district. (Pub. Util. Code, § 99171.)

   Additionally, under current law"[a]ny person who enters or remains upon any transit-related property without permission or whose entry, presence, or conduct upon the property interferes with, interrupts, or hinders the safe and efficient operation of the transit-related facility is guilty of a misdemeanor." (Pen. Code, § 3691, subd. (b)(1).) Specified acts committed with respect to the property, facilities, or vehicles of a transit district are infractions. (Pub. Util. Code, § 99170.)

This bill would extend a transit district's authority to issue prohibitions and the scope of the prohibition orders to include the property, facilities, or vehicles upon which it owes policing responsibilities to a local government pursuant to an operations and maintenance agreement or similar interagency agreement. It would also make the infraction and misdemeanor offenses applicable to these properties, as well.

3) **BART's Annual Report**: According to BART's annual report, as required by statute (Pub. Util. Code, § 99172), the number of prohibition orders issued in 2019 was 371 compared to 376 in 2018. Battery and threats to BART patrons continued to be a noticeable problem in 2019, accounting for 28 percent of prohibition orders issued. To address this, BART is implementing high visibility foot patrols and commanders for specific zones. The report notes a need or continued outreach efforts involving mental health and homelessness. To address this, BART has Crisis Intervention Training (CIT) officers and police personnel to offer services at the scene by referring individuals in crisis to appropriate resources through local city or county organizations. In 2019, less than 3% (actual - 2.96%) of individuals issued prohibition orders violated the order. In 2018, seven persons violated the prohibition order for a total of 12 arrests.

4) **Argument in Support**: According to the Sacramento Bay Area Rapid Transit District, the sponsor of this bill, "Currently, BART has the authority to issue prohibition orders on BART-owned property only. AB 1337 will extend that authority to areas where BART has an operating agreement but does not own the land, specifically for the new BART extension in Santa Clara County. The new stations opened for service in the summer of 2020.

   In 2011, AB 716/Ch. 534 authorized BART and several other transit agencies to implement pilot programs to issue prohibition orders to riders, which can ban a rider from District property for up to 90 days. The rider may only be banned if they have been: 1) cited by BART police on three separate occasions during a 90-day period; or 2) arrested for a crime committed on District property, or 3) convicted of loitering with the intent to commit a drug crime or prostitution. In 2017, AB 730/Ch. 46 was enacted that made the BART prohibition authority permanent.

   "For the Santa Clara County extension, BART has an operating agreement in perpetuity with the Valley Transportation Authority and does not own the land. AB 1337 will only extend the current authority to the trains, platforms and ticketing areas of the new Milpitas and Berryessa/North San Jose stations.

   "We believe this is a measure that ensures consistent application of BART policies throughout the entirety of the system…."

5) **Prior Legislation**:

   a) AB 730 (Quirk) Chapter 46, Statutes of 2017, repealed the sunset on the law that allows BART to issue prohibition orders to passengers committing certain illegal behaviors, making BART's authority to do so permanent.

   b) AB 468 (Santiago) Chapter 192, Statutes of 2017, added the Los Angeles County Metropolitan Transportation Authority (Metro) to the transit districts authorized to issue prohibition orders to passengers committing certain illegal behaviors.

c) SB 1154 (Hancock) Chapter 559, Statutes of 2014, in part, extended the sunset on the law that allows BART to issue prohibition orders denying passengers committing certain illegal behaviors entry onto transit vehicles and facilities, until January 1, 2018.

d) AB 716 (Dickinson) Chapter 534, Statutes of 2011, in part, authorized the San Francisco Bay Area Rapid Transit District, until January 1, 2015, to issue prohibition orders denying passengers committing certain illegal behaviors entry onto transit vehicles and facilities. AB 716 also removed the sunset provisions for Sacramento Regional Transit District and the Fresno Area Express, making their related authority permanent.

e) SB 1561 (Steinberg) Chapter 528, Statutes of 2008, authorized the Sacramento Regional Transit District and the Fresno Area Express, until January 1, 2012, to issue prohibition orders denying passengers committing certain illegal behaviors entry onto transit vehicles and facilities. SB 1561 also described the kinds of behaviors according to their potential severity and prescribes the progressive penalties based upon the severity and frequency of violations.

REGISTERED SUPPORT / OPPOSITION:

Support

Bay Area Rapid Transit District (BART) (Sponsor)

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

Date of Hearing: April 13, 2021
Counsel: Nikki Moore

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

AB 1475 (Low) – As Amended March 25, 2021

SUMMARY: Limits a police department and sheriff's department from sharing mug shots on social media. Specifically, **this bill**:

1) Prohibits a police department or sheriff's office from sharing on social media the booking photos of an individual arrested on suspicion of committing a nonviolent crime unless one of the following circumstances exist:

   a) The individual is convicted of a criminal offense based on the conduct for which the individual was incarcerated at the time the booking photo was taken;

   b) A police department or sheriff's office has determined that the suspect is a fugitive or an imminent threat to an individual or to public safety and releasing or disseminating the suspect's image will assist in locating or apprehending the suspect or reducing or eliminating the threat;

   c) A judge orders the release or dissemination of the suspect's image based on a finding that the release or dissemination is in furtherance of a legitimate law enforcement interest; or,

   d) There is an exigent circumstance that necessitates the dissemination of the suspect's image in furtherance of an urgent and legitimate law enforcement interest.

2) Requires a police department or sheriff's office that shares, on social media, photos or the identity of an individual arrested for the suspected commission of any crime to remove the information from its social media page within 14 days, upon the request of the individual who is the subject of the social media post or that individual's representative, if any of the following have occurred:

   a) The individual's record has been sealed;

   b) The individual's conviction has been dismissed, expunged, pardoned, or eradicated pursuant to law;

   c) The individual has been issued a certificate of rehabilitation; or,

   d) The individual was found not guilty of the crime for which they were arrested.

3) Provides that this subdivision shall apply retroactively to any information shared on social media.

EXISTING LAW:

1. Defines "violent crime" to include specified crimes (Pen. Code, § 667.5, subd. (c).)

2. Defines "social media" to mean "an electronic service or account, or electronic content, including, but not limited to, videos or still photographs, blogs, video blogs, podcasts, instant and text messages, email, online services or accounts, or Internet Web site profiles or locations." (Pen. Code, § 632.01.)

3. Defines "booking photograph" to mean "a photograph of a subject individual taken pursuant to an arrest or other involvement in the criminal justice system." (Civ. Code, § 1798.91.1, subd. (a)(1).)

4. Defines "subject individual" to mean "an individual who was arrested." (Civ. Code, § 1798.91.1, subd. (a)(2).)

5. Provides that it shall be an unlawful practice for any person engaged in publishing or otherwise disseminating a booking photograph through a print or electronic medium to solicit, require, or accept the payment of a fee or other consideration from a subject individual to remove, correct, modify, or to refrain from publishing or otherwise disseminating that booking photograph. (Civ. Code, § 1798.91.1, subd. (b).)

6. Permits a public entity to require and accept a reasonable administrative fee to correct a booking photograph. (Civ. Code, § 1798.91.1, subd. (c).)

7. States that each payment solicited or accepted in violation of these provisions constitutes a separate violation, and permits a subject individual to bring a civil action for damages and attorney's fees, and any other legal or equitable relief. (Civ. Code, § 1798.91.1, subd. (d)-(e).)

8. Provides pursuant to the California Public Records Act (PRA) that all records maintained by local and state governmental agencies are open to public inspection unless specifically exempt. (Gov. Code, §§ 6250 et seq.)

9. 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, § 6252, subd. (e).)

10. States that, except as in other sections of the PRA, this chapter does not require the disclosure of specified records, which includes among other things: records of complaints to, or investigations conducted by specified agencies, including 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, § 6254, subd. (f).)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "Suspects arrested on suspicion of committing a crime are presumed innocent until proven guilty. However, when law enforcement agencies publish a person's mug shot on Facebook or other social media without waiting for a conviction or even for charges to be formally filed, internet mobs rush to judgement. This practice causes great personal harm if a mug shot is shared with employers, clients, family members or friends — and these posts can follow a person for life.

   "The mug shots that law enforcement agencies post on social media are often unflattering and rarely warn the public of an ongoing safety threat, as the suspect is already in custody at the time of posting. Instead, the purpose of posting these images often is to shame and ridicule suspects, many of whom are dealing with serious drug addiction and mental health issues. Furthermore, these posts perpetuate harmful racial stereotypes and foster implicit bias in a community and police force.

   "AB 1475 would prohibit police and sheriff's departments from using social media to share the booking photos of suspects who are arrested — but not convicted — on suspicion of committing a crime. The legislation creates exemptions for situations in which the suspect is a fugitive or an imminent threat to public safety. It would also create a mechanism for a person whose mug shot has been published to request that the post about their arrest be deleted if that person was found not guilty, not charged with the crime, if their record was sealed or expunged, or if the person was pardoned or issued a certificate of rehabilitation. Suspects continue to have the right to acquire their own mug shot if they are alleging excessive force by arresting officers.

   "This bill will not only reduce racial stereotypes and negative interactions with law enforcement, but also serve as a reminder that all people are considered innocent in the eyes of the law until proven guilty."

2) **Need for this bill:** According to the author, "AB 1475 seeks to remedy two interconnected problems. With the advent of social media, public agencies, including local police and sheriff's departments, increasingly use Facebook and Twitter to connect with community members and highlight their work. Used effectively, these accounts can foster trust and familiarity between a community and their public agencies. However, in recent years, many law enforcement departments across California have used their social media accounts to shame suspects arrested by officers, posting suspects' mug shots, names, and descriptions of their alleged crimes on Facebook."

3) **Mug Shot Legislation**: In 2014, California passed legislation to prohibit a person or company from extorting individuals by posting their mug shots and charging for removal of a photo. In analyzing SB 1027 (Hill), Chapter 194, Statutes of 2014, the Assembly Judiciary committee wrote:

   "Typically, freedom of information concerns are raised with bills that may restrict the public's right to access government records. However, this bill does not prohibit the public from accessing criminal information records from governmental entities. Rather, this bill is narrowly tailored to only prohibit an individual (not a public entity) from charging fees for the removal, correction, or modification of booking photographs

published by the individual. Staff notes that by prohibiting charging a fee to remove mug shots from commercial Web sites, this bill would eliminate the incentive for the Web site to remove the mug shot upon request of the subject individual. Thus, the mug shot may remain online for potential employers and other members of the public to access. However, this bill, by making a modest prohibition on the removal of mug shots for fees, would eliminate the alleged extortion activities currently perpetrated by mug shot Web sites. Since this bill does not require removal of the mug shot, which is public information protected under the [California Public Records Act ("CPRA")], this bill does not raise concern regarding the public's right to access the criminal record information."

Similarly, this bill does not disturb the public right to request and access mug shots, nor does it limit a police agencies' ability to disclose such documents to the public under the CPRA. The California Constitution requires a bill that limits the public's right of access to information to adopt findings that support limiting the public's right of access. No such findings are included in this bill, further indicating that there is no intent to disturb the public's right to access such records under the law.

This bill also does not implicate any First Amendment rights because it only addresses the ability of a public agency to share information, and only extends the right to request documents be deleted to person engaging with a public agency. This bill does not permit a person to request a newspaper or an individual user on social media to delete photos. Forcing a private citizen or company to delete information would raise concerns about authorizing a prior restraint, which is seen as the "the most serious and least tolerable infringement on First Amendment rights." (*Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 559 (1976).)

Some advocates suggest that this bill should go further, extending to all mugshots, not just those dealing with a non-violent crime. Additionally, they argue that police agencies should be limited from releasing mug shots at all, on any forum.

4) **Retroactivity**: This bill provides that it applies "retroactively to any information shared on social media." That does not mean that this bill has retroactive application, however, or create any liability for past actions. It means that the provisions of this bill permit a person to make a request for removal of photos after the bill is enacted. The public agency receiving the request would then be required to comply with the provisions of law that instruct it to remove specified photos. Likewise, a public agency will face no liability for posting a mug shot of a person involved in a nonviolent crime prior to the enactment of this bill, nor would the agency be required to proactively delete such records unless an individual makes a request for deletion pursuant to the provisions of this bill.

5) **Implementation Concerns**: This bill only provides a mechanism for having a mug shot removed from a social media account of a law enforcement officer in the instance of a nonviolent crime, and only requires a public agency to remove such content in four scenarios: (1) The individual's record has been sealed, (2) the individual's conviction has been dismissed, expunged, pardoned, or eradicated pursuant to law; (3) the individual has been issued a certificate of rehabilitation; (4) the individual was found not guilty of the crime for which they were arrested. This bill is silent regarding the level of proof that an individual must present to a law enforcement agency when requesting the deleting of the photo, and it is also silent in providing instructions to a public agency in how to make such a determination. Based on this, the Legislature might consider removing the proof requirement altogether and

simply mandate that a police agency remove a mug shot upon request in the case of a nonviolent incident.

6) **Argument in Support**: According to the *California Public Defenders Association,* "AB 1475 would prohibit law enforcement agencies in the State of California from sharing the booking photos of suspects arrested on suspicion of committing nonviolent crimes on social media. The bill also requires departments to remove social media posts about a suspect who was ultimately found not guilty, not charged, or who had their record expunged. AB 1475 will reduce implicit bias and protect community members who are found not guilty from public humiliation and serious consequences like loss of employment or housing.

   "AB 1475 will enhance the protection of the presumption of innocence for accused Californians and will restore quality of life to those whose arrests do not lead to charges, are acquitted at trial, or are granted expungements. This bill will help free innocent individuals from fear that a simple website search will dredge up inaccurate past information that will destroy their employment opportunities.

   "CPDA members can attest that unfettered pretrial publicity leads to wrongful convictions through biased identifications, prejudice within our jury pools, and decreased safety for our incarcerated clients. Our clients whose cases are dismissed, successfully win at trial, or are fully rehabilitated are still stigmatized by their past publicity on the internet. The passage of AB 1475 would be a significant step towards protecting the presumption of innocence for California's residents."

7) **Prior Legislation**: AB 1027 (Hill), Chapter 194, Statutes of 2014, made it unlawful to publish or otherwise disseminate a booking photograph in order to solicit, require, or accept the payment of a fee or other consideration from a subject individual to remove, correct, modify, or to refrain from publishing or otherwise disseminating that booking photograph.

REGISTERED SUPPORT / OPPOSITION:

Support

Asian Americans Advancing Justice - California
California Public Defenders Association (CPDA)
Californians for Safety and Justice
Ella Baker Center for Human Rights
Initiate Justice
Legal Services for Prisoners With Children
National Association of Social Workers, California Chapter
San Francisco Public Defender

Opposition

None

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Date of Hearing: April 13, 2021
Counsel: Matthew Fleming

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

AB 1542 (McCarty) – As Amended March 30, 2021

SUMMARY: Authorizes the County of Yolo to offer a pilot program, known as the Secured Residential Treatment Program, for individuals suffering from substance use disorders (SUDs) who have been convicted of drug-motivated felony crimes, as specified. Specifically, **this bill**:

1) Requires the pilot program in the County of Yolo to meet all of the following conditions:

   a) The county develops the program in consultation with drug treatment service providers and other relevant community partners;

   b) The staff of the Yolo County Health and Human Services Agency (HHSA) performs a risk and needs assessment, utilizing an assessment tool demonstrated to be appropriate for drug offenders, for each offender entering the program;

   c) The individual, as an alternative to a jail or prison sentence, consents to participate in the program;

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

   e) The program includes components that are evidence-based or promising practices;

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

   g) A judge determines the length of the treatment program after being informed by, and based on, the risk and needs assessment and recommendations of treatment providers. After leaving the secured residential treatment facility, the participant continues outpatient treatment for a period of time and may also be referred to a "step-down" residential treatment facility, as specified.

   h) The program includes a continuum of care and intensive followup services for participants;

   i) Treatment provided to a participant during the program is reimbursable under the Medi-Cal program, to the extent that the participant is a Medi-Cal beneficiary and the treatment is already covered under the Medi-Cal program, and to the extent that reimbursement is not prohibited under federal law;

j) An outcome measures report is completed by a local independent evaluator;

k) The county collects and monitors all of the following data for participants in 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 and needs assessment;

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

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.

l) The county reports all of the following information annually to the Legislature:

i) The risk and needs 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 participating in the program;

v) Individual data for the items described in paragraph (11); and,

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

2) Requires the pilot program to align with the resolution adopted by the County of Yolo in 2015 in recognition of the national Stepping Up Initiative, with the goal of ensuring that people with behavioral health conditions receive treatment out of custody wherever possible.

3) Specifies that for the purposes of these provisions, "drug-motivated crimes" include any felony other than registerable sex offenses, and serious or violent felonies, as specified.

4) Specifies that persons convicted of a "nonviolent drug possession offense," as specified, may not be diverted into the program.

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

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

b) The defendant meets the eligibility requirements of the program; and,

c) The judge makes their determination based on the recommendations of the treatment providers who conducted the assessment and on a finding by HHSA that the defendant's participation in the program would be appropriate;

6) Requires that the amount of time in the secured residential treatment facility shall be based on the recommendations of the treatment providers who conducted the assessment. Requires that the amount of time, combined with any outpatient treatment or "step-down" residential treatment pursuant to the program, not exceed the maximum allowable jail or prison time for the drug-motivated crime; and,

7) Prohibits the court from placing the defendant on probation for the underlying offense, but requires, for the period in which an individual is participating in the pilot program, the individual shall be on supervision with the probation department.

8) Requires that, in making the decision to place a person in the pilot program, 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.

9) Authorizes the court, based on the recommendations of the treatment providers, to transfer the participant out of the secured residential treatment phase of the program prior to the end of the original order.

10) Provides that, if a person is transferred out of the secured residential treatment facility prior to the end of the original order, the participant shall continue to be supervised in the program by HHSA and the probation department for the duration of the sentence.

11) Requires the court, upon successful completion of the program, to expunge the conviction from the participant's record and provides the court with discretion to expunge the conviction of any previous drug possession or drug use crimes on the participant's record, as specified.

12) Makes legislative findings and declarations.

13) Sunsets these provisions on January 1, 2025.

EXISTING LAW:

1) 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.)

2) 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).

3) 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.)

4) 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).)

5) 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).)

6) 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).)

7) States that when a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime. (Pen. Code, § 1170, subd. (b).)

8) States that if a person is convicted of a felony and is eligible for probation, before judgment is pronounced, the court shall immediately refer the matter to a probation officer to investigate and report to the court, at a specified time, upon the circumstances surrounding the crime and the prior history and record of the person, which may be considered either in aggravation or mitigation of the punishment. (Pen. Code, § 1203, subd. (b)(1).)

9) Provides that for every six months of continuous incarceration, a prisoner at a CDCR facility shall be awarded credit reductions from his or her term of confinement of six months. (Pen. Code § 2933, subd. (b).)

10) 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, subd. (f).)

11) Provides for additional deductions and credits for time served based on completion of rehabilitation programs. (Pen. Code, §§ 2933.05, *et. seq.* and 4019.1 *et seq.*)

12) Allows a county jail facility to release misdemeanor inmates prior to them serving the full amount of a given sentence due to lack of jail space to an involuntary home detention program and specifies that participants in the program shall receive any sentence reduction credits that they would have received had they served their sentences in a county correctional facility. (Pen/ Code, § 1203.017, subd. (a).)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement:** According to the author, "Hope Yolo is a second chance opportunity for individuals struggling with substance use disorder. The U.S. Department of Justice estimates that 58% of state prisoners and 63% of jailed inmates meet the criteria for drug dependence or abuse. Incarceration is not the answer to treat substance use disorders; evidence-based treatment given by health care providers is. This is what AB 1542 is about; a voluntary pilot program that will give individuals whose felony crimes are driven by drug dependency an opportunity to recover. Hope Yolo will provide residential evidence-based treatment for individuals who would otherwise be incarcerated with minimal opportunity to receive treatment. In addition, individuals who successfully complete the program will receive record expungement."

2) **Yolo County Pilot Program**: This bill would allow Yolo County to establish a pilot program for the purposes of establishing a secured, drug treatment facility where felony offenders could be sentenced and treated for substance use disorders rather than going to jail or prison. According to the Legislative findings and declarations that are proposed by this bill, a significant percentage of people arrested and charged with crimes in the County of Yolo suffer from substance use disorders and California's efforts in treating that population, some of whom are homeless, has had limited success.

   The bill establishes a number of requirements that must be met by the program in order for it to be offered. Among those are the requirement that the Yolo County Health and Human Services Agency (HHSA) create a risk and needs assessment that it would then use on potential program participants. The program would be required to include components that are evidence-based or promising practices. A judge would be required to determine the length of the treatment program after being informed by the risk and needs assessment and recommendations of treatment providers. After leaving the secured treatment facility, the participant would be required to do outpatient treatment for a period of time that includes a continuum of care and intensive follow-up services for participants. In addition, the bill requires that treatment provided by the program be reimbursable under the Medi-Cal program.

   The bill contemplates that felony offenders who have not committed serious or violent felonies, registerable sex offenses, or non-violent drug possession offenses would all be eligible for the program. Prior to being sentenced to the program, the local health and human services agency would have to create and perform an assessment on the potential participant. At the time of sentencing a judge would be required to offer the program to an eligible participant instead of jail or prison time that they would otherwise impose.

The bill requires an annual report to the Legislature and would sunset on January 1, 2025.

3) **Efficacy of Involuntary Substance Use Treatment**: This bill has received opposition from groups and organizations with a variety of interests, including human rights, criminal justice reform, public health, and substance use treatment. One common thread of their concerns about the policy of this bill is rooted in the concept that involuntary treatment is ineffective, expensive and likely to be counter-productive.

Despite widespread implementation of involuntary drug treatment worldwide, there appears to be little available, high-quality research on its effectiveness. A comprehensive study was published in 2016, claiming to be the first of its kind. (Werb, "The Effectiveness of Compulsory Drug Treatment: A Systemic Review," International Journal of Drug Policy, Feb. 2016, 28: 1-9, available at: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4752879/, [as of April 8, 2021].) That study concluded that "[e]vidence does not, on the whole, suggest improved outcomes related to compulsory treatment approaches, with some studies suggesting potential harms." (*Id.* at 2.) The study continued, "Given the potential for human rights abuses within compulsory treatment settings, non-compulsory treatment modalities should be prioritized by policymakers seeking to reduce drug-related harms." (*Ibid.*) It is worth noting that the study did not limit its assessment of compulsory drug treatment in detention centers, but also included compulsory treatment in inpatient and outpatient settings. (*Id.* at 10.) Other 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, *Offender Tratment: A Meta-Analysis of Effectiveness*, Criminal Justice and Behavior, Vol. 35, No. 9, p. 1128, Sep. 2008, available at: https://studysites.sagepub.com/stohrstudy/articles/05/Parhar.pdf, [as of April 9, 2021].)

Opponents of this bill agree with the conclusions of the comprehensive study and other available research. They argue that potential harms resulting from compulsory treatment include increased risk of overdose and fostering distrust between treatment providers and patients, causing people who need help to be unlikely to seek it out in the future. They further suggest spending money on voluntary treatment programs instead of compulsory ones.

Although the bill ostensibly requires the consent of the defendant prior to being sentenced into the program, the procedure by which a defendant chooses to participate may be coercive. The procedure outlined in the bill requires the judge, at the time of sentencing or pronouncement of judgment to offer participation to the defendant in lieu of jail or prison time, which the court would otherwise impose. Most people, when faced with the prospect of prison or jail, or likely to submit themselves to almost any reasonable alternative. But that does not mean the person has the willingness or ability to succeed in drug treatment. As put by one group opposing the bill, participants will be "likely to consent to treatment as it will be seen as a less harsh alternative, even if they would not have voluntarily chosen to engage in treatment outside of this situation."

Staffing a secured drug treatment facility and providing substance abuse treatment, counseling, and potentially medication are all likely to be very expensive. If there is not a commensurate improvement in drug abuse or recidivism rates then costs of such a program

are likely to outweigh its benefits.

4) **Additional Policy, Practical, and Implementation Considerations**: In its current version, there are a number of policy, practical and implementation issues presented by this proposal. It may be worth considering the following:

   a) *Procedure at Sentencing*: One component of this bill requires the judge to offer the pilot program to the defendant at the time of sentencing. This provision raises a number questions. First, many of the offenders that fit the eligibility criteria for this program are also likely to be eligible for felony probation. 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 drug facility.

   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. 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. Regardless, this bill would authorize the judge to sentence the defendant to secured drug treatment facility for up to the "maximum allowable jail or prison time." In other words, everyone sentenced for a felony could be put into the program for the upper term even if the judge would have imposed a lesser term in jail or state prison.

   Additionally, many offenders who would be sentenced to this program would receive day-for-day credit if they were to serve the time in a jail or prison (sometimes referred to as "half-time.") This bill does not appear to award such credit. Other alternative sentencing programs in California, the involuntary home detention pursuant to penal code section 1203.017, for example, provide that defendants receive the same credit for days spent in involuntary home detention that they would get if they were in jail. Inmates who complete non-court ordered drug treatment while incarcerated also receive additional credits. Thus, a felony offender who would normally be sentenced to 16 months in jail and receive half that time as credit (doing a total of 8 months or perhaps even less), could be required to spend as much as three years at the Yolo County secured drug treatment facility and earn no credit, under the terms of this proposal as currently constructed.

   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, will not earn credits off their sentence for time served at the secured treatment facility, and will be subject to the maximum punishment allowable by law regardless of mitigating factors in their offense that may result in a lower term being imposed.

   Another potentially problematic part of this procedure is the simple fact that judges, rather than treatment providers, would be the decision-makers of how long a person

would be committed to the secured treatment facility. Typically, treatment providers are responsible for determining length of treatment and when a person is sufficiently recovering from their substance use disorder to discontinue treatment. Placing that responsibility with the judges, even upon consultation with treatment providers, may not result in ideal outcomes for participants.

b) *Medi-Cal Reimbursement:* One premise of this bill is that the Medi-Cal program will reimburse costs of substance use treatment. Opponents argue that Medi-Cal reimbursement is not available for in-custody treatment. According to CDCR, Medi-Cal reimbursement is not available to prisoners who participate in drug treatment while incarcerated, although it is available for outpatient services. (CDCR website, Medi-Cal information, https://www.cdcr.ca.gov/rehabilitation/medi-cal/, [as of April 8, 2021].)

As currently written, one of the requirements for Yolo County being able to offer this program is that substance use treatment is reimbursable by the Medi-Cal program. If it is true that there can be no federal reimbursement through the Medi-Cal program then the bill will have to be amended to eliminate that provision before the program could go into effect.

c) *Facility and Staffing*: The bill does not describe a particular location for the secured drug treatment program to be established. It does not discuss who would be the custodial staff or the treatment providers. Although the bill prohibits a judge from granting probation to a participant in the program, the bill would require probation officers to supervise all program participants. Would probation officers be in charge of staffing the facility and performing the custodial tasks that are normally assigned to correctional officers in CDCR or sheriffs in county jails?

d) *The Stepping Up Initiative*: The Stepping Up Initiative is a national program dedicated to reducing the number of people with mental illness who are incarcerated in jail or prison. (https://stepuptogether.org/.) The Stepping Up Initiative provides a variety of resources that are designed to encourage and assist local governments to rely less on incarceration as a means of dealing with mental illness. (*See e.g.*, https://stepuptogether.org/wp-content/uploads/2015/05/Stepping-Up-Resolution-Template.pdf, providing model language for a local government resolution.)

This bill requires the pilot program to be consistent with Yolo County's 2015 resolution, pertaining to the national Stepping Up Initiative. The bill states specifically that the program "shall align with the resolution adopted by the County of Yolo in 2015 in recognition of the national Stepping Up Initiative, with the goal of ensuring that people with behavioral health conditions receive treatment out of custody wherever possible."

The requirement that this program be consistent with the Stepping Up Initiative is somewhat confusing. The Stepping Up Initiative is dedicated to getting people with mental health issues out of custody and into settings that can appropriately address those issues, such as psychiatric hospitals. This bill deals with people who have substance use disorders, or more specifically, people who have committed "drug-motivated crimes." It would create a program where such offenders could receive in-custody treatment at a secure facility. While mental illness and substance use are often related, and individuals are sometimes given a dual diagnosis, the two issues are not one in the same. It is also

unclear whether or not the in-custody treatment envisioned by this bill fits within the stepping-up initiative's stated intent of getting people with mental illness out of the criminal justice system.

e) *Reporting Requirements*: The bill is currently drafted to sunset the Yolo County Pilot Program on January 1, 2025. It also requires an annual report and an evaluation of specified information on program participants at 1, 3 and 5 years after completion of the program. Given the sunset date, the 3 and 5 year reports are highly unlikely to come to fruition. In addition, some of the categories of information in the report and evaluation could be more specific and detailed in order to assess the efficacy of the program.

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

6) **Argument in Opposition**: According to *Human Rights Watch*: "The apparent premise of AB 1542 is that people with 'Substance Use Disorders' (SUDs) have a medical condition that is best addressed through treatment as opposed to punishment. Human Rights Watch supports increasing the availability of evidence-based voluntary treatment for people who struggle with problematic use of psychoactive substances. However, this bill proposes forcing people involuntarily into 'secured' or locked treatment, regulated by the courts, thus blurring the lines between medical care and punishment, and undermining the goal of helping those in need. It runs directly counter to the principle of free and informed consent to mental health treatment, which is a cornerstone of the right to health. Conflating health treatment and jailing, as envisioned by AB 1542, risks substantial human rights abuse, is ineffective as a treatment, and takes resources and policy focus away from initiatives that are much more likely to help people.

"AB 1542 Conflates Treatment with Punishment

"AB 1542 would give judges power to sentence people convicted of crimes to "secured residential treatment" facilities if the judges determine that those people have SUDs that in any way contributed to the crime for which they were convicted. Convictions for most criminal offenses, including trespassing, theft, delaying a police officer, drug sales and others, would be eligible. Convictions for simple drug possession, sex crimes, or statutorily defined 'serious' or 'violent' crimes, would be excluded.5 Judges would be responsible for overseeing that treatment.

"However, judges lack the medical training or knowledge required to decide if a person has a medical condition or if substance use motivated their crime or to make decisions on the course of a person's treatment. The bill does not require an evidentiary hearing to assess these underlying conditions; the health and human services agency conducts an assessment, but only after a person has been ordered into the locked treatment. Further, judges' decisions, particularly in overseeing progress in the program, may be influenced by factors related to punishment rather than prioritizing therapeutic
benefit.

"While billed as an alternative to incarceration, permitting judges to confine people to a locked treatment facility essentially authorizes their imprisonment in that facility, even if there is an involuntary treatment component.

"AB 1542 Standards Deny Due Process

...

"Judges also lack training to make such diagnoses, and the bill establishes no fact-finding procedure beyond the judges' subjective beliefs. This pilot threatens to create a separate legal track for people perceived to have SUDs, with lowered due process, negatively implicating basic rights.

"The bill does call for consultation with the healthcare provider, but it does not establish the nature of that consultation. It requires courts to use a risk and needs assessment tool to recommend the length and intensity of treatment upon entering the program. By specifying 'tool' as opposed to calling for a clinical assessment, this bill raises the specter of using formulaic checklists or algorithms to make diagnoses, instead of having health professionals conduct interactive examinations that allow for detailed input from patients. Risk assessment tools used in other aspects of the criminal legal system are known to produce racially discriminatory results, to reduce complex personal histories to out of context data-points, and to have adjustable scoring systems that can be used to increase incarceration rates regardless of need. These tools should not be used to inform judicial decisions, especially as to medical treatment.

"Even if amended to create stronger judicial procedures, to elevate input from treatment providers, and to remove the use of risk assessment tools, this program would remain objectionable because it is premised on coercing people into a locked treatment facility.

"Coerced Treatment Violates Human Rights

"Under international human rights law, all people have the right to 'the highest attainable standard of mental health.' Free and informed consent, including the right to refuse treatment, is a core element of that right to health. People have a right to be free from forced mental health treatment. Having a 'substitute' decision-maker, including a judge, make orders for health care can deny a person their rights and infringe on their personal autonomy in health care. The World Health Organization condemns involuntary mental health treatments as inconsistent with international human rights standards. Due to the coercive circumstances under which the AB 1524 sentencing would take place, the treatment would not be voluntary.

"In practice, courts will use the threat of jail or prison time to pressure people to plead guilty to a sentence of treatment, regardless of whether those people are independently willing or ready to accept treatment, and in many cases even if they do not need treatment. Prosecutors could simply demand longer prison or jail sentences in plea negotiations to leverage people into accepting this treatment 'voluntarily.' This coerced process for imposing 'treatment' undermines any therapeutic aim of the bill. Further, judges will be able to re-sentence to jail or prison if a person does not adequately comply with the terms of the locked program, meaning that the coercion continues throughout the course of treatment.

"The pilot program, as currently written, envisions sentencing people accused of misdemeanors and lower-level felonies to these locked facilities. People who would otherwise face little or no time in custody on these charges may be pressured into locked

treatment if the judge or prosecutor wills it. Even if amended to limit application to felonies, the same pressure will remain. Time incarcerated in treatment can exceed time expected to be spent serving traditional jail or prison sentences for such crimes, as long as it does not exceed the maximum allowable term. AB 1542 requires the judge to decide the length of time spent in the locked facility, unlike voluntary treatment which should be determined by the health professional and patient together.

"AB 1524 requires treatment providers to report the person's therapeutic progress to the court, including to prosecutors who have an inherently adversarial relationship with the person, to probation officers, and to judges; it requires Yolo County to collect that individual's data and to report it to the state. It allows probation officers and prosecutors to have input into the course of treatment. These provisions violate the right to confidentiality, a key component of the right to health. This violation will undermine patient-healthcare provider relationships that are necessary to successful treatment outcomes. By requiring healthcare providers to report treatment progress to the courts, including temporary failures in treatment, this bill compromises medical ethics requiring loyalty to patients. Healthcare providers should be working directly with their patients, without outside interference especially from courts, to create good health outcomes.

"**Coerced Treatment is Ineffective**

"The coercion involved in this approach to treatment not only encourages abuse and violation of basic rights, it is also ineffective. Like more traditional drug courts, this pilot may result in courts sentencing people who do not actually need treatment, wasting their time, and diverting resources from those who do. For treatment to work, people generally must be willing and ready to accept it; compulsory treatment ignores this reality. Blurring lines between treatment and incarceration, especially betraying patient confidences to judges and prosecutors who can order further jailing, damages the trust necessary for a person to embrace their treatment.31 Studies of court ordered drug treatment generally have not shown positive outcomes.32 Studies have correlated coerced treatment to increased occurrence of overdoses and relapse compared to voluntary treatment.

"**California Should Invest in Voluntary Treatment and Supportive Services**

"Investing in carceral, involuntary treatment shifts resources away from providing voluntary treatment and the services necessary to make that treatment effective. Instead of investing in locked facilities, Yolo County and the State of California could scale up treatment capacity for people who need and want to access it. Providing well-resourced community-based options and removing barriers to treatment will help people mitigate problematic substance use.

"An initial draft of the pilot program bill explicitly stated that it was designed to address the homeless population in Yolo County, which has grown substantially in recent years. The bill as introduced removed most of that language from its introduction, but the content of the pilot remains the same. Without addressing the need for housing and ongoing services, it is unlikely that locked treatment will help people experiencing homelessness improve their situation.

"Yolo County and California would more effectively address these problems by providing more affordable housing and voluntary services and health care, instead of spending resources on incarcerating people in the name of treatment.

"AB 1542 is simply a plan for more incarceration under the guise of treatment. More harmfully, it co-opts the language of the movement to address health problems related to crime with supportive solutions and redirects it toward more imprisonment. We ask that you reject this harmful pilot program and, instead, direct resources towards making voluntary treatment and other necessary services accessible to all."

7) **Prior Legislation**:

a) 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.

b) SB 1004 (Hill), Chapter 865, Statutes of 2016, established the Transitional Age Youth pilot program, authorizing five counties -- Alameda, Butte, Napa, Nevada, and Santa Clara -- to operate a three-year pilot program in which certain young adult offenders ages 21 and younger would serve their time in juvenile hall instead of jail.

REGISTERED SUPPORT / OPPOSITION:

Support

None

Opposition

American Civil Liberties Union/northern California/southern California/san Diego and Imperial Counties
California Association of Alcohol and Drug Program Executives, INC.
California Attorneys for Criminal Justice
California Consortium of Addiction Programs and Professionals
California Public Defenders Association (CPDA)
California United for A Responsible Budget (CURB)
County Behavioral Health Directors Association of California
Dignity and Power Now
Disability Rights California
Drug Policy Alliance
Harm Reduction Coalition
Human Rights Watch
Initiate Justice
Lawyers' Committee for Civil Rights - San Francisco
San Francisco Pretrial Diversion Project
San Francisco Public Defender

Silicon Valley De-bug
Students for Reproductive Freedom At UC Davis
Think Dignity
Union Station Homeless Services
We the People - San Diego
Young Women's Freedom Center

24 Private Individuals

Analysis Prepared by: Matthew Fleming / PUB. S. / (916) 319-3744

Date of Hearing: April 13, 2021
Chief Counsel: Gregory Pagan

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

AB 689 (Petrie-Norris) – As Amended March 18, 2021

SUMMARY: Expands the Office of Emergency Services (OES) Comprehensive Statewide Domestic Violence Program's 24-hour telephone communication services to possibly include other communications methods offered on a 24-hour or intermittent basis, such as text messaging, computer chat, or any other technology approved by OES.

EXISTING LAW:

1) States that the Legislature finds the problem of domestic violence to be of serious and increasing magnitude; and that existing domestic violence services are underfunded and that some areas of the state are unserved or underserved. Declares that a goal or purpose of the Office of Emergency Services (OES) shall be to ensure that all victims of domestic violence served by the OES Comprehensive Statewide Domestic Violence Program receive comprehensive, quality services. (Pen. Code, § 13823.15, subd. (a).)

2) Establishes under OES a Comprehensive Statewide Domestic Violence Program; the program's goals are to provide local assistance to existing service providers, to maintain and expand services based on a demonstrated need, and to establish a targeted or directed program for the development and establishment of domestic violence services in currently unserved and underserved areas. OES shall provide financial and technical assistance to local domestic violence centers in implementing all of 14 required services including operating a 24-hour crisis hotline. (Pen. Code, § 13823.15, subd. (b).)

3) Establishes the OES and the specified advisory committee to collaboratively administer the Comprehensive Statewide Domestic Violence Program, and requires OES to allocate funds to local centers meeting the criteria for funding. Provides that all organizations funded pursuant to this section shall utilize volunteers to the greatest extent possible. States that the centers may seek, receive, and make use of any funds which may be available from all public and private sources to augment state funds received pursuant to this section. (Pen. Code, § 13823.15, subd. (c).)

4) States that centers receiving funding shall provide cash or an in-kind match of at least 10 percent of the funds received pursuant to this section. (Pen. Code, § 13823.15, subd. (c).)

5) Defines "domestic violence shelter service provider" or "DVSSP" to mean "a victim services provider that operates an established system of services providing safe and confidential emergency housing on a 24-hour basis for victims of domestic violence and their children, including, but not limited to, hotel or motel arrangements, haven, and safe houses." (Pen. Code, § 13823.15, subd. (f)(15)(B).)

6) States that the funding process for distributing grant awards to DVSSPs shall be administered by the Office of Emergency Services, and including by providing matching funds or in-kind contributions equivalent to not less than 10 percent of the grant they would receive, which may come from other governmental or private sources. (Pen. Code, § 13823.15, subd. (f)(14).)

FISCAL EFFECT: Unknown.

COMMENTS:

1) **Author's Statement**: According to the author, "This bill modernizes California code to ensure that funding for and reporting about vital crisis communication services offered by Domestic Violence service provider include new text-based technology like computer chat lines and phone texting. By modernizing the requirements to include text-based optional services, Domestic Violence service providers will be better equipped to respond victims of domestic violence who may not feel safe or be able to call a traditional phone-based hotline. Additionally, the state will be better able to track and collect more accurate data about domestic abuse."

2) **Domestic Violence Increase During COVID-19**: The stay at home orders issued in response to the COVID-19 pandemic has created an environment for increased domestic violence cases. More than 10 million Americans experience domestic violence, and experts project that isolation to homes, job loss, and overall stress associated with the pandemic will cause that number to increase[1]. National domestic violence hotlines have reported a spike in calls since March 2020 when stay at home orders began being enforced. Police statistics reveal that in the city of Los Angeles, as of March 21, aggravated assault crimes, including those of domestic violence, have increased more than 4 percent. Many police stations have closed their reception area in response to the spread of COVID, forcing victims to contact departments via phone for restraining and emergency orders. However many domestic violence shelters have remained open during this time, accepting families and creating quarantine areas to protect those most in need. Domestic violence centers working with survivors are staying connected through increased tele-advocacy and remote intake. As domestic violence centers continue working and implementing social distancing protocols during this pandemic, it is greatly impacting their revenue and ability to raise funds. Cities across California are extending their stay at home orders and social distancing protocols, therefore the suspension of match requirements will allow domestic violence to continue channeling their resources where they are most needed.

3) **Argument in Support**: According to *WEAVE,* "Law enforcement agencies across California field an average of 457 domestic violence calls a day. For many victims, calling law enforcement is not the safest or most helpful option, so they turn to other resources like 24/7 crisis response services from organizations like WEAVE. Text-based services like computer chat and secure text messaging offer alternative ways for victims to reach out for support, even when a phone call may not be safe. However these services can be costly and technically complex; service providers need resources and assistance to deploy these tools.

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[1] https://ncadv.org/blog/posts/what-dv-orgs-need-to-know-coronavirus

"By modernizing the statutory requirements to include text based optional communication services, Domestic Violence Service providers will be eligible for technical and financial support for these offerings through CalOES and will be able to offer victims more options for engagement that suit the victim's need and preferences. These additional services may also help the state to better track and collect more accurate data about domestic violence."

REGISTERED SUPPORT / OPPOSITION:

Support

California Partnership to End Domestic Violence
WEAVE INC.

Opposition

None

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

Date of Hearing: April 13, 2021
Counsel: Nikki Moore

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

AB 717 (Stone) – As Amended April 7, 2021

SUMMARY: Requires Department of Motor Vehicles (DMV) to provide a person incarcerated in the California Department of Corrections and Rehabilitation (CDCR) with a driver's license or valid California identification card. Specifically, **this bill**:

1) Repeals existing law regarding eligible inmate identification and relocates provisions related to exonerated persons to a new section.

2) Mandates that CDCR and DMV have the necessary equipment, including, but not limited to, DMV-approved cameras.

3) States that as soon as an inmate is within 24 months of release, CDCR shall determine the documentation the inmate requires to obtain a California identification card or driver's license, and, after obtaining consent, shall assist an incarcerated with seeking and accessing necessary documentation for obtaining an identification card or driver's license.

4) Requires CDCR to immediately begin this process for a person whose sentence is shortened to within 24 months of release for any reason. Establishes that a person serving a life sentence shall be entitled to this process within 24 months of their minimum eligible parole date.

5) Establishes that when a person is within 13 months of release, CDCR and DMV shall collaborate to obtain an identification card or driver's license from DMV.

6) Requires CDCR to make any necessary licensing examinations available to inmates, with the exception of, for driver's licenses, an examination of the applicant's ability to exercise ordinary and reasonable control in operating a motor vehicle.

7) Requires CDCR to provide inmates their California identification card or driver's license, plus any additional documents obtained on their behalf, upon their release.

8) Required CDCR to annually prepare a report with the following information:

   a) The number of inmates provided with original and renewal identifications, renewal licenses, disaggregated by license type, and written examinations disaggregated by license type.

   b) The number of Department of Corrections and Rehabilitation facilities that are providing license and ID services to inmates.

c) Any impediment to implementation of this program and recommendations for resolution of those issues.

9) Sets the fee for an original and duplicate identification card or driver's license issued to a person upon release from a state or federal correctional facility or a county jail facility at eight dollars ($8), aligning the fee with the existing reduced fee for a replacement card.

10) Repeals the provision that limits a fee reduction qualification to only "eligible inmates" who meet specified criteria, and extends the fee reduction to all persons released from custody.

EXISTING LAW:

1) Requires that CDCR and the DMV ensure that all inmates released from state prison have a valid identification card, or, for those who satisfactorily complete the requirements required by the Vehicle Code. (Pen. Code, § 3007.05.)

2) Defines "eligible inmate" to mean an inmate who meets all of the following requirements (Pen. Code, § 3007.05, subd. (c).):

   a) The inmate has previously held a California driver's license or identification card;

   b) The inmate has a usable photo on file with the Department of Motor Vehicles that is not more than 10 years old;

   c) The inmate has no outstanding fees due for a prior California identification card; and,

   d) The inmate has provided, and the Department of Motor Vehicles has verified, all of the following information: the inmate's true full name, the inmate's date of birth, the inmate's social security number, and the inmate's legal presence in the United States.

3) Establishes an $8 fee for a replacement identification card issued to an eligible inmate upon release from a state or federal correctional facility or a county jail facility. (Veh. Code, § 14902, subd. (g).)

4) Defines "eligible inmate" to mean an inmate who meets all of the following requirements: the inmate previously held a California driver's license or identification card; the inmate has a usable photo on file with the department that is not more than 10 years old; the inmate has no outstanding fees due for a prior California identification card; the inmate has provided, and the department has verified, his or her true full name, date of birth, social security number, and legal presence in the United States; the inmate currently resides in a facility housing inmates under the control of the Department of Corrections and Rehabilitation, a federal correctional facility, or a county jail facility; the inmate has provided the department, upon application, a verification of his or her eligibility under this subdivision that meets all of the requirements. (Veh. Code, § 14902, subd. (g)(1-6).)

FISCAL EFFECT: Unknown.

COMMENTS:

1) **Author's Statement**: According to the author, "A government-issued identification (ID) card is essential to securing healthcare, employment, housing, bank accounts, and public benefits such as Medi-Cal and CalFresh. During the COVID-19 public health crisis, ensuring people are released from prison with a photo ID is more vital than ever because it will streamline access to Coronavirus testing and vaccines. Possessing an ID card will decrease rates of recidivism and mass incarceration, and is ultimately a passport to successful reintegration.

   "The existing CAL-ID Program provides an avenue for eligible individuals to acquire a valid ID when they leave a state prison, however, the program's narrow edibility criteria leaves 71% of people without an ID upon release. AB 717 will require the California Department of Corrections and Rehabilitation (CDCR) and the Department of Motor Vehicles (DMV) to provide a California Identification card or driver's license to every person released from state prison. A legal ID has always been a lifeline for people returning home from prison, and its importance has only been compounded amidst the pandemic."

2) **Undocumented Persons May Only Obtain Driver's Licenses Not Identification Cards**: AB 60 (Alejo), Chapter 524, Statutes of 2013, established a right of individuals who are unable to provide proof of legal presence in the United States to obtain a driver's license if they meet California DMV requirements and are able to provide proof of identity and California residency. This right does not extend to a state identification card. Thus, when an incarcerated person is unable to prove proof of legal presence in the US, DMV can only offer that person access to a driver's license and not an identification card. This bill expands access to a driver's license to an incarcerated person, which thus makes a person unable to prove legal presence in the US with a means of obtaining a state issued identification.

3) **Logistical Barriers**: Obtaining a government-issued identification to persons who are incarcerated poses logistical issues.

   Driving exam: Because this bill extends access to a driver's license to an incarcerated person prior to their release from CDCR, it mandates that all elements required to obtain a driver's license must be met. That necessarily requires that an inmate take a physical driving exam. Currently, it is not clear what vehicles CDCR would employ at each location to conduct such exam. It is not clear if conducting a driving exam at a CDCR facility would pose a security risk.

   Mail: This bill requires CDCR to provide a person being released from custody with the identification card or driver's license obtained through this bill. However, a person is not able to receive mail from DMV while incarcerated, due to CDCR's restrictions. This bill would require CDCR to receive and store mail from the DMV while a person is incarcerated, and then provide the mail to that person upon release.

4) **Reduced Fee Expanded**: Existing law permits a person released from custody from state or local detention to obtain a replacement identification card for a reduced fee of $8. This bill would extend the reduced fee to driver's licenses, and also reduce the fee to obtain both an original and a renewed identification card or driver's license to $8. This provision would establish the first reduced fee for a driver's license or a renewal license in law. There are currently no other provisions in law that permit a reduced fee for a person to obtain a new or

renewed identification card or driver's license.

5) **Argument in Support**: According to the *Ella Baker Center for Human Rights*, "People being released from prison need access to housing, employment, and social services to successfully reenter society. Covid-19 also spotlights the essence of access to health care. Typically, people only can access these basic necessities with a government-issued photo identification card. Obtaining a government-issued photo ID is a lengthy and overwhelming process for many, in part because the process for getting a government-issued photo ID card typically requires a birth certificate and social security number, while the processes for getting a birth certificate and social security card typically require a government-issued photo ID. The current pandemic, which will not be the last, led to months of DMV closures for the purpose of processing new Cal-ID cards. Yet, people do not have weeks or months to wait for a government-issued photo ID, if they need a Covid-19 vaccine, a place to live, or a job to make ends meet.

   ...

   "AB 2308, authored by Assemblymember Stone in 2014, opened the door for people reentering society to obtain government-issued photo IDs. However, the eligibility criteria is narrow, leaving out vulnerable populations, including people who have not been home in over ten years, people who owe money to the DMV, and people who do not know their social security numbers. Most people currently leave California prisons without a government-issued photo ID in hand. In the last six months of 2019, 71% of people who left prison were released with no Cal-ID in hand. Because a photo ID is so important to reentry, we must instead ensure all incarcerated people can obtain a photo ID before their release.

   "AB 717 would expand existing legislation to position more Californians for success when exiting confinement. This bill would allow CDCR to process original, duplicate, and renewal requests for California IDs and driver's licenses, so more individuals would be released with legal identification. To address significant barriers to obtaining identification, this bill would enable CDCR to assist incarcerated individuals with obtaining documents necessary to apply for California IDs, such as birth certificates and social security cards, and would allow individuals to take the written driver's license test while incarcerated.

   "AB 2308 also excluded incarcerated people who were serving life and other long sentences. AB 717 would ensure that CDCR screens and initiates the identification card process in a timely manner for those with both determinate and indeterminate sentences. Lastly, AB 717 would require CDCR to provide an annual report on the implementation of the government-issued photo ID program. Coming home with an ID validates that a formerly incarcerated person is now a valued community member of California and helps them reenter society with their dignity restored."

6) **Related Legislation**: SB 629 (Roth), would establish an $8 fee for an original or replacement identification card or driver's license for an "eligible inmate" and permits the use of a photo older than 10 years, or provides for the person to obtain a new photo if the existing photo is unusable. SB 629 is currently pending before the Senate Transportation Committee.

7) **Prior Legislation:**

a) AB 2308 (Stone), Chapter 607, Statutes of 2014, expanded the Cal-ID program in an attempt to ensure that all people being released from state prisons would be released with ID. To be eligible for program, a person must have previously held a California ID, have a recognizable photo on file with the DMV from within the last 10 years, possess a DMV-verifiable social security number, birth date, and proof of legal presence in the United States, and must not owe any fines or fees.

b) AB 2835 (Stone), of the 2019-2020 Legislative Session, would have expanded the CAL-ID program to include original and renewal California IDs, Drivers Licenses, and Real-IDs. The bill was not set in Assembly Public Safety due to COVID-19 bill limitations.

REGISTERED SUPPORT / OPPOSITION:

Support

San Diego County District Attorney's Office (Sponsor)
Anti Recidivism Coalition (Co-Sponsor)
Our Road Prison Project (Co-Sponsor)
San Diego Reentry Roundtable/the Neighborhood House Association (Co-Sponsor)
The W. Haywood Burns Institute (Co-Sponsor)
A Helping Hand in Recovery INC
A New Way of Life Re-entry Project
Alameda County Public Defender's Office
American Civil Liberties Union/northern California/southern California/san Diego and Imperial Counties
Blameless and Forever Free Ministries
California Attorneys for Criminal Justice
California Catholic Conference
California Coalition for Women Prisoners
California for Safety and Justice
California Public Defenders Association (CPDA)
California Reentry Program
Center for Employment Opportunities
Center on Juvenile and Criminal Justice
Community Legal Services in East Palo Alto
Cure California
Defy Ventures
Drug Policy Alliance
Ella Baker Center for Human Right
Five Keys Schools and Programs
Fresno Barrios Unidos
Green Life Project of Earth Island Institute
Initiate Justice
Insight Garden Program
Legal Aid At Work
Legal Services for Prisoners With Children

Los Angeles Centers for Alcohol and Drug Abuse
Los Angeles Regional Reentry Partnership (LARRP)
National Association of Social Workers, California Chapter
National Center for Youth Law
National Institute for Criminal Justice Reform
Paper Prisons Initiative
Prisoner Reentry Network
Project Rebound Consortium
Rising Sun Center for Opportunity
Root & Rebound
Rosen Bien Galvan & Grunfeld, Llp
Rubicon Programs
San Francisco Public Defender
Successful Reentry, LLC
The Transformative In-prison Workgroup
Time for Change Foundation
Transitions Clinic Network
Uncommon Law
Yurok Tribal Court Reentry Program

Opposition

None

Analysis Prepared by: Nikki Moore / PUB. S. / (916) 319-3744

Date of Hearing: April 13, 2021
Counsel: Matthew Fleming

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

AB 1237 (Ting) – As Introduced February 19, 2021

SUMMARY: Expands the Department of Justice's (DOJ) data sharing requirements with regard to researchers affiliated with the California Firearm Violence Research Center at UC Davis, and allows the DOJ, in its discretion, to make available specified information to any other nonprofit bona fide research institution or public agency concerned with the study and prevention of violence, for academic and policy research purposes. Specifically, **this bill**:

1) Specifies that the center for research into firearm-related violence be named the California Firearm Violence Research Center at UC Davis.

2) Requires DOJ to maintain all available information necessary to identify and trace the history of all recovered firearms that are illegally possessed, have been used in a crime, or are suspected of having been used in a crime, for a period of 25 years rather than 10 years.

3) Requires DOJ to share all information necessary to identify and trace the history of all recovered firearms that are illegally possessed, have been used in a crime, or are suspected of having been used in a crime with the California Firearm Violence Research Center at UC Davis.

4) Authorizes DOJ, in its discretion, to share the same information with any other nonprofit bona fide research institution or public agency concerned with the study and prevention of violence.

5) Requires that Criminal Offender Record Information (CORI) be provided to the California Firearm Violence Research Center at UC Davis and specifies that material identifying individuals shall only be provided for research or statistical activities and shall not be revealed or used for purposes other than research or statistical activities, and reports or publications derived therefrom shall not identify specific individuals.

6) Requires, unless expressly and specifically prohibited by statute, that state agencies, including, but not limited to, the Department of Justice, the State Department of Public Health, the State Department of Health Care Services, the Office of Statewide Health Planning and Development, and the Department of Motor Vehicles, provide to the California Firearm Violence Research Center at UC Davis, upon proper request, the data necessary for the center to conduct its research, including material identifying individuals, provided that it is used for research or statistical activities and shall not be revealed or used for purposes other than research or statistical activities, and reports or publications derived therefrom shall not identify specific individuals.

7) Requires DOJ to share information that is maintained in the California Restraining and Protective Order System, or any other gun violence restraining order data maintained by DOJ, with researchers affiliated with the University of California Firearm Violence Research Center at UC Davis and gives DOJ discretion, as specified, to provide to any other nonprofit educational bona fide research institution or public agency immediately concerned with the study and prevention of violence, for academic and policy research purposes, provided that any material identifying individuals is not transferred, revealed, or used for other than research or statistical activities and reports or publications derived therefrom shall not identify specific individuals.

8) Requires DOJ to share information contained in the Prohibited Armed Persons File with researchers affiliated with the California Firearm Violence Research Center at UC Davis and gives DOJ discretion, as specified, to provide to any other nonprofit educational bona fide research institution or public agency immediately concerned with the study and prevention of violence, for academic and policy research purposes, provided that any material identifying individuals is not transferred, revealed, or used for other than research or statistical activities and reports or publications derived therefrom shall not identify specific individuals.

9) Requires DOJ to retain information pertaining to all sales and transfers of ownership of ammunition for a period of not less than 25 years in the Ammunition Purchase Records File.

10) Requires DOJ to share information in the Ammunition Purchase Records File with researchers affiliated with the California Firearm Violence Research Center at UC Davis, and gives DOJ discretion, as specified, to provide to any other nonprofit educational bona fide research institution or public agency immediately concerned with the study and prevention of violence, for academic and policy research purposes, provided that any material identifying individuals is not transferred, revealed, or used for other than research or statistical activities and reports or publications derived therefrom shall not identify specific individuals.

11) Requires DOJ to retain information pertaining to for all sales and transfers of ownership of a firearm precursor part for a period of not less than 25 years in the Firearm Precursor Part Purchase Records File.

12) Requires DOJ to share information contained in the Firearm Precursor Part Purchase Records File with researchers affiliated with the California Firearm Violence Research Center at UC Davis and gives DOJ discretion, as specified, to provide to any other nonprofit educational bona fide research institution or public agency immediately concerned with the study and prevention of violence, for academic and policy research purposes, provided that any material identifying individuals is not transferred, revealed, or used for other than research or statistical activities and reports or publications derived therefrom shall not identify specific individuals.

13) Requires DOJ to share reports about persons who have been taken into custody because they are a danger to themselves or others on account of a mental health disorder, as specified, with the California Firearm Violence Research Center at UC Davis, and gives DOJ discretion, as specified, to provide to any other nonprofit educational bona fide research institution or public agency immediately concerned with the study and prevention of violence, for academic and policy research purposes, provided that any material identifying individuals is not transferred, revealed, or used for other than research or statistical activities and reports or

publications derived therefrom shall not identify specific individuals.

14) Requires the State Department of State Hospitals (DSH) to share records of information that is necessary to identify persons who are a danger to themselves or others on account of a mental health disorder, as specified, with the California Firearm Violence Research Center at UC Davis, and gives DOJ discretion, as specified, to provide to any other nonprofit educational bona fide research institution or public agency immediately concerned with the study and prevention of violence, for academic and policy research purposes, provided that any material identifying individuals is not transferred, revealed, or used for other than research or statistical activities and reports or publications derived therefrom shall not identify specific individuals.

15) States that for all material identifying individuals contained in the various data and databases described above, that material shall be provided if it is necessary for the California Firearm Violence Research Center at UC Davis to conduct its research. Material identifying individuals shall only be provided for research or statistical activities and shall not be revealed or used for purposes other than research or statistical activities, and reports or publications derived therefrom shall not identify specific individuals. Reasonable costs to the department associated with the department's processing of that data may be billed to the researcher. If a request for data or letter of support for research using the data is denied, the department shall provide a written statement of the specific reasons for the denial.

EXISTING LAW:

1) Establishes the California Firearm Violence Research Center and makes legislative findings and declarations of intent in regards to firearm violence as a public safety and public health issue and the principles to be addressed by the research center. (Pen. Code, §§ 14230 – 14231.)

2) States that, subject to conditions and requirements, as specified, state agencies, including, but not limited to, the Department of Justice, the State Department of Public Health, the State Department of Health Care Services, the Office of Statewide Health Planning and Development, and the Department of Motor Vehicles, shall provide to the center, upon proper request, the data necessary for the center to conduct its research. (Pen. Code, § 14231, subd. (d).)

3) Authorizes DOJ to provide every public agency or bona fide research body immediately concerned with the prevention or control of crime, the quality of criminal justice, or the custody or correction of offenders with criminal offender record information, including criminal court records, as required for the performance of its duties, so long as any material identifying individuals is not transferred, revealed, or used for purposes other than research or statistical activities and reports or publications derived therefrom do not identify specific individuals, and provided that the agency or body pays the cost of the processing of the data, as determined by the Attorney General. (Pen. Code, § 13202, subd. (a).)

4) Requires law enforcement agencies, as defined, to report to DOJ all available information necessary to identify and trace the history of all recovered firearms that are illegally possessed, have been used in a crime, or are suspected of having been used in a crime, within seven calendar days of obtaining the information and requires DOJ maintain such

information for a period of 10 years. (Pen. Code, § 11108.3, subds. (a) and (d).)

5) States that subject to the conditions and requirements established by law, state agencies, including, but not limited to, the Department of Justice, the State Department of Public Health, the State Department of Health Care Services, the Office of Statewide Health Planning and Development, and the Department of Motor Vehicles, shall provide to the California Firearms Research Center, upon proper request, the data necessary for the center to conduct its research. (Pen. Code, § 14231, subd. (c).)

6) States that DOJ shall make information relating to gun violence restraining orders that is maintained in the California Restraining and Protective Order System, or any similar database maintained by the department, available to researchers affiliated with the University of California Firearm Violence Research Center, or, at the department's discretion, to any other nonprofit educational institution or public agency immediately concerned with the study and prevention of violence, for academic and policy research purposes, provided that any material identifying individuals is not transferred, revealed, or used for other than research or statistical activities and reports or publications derived therefrom shall not identify specific individuals. (Pen. Code, § 14231.5.)

7) Requires the Attorney General shall establish and maintain an online database to be known as the Prohibited Armed Persons File. The purpose of the file is to cross-reference persons who have ownership or possession of a firearm on or after January 1, 1996, as indicated by a record in the Consolidated Firearms Information System, and who, subsequent to the date of that ownership or possession of a firearm, fall within a class of persons who are prohibited from owning or possessing a firearm. (Pen. Code, § 30000, subd. (a).)

8) Provides that the information contained in the Prohibited Armed Persons File shall only be available specified entities through the California Law Enforcement Telecommunications System, for the purpose of determining if persons are armed and prohibited from possessing firearms. (Pen. Code, § 30000, subd. (b).)

9) Requires an ammunition vendor to electronically submit to DOJ specified information for all sales and transfers of ownership of ammunition and requires DOJ to retain this information in a database to be known as the Ammunition Purchase Records File. (Pen .Code, § 30352, subd. (b).

10) Requires a firearm precursor part vendor to electronically submit to DOJ specified information for all sales and transfers of ownership of firearm precursor parts and requires DOJ to retain this information in a database to be known as the Ammunition Purchase Records File. (Pen .Code, § 30452, subd. (b).

11) Provides that a person who, as a result of a mental health disorder, is a danger to others or themself, may be taken into custody for a period of up to 72 hours for assessment, evaluation, and crisis intervention, or placement for evaluation and treatment in a facility designated by the county for evaluation and treatment and approved by the State Department of Health Care Services. (Welf. & Inst. § 5150, subd. (a).)

12) Requires a facility designated to by a county for evaluation and treatment, who admits a person who is a danger to themselves or others as a result of a mental health disorder to

submit a report, within 24 hours of the admission, to the DOJ containing information that includes, but is not limited to, the identity of the person and the legal grounds upon which the person was admitted, and states that any report submitted pursuant to this paragraph shall be confidential, except for purposes of specified court proceedings and for determining the eligibility of the person to own, possess, control, receive, or purchase a firearm. (Welf. & Inst., § 8103, subd. (f)(2)(A) – (B).)

13) Requires DSH to maintain and make available to DOJ records that are necessary to identify persons who are prohibited from owning or possessing a firearm or ammunition or a deadly weapon. (Welf. & Inst. § 8104.)

14) Provides that a state agency shall not disclose any personal information in a manner that would link the information disclosed to the individual to whom it pertains unless the information is disclosed, to the University of California, a nonprofit educational institution, or, in the case of education-related data, another nonprofit entity, conducting scientific research, if the request for information is approved by an institutional review board, and all the following criteria have been satisfied:

   a) The researcher has provided a plan sufficient to protect personal information from improper use and disclosures, including sufficient administrative, physical, and technical safeguards to protect personal information from reasonable anticipated threats to the security or confidentiality of the information;

   b) The researcher has provided a sufficient plan to destroy or return all personal information as soon as it is no longer needed for the research project, unless the researcher has demonstrated an ongoing need for the personal information for the research project and has provided a long-term plan sufficient to protect the confidentiality of that information; and,

   c) The researcher has provided sufficient written assurances that the personal information will not be reused or disclosed to any other person or entity, or used in any manner, not approved in the research protocol, except as required by law or for authorized oversight of the research project. (Civ. Code, 1798.24, subd. (t)(1).)

15) Requires an institutional review board to, at a minimum, accomplish all of the following as part of its review and approval of the research project for the purpose of protecting personal information held in agency databases:

   a) Determine whether the requested personal information is needed to conduct the research;

   b) Permit access to personal information only if it is needed for the research project;

   c) Permit access only to the minimum necessary personal information needed for the research project;

   d) Require the assignment of unique subject codes that are not derived from personal information in lieu of social security numbers if the research can still be conducted without social security numbers; and,

e) If feasible, and if cost, time, and technical expertise permit, require the agency to conduct a portion of the data processing for the researcher to minimize the release of personal information. (Civ. Code, 1798.24, subd. (t)(2).)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "Despite a 30 year history of the California Department of Justice (DOJ) sharing data with gun violence researchers, DOJ has stopped sharing this information and continues to create barriers to the study of gun violence. DOJ's decision to cease providing firearm violence-related data to bona fide research organizations, including the State funded UC Firearm Violence Research Center, has real-world adverse effects. This data leads to evidence based policies and programs that reduce deaths and injuries from gun crimes and California must continue to share this data so we to continue to improve our firearms policies and reduce gun violence. AB 1237 reinforces existing law to ensure that DOJ continues to share gun violence data with researchers at the UC Firearms Violence Center and creates a discretionary process for other bona fide research centers doing firearms research to receive data, while ensuring the information remains confidential."

2) **University of California Firearms Violence Research Center**: In 2016, the Legislature passed budget trailer bill AB 1602. Among other things, AB 1602 authorized the creation of a research center focused on firearm violence at the University of California. The Violence Prevention Research Program at UC Davis was designated as the home of the new research center.

   The research center's mission with respect to firearm violence has three elements:

   1) To conduct research and develop sound scientific evidence on the nature, causes, consequences, and prevention of firearm violence;

   2) To disseminate that evidence and promote the adoption of evidence-based firearm violence prevention measures; and,

   3) To expand and extend such efforts through education and training in firearm violence research and its applications. (UC Davis Violence Prevention Research Program website, available at: https://health.ucdavis.edu/vprp/, [as of April 6, 2021].)

   According to the UC Davis website, the research center has recruited faculty members who have made long term commitments to conducting firearm violence research. Those faculty include investigators, postdoctoral research fellows, statisticians, and analysts.

   The research center produces dozens of publications pertaining to firearm violence. For example, one study was population-based comparison of mortality rates among 238,292 persons who purchased a handgun in California with that in the general adult population of the state during the same time period. (*See* Wintemute, *Mortality among Recent Purchasers of Handguns*, N. Engl J. Med. 341:1583-1589, Nov. 18, 1999, available at: https://www.nejm.org/doi/full/10.1056/NEJM199911183412106, [as of April 7, 2021].) In

order to conduct studies like these, the research center relies predominantly on information provided by California state agencies, such as DOJ.

3) **Information-Sharing with the Firearms Research Center**: According the proponents of this bill, for more than 30 years the Firearms Violence Research Center has had adequate access to information. Recently, however, the research center has been unable to obtain data that was previously made available. (*See* Orr, "AG Becerra Takes Heat for DOJ's Move to Restrict Release of Gun Violence Data," KQED, March 12, 2021, available at: https://www.kqed.org/news/11864335/ag-becerra-takes-heat-for-dojs-move-to-restrict-release-of-gun-violence-data, [as of April 7, 2021].) The decision to restrict the provision of information to the firearms research center was apparently made based upon an interpretation of existing law that prohibited such information sharing.

   This bill would state that DOJ and other agencies must turn over information in specified databases that is necessary for the center to conduct its research. There is already a similar requirement in current law, but that requirement is explicitly subject to other statutory "conditions and requirements." This bill would change that language to state that "unless expressly and specifically prohibited elsewhere in statute." The bill would also amend each of the statutory provisions that require DOJ and other agencies to store information that the center has deemed necessary to conduct its research. It would provide specific, statutory access to databases such as the Armed Prohibited Persons System (APPS), the Criminal Offender Record Information (COIR) database, the precursor parts, ammunition, crime gun tracing, and mental health disorder databases, that relate to the purchase, ownership, transfer, and prohibition against owning or possessing firearms or ammunition. The bill also allows for the sharing of personal information, provided that such information is not made public.

4) **Argument in Support**: According to the bill's sponsor, the *Brady Campaign of California*: "California collects and archives a uniquely rich body of data on potential risk factors for and causes, characteristics, and consequences of gun violence. This data includes records of firearm transactions, crimes involving firearms, armed and prohibited persons, risk protection orders, concealed weapon permit applications, firearm-related deaths and injuries, and other valuable information. California's firearm violence related data has made possible important research that cannot be conducted in any other state. Results from this research have informed firearm safety laws and policies in California and elsewhere, provided an important resource for law enforcement as well as public health and health care professionals, and made major contributions to advancing understanding of firearm violence. This has helped improve the health and safety of Californians and Americans.

   "California recognized the importance of the research of gun violence by creating and funding the Research Center at UC Davis. Additionally, legislation was passed to require state agencies to share information on gun use and violence with the Research Center and allow agencies to share data with other research institutions.

   "Recently, DOJ has stopped sharing this important information and continues to create barriers to the study of gun violence. DOJ's decision to cease providing firearm violence related data to bona fide research organizations has important, real-world adverse effects. This data leads to evidence-based policies and programs that reduce deaths and injuries from gun crimes and California must continue to share this data so we to continue to improve our firearms policies and reduce gun violence.

AB 1237 will play a crucial role in the research ultimately used to prevent the senseless loss of life due to gun violence. This measure does so with safeguards in place to stop the unlawful sharing of personal informational as well as provides a mechanism for DOJ to recover the costs associated with providing this data."

5) **Argument in Opposition**: According to the *California Sportsman's Lobby, INC.*: "The California Sportsmen's Lobby (CSL) opposes AB 1237.

"It would mandate that the Department of Justice (DOJ) release an individual's identity and other private information to the California Firearm Violence Research Center at UC Davis (UCD) when providing data for firearm violence research in specified subject areas.

"There is no credible reason why any research institution such as UCD that works with a large volume of general information pertaining to a particular subject matter would possibly need to know the identities of any individuals or their personal information. It's just not relevant to the larger base of data that is needed for research that is intended to solve firearms violence problems affecting the overall population in general.

"The identities and private information of individuals should not be provided to anyone by DOJ or other state entity other than to a law enforcement agency conducting an investigation that has a specific and lawful need for it. No-one else, not even a researcher, has sufficient justification to have access to it and it would be an unjustified intrusion into such a person's privacy.

"It is inconceivable that any broad-based research conducted by UCD would require as necessary and justifiable, any specific material identifying an individual or providing their private information in order for it to conduct its research.

"For DOJ or other entity to provide UCD with an individual's name and other personal information could subject DOJ or other entity and UCD to liability resulting from the inappropriate use of the information by UCD or its 'affiliates', or the inappropriate distribution of it by UCD or its affiliates to other unauthorized persons or entities.

"AB 1237 emphasizes providing UCD information that '… is necessary for the center to conduct its research…', but makes no effort to define 'necessary' for this purpose or to justify when an individual's personal information constitutes 'necessary' information.

"The bill also would provide that such information can be made available to researchers 'affiliated' with UCD, and also at the department's discretion, '…be made available to any other nonprofit bona fide research institution or public agency concerned with the study and prevention of violence, for academic and policy research purposes.'

"However, no effort is made in AB 1237 to define what 'affiliated' or 'nonprofit bona fide research institution or public agency' means for purposes of the bill. Are these references to outside independent contractors, graduate students or interns, or public agencies which may not be sufficiently qualified or experienced in conducting this kind of research?

"The bill is vague, perhaps constitutionally vague, with respect to exactly what is intended.

How would an individual's identity and private personal information be protected?

"A UCD representative was reported in the Sacramento Bee newspaper on March 4, 2021, as having indicated that UCD would protect personal confidential information by managing it under a secure password-protected server and that only authorized researchers would have access to it.

"This provides little comfort that the information would actually be secure.

"How secure is the UCD password-protected server? The data bases at the Employment Development Department (EDD) and other state entities have been shown to be not as secure as believed. Is the server used by UCD more secure than those of other state entities? CSL believes it is not."

6) **Prior Legislation**:

a) AB 521 (Berman) Chapter 728, Statutes of 2019, 1) Requires the University of California Firearm Violence Research Center to develop education and training programs for medical and mental health providers on the prevention of firearm-related injury and death and would apply those programs to the University of California (UC) to the extent that the Regents of the University of California choose to do so.

b) AJR 5 (Jones Sawyer) Chapter 127, Statutes of 2019, urged the federal government to use California as an example for firearm safety and to pass legislation that would provide universal firearm safety regulation throughout the nation.

c) AB 1602 (Committee on Budget) Chapter 24, Statutes of 2016, this budget trailer bill established the provisions of law pertaining to the firearm violence research center at the University of California.

REGISTERED SUPPORT / OPPOSITION:

Support

Brady Campaign (Sponsor)
Brady Campaign California (Sponsor)
Coalition to Stop Gun Violence
Friends Committee on Legislation of California
Giffords
Laguna Woods Democratic Club
National Association of Social Workers, California Chapter
San Diegans for Gun Violence Prevention
The Violence Prevention Coalition of Orange County
Women Against Gun Violence

Oppose

California Sportsman's Lobby, INC.
Gun Owners of California, INC.
Outdoor Sportsmen's Coalition of California
Safari Club International - California Chapters

Analysis Prepared by: Matthew Fleming / PUB. S. / (916) 319-3744

Date of Hearing: April 13, 2021
Counsel: David Billingsley

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

AB 931 (Villapudua) – As Amended April 8, 2021

SUMMARY: Requires the Commission on Peace Officer Standards and Training (POST) to include specified elements in the training on duty to intercede where there is excessive use of force by another peace officer, including both classroom instruction and extensive simulator-based training or live scenario-based training. This bill would additionally require every law enforcement officer to complete an updated course of instruction on the duty to intercede every 2 years. Specifically, **this bill**:

1) Requires the duty to intercede training to include the following elements:

   a) A robust discussion of the science of active bystandership, including an exploration of social science experiments that help explain the inhibitors to intervention;

   b) Interactive facilitated discussions of the inhibitors to intervention, with a special focus on inhibitors at play in a hierarchical organizational structure;

   c) Interactive discussions of where, how, and why deliberate intervention training has worked in other professions;

   d) Multiple practical skills and tactics targeted at increasing the frequency and effectiveness of interventions, including actual practice using those skills and tactics;

   e) Interactive discussions of how intervention tactics can be used in a variety of settings, including to prevent misconduct, prevent mistakes, and promote officer health and wellness;

   f) Meaningful live, facilitated scenario-based role plays;

   g) The mental health and wellness risks of non-intervention;

   h) The legal and practical risks of non-intervention;

   i) The impact of non-intervention on communities and individual community members;

   j) A focus on the importance of developing a law enforcement culture where intervention is not only encouraged, but expected, among members of a law enforcement organization regardless of the risk of the intervenor or the individual being intervened upon; and

k) At least eight hours of both classroom instruction and extensive simulator-based training or live scenario based-training.

2) Requires every law enforcement officer to complete an updated course of instruction on the duty to intercede every two years.

3) Makes Legislative Findings and Declarations

EXISTING LAW:

1) Requires POST to implement a course or courses of instruction for the regular and periodic training of law enforcement officers in the use of force and shall also develop uniform, minimum guidelines for adoption and promulgation by California law enforcement agencies for use of force. (Pen. Code, § 13519.10, subd. (a)(1).)

2) Specifies that the guidelines and course of instruction shall stress that the use of force by law enforcement personnel is of important concern to the community and law enforcement and that law enforcement should safeguard life, dignity, and liberty of all persons, without prejudice to anyone. (Pen. Code, § 13519.10, subd. (a)(1).)

3) State that these guidelines shall be a resource for each agency executive to use in the creation of the use of force policy that the agency is required to adopt and promulgate pursuant to Section 7286 of the Government Code, and that reflects the needs of the agency, the jurisdiction it serves, and the law. (Pen. Code, § 13519.10, subd. (a)(1).)

4) Requires that the course or courses of the regular basic course for law enforcement officers and the guidelines shall include all of the following:

   a) Legal standards for use of force;

   b) Duty to intercede;

   c) The use of objectively reasonable force;

   d) Supervisory responsibilities;

   e) Use of force review and analysis;

   f) Guidelines for the use of deadly force;

   g) State required reporting;

   h) Deescalation and interpersonal communication training, including tactical methods that use time, distance, cover, and concealment, to avoid escalating situations that lead to violence;

   i) Implicit and explicit bias and cultural competency;

j) Skills including deescalation techniques to effectively, safely, and respectfully interact with people with disabilities or behavioral health issues;

k) Use of force scenario training including simulations of low-frequency, high-risk situations and calls for service, shoot-or-don't-shoot situations, and real-time force option decisionmaking;

l) Alternatives to the use of deadly force and physical force, so that deescalation tactics and less lethal alternatives are, where reasonably feasible, part of the decisionmaking process leading up to the consideration of deadly force;

m) Mental health and policing, including bias and stigma; and

n) Using public service, including the rendering of first aid, to provide a positive point of contact between law enforcement officers and community members to increase trust and reduce conflicts. (Pen. Code, § 13519.10, subd. (b)(1)-(14).)

5) Specifies that law enforcement agencies are encouraged to include, as part of their advanced officer training program, periodic updates and training on use of force. (Pen. Code, § 13519.10, subd. (c).)

6) States that the course or courses of instruction, the learning and performance objectives, the standards for the training, and the guidelines shall be developed by the commission in consultation with appropriate groups and individuals having an interest and expertise in the field on use of force. (Pen. Code, § 13519.10, subd. (d)(1).)

7) Requires POST, in consultation with these groups and individuals, shall review existing training programs to determine the ways in which use of force training may be included as part of ongoing programs. (Pen. Code, § 13519.10, subd. (d)(2).)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "In the aftermath of the death of George Floyd, policymakers across the world have taken an interest in understanding what set of policies should have been in place to prevent his death. AB 931 represents one of those policy proposals that is rooted in academic research and the psychology of peer intervention. We expect law enforcement officers to intervene to stop a peer's use of excessive force, just as we expect co-pilots and allied health professionals to keep a watchful eye in their respective fields to prevent plane crashes and medical errors. Unfortunately, law enforcement agencies have not taken the steps to ensure that they can create an environment that is conducive of peer intervention.

"AB 931 recognizes that police officers need to be conditioned and trained in peer intervention to increase the likelihood that it occurs on the job, thereby reducing instances of unreasonable and excessive uses of force."

2) **Duty to Intercede When Another Officer Uses Excessive Force:** Current law specifies that every law enforcement agency have a policy that requires an officer intercede when present and observing another officer using force that is clearly beyond that which is necessary, as determined by an objectively reasonable officer under the circumstances, taking into account the possibility that other officers may have additional information regarding the threat posed by a subject. That requirement was established by SB 230 (Caballero), Chapter 285, Statutes of 2019.

   SB 230 requires the basic training course for officers to include specified elements regarding the use of force. One of those elements is the duty to intercede when another officer uses excessive force. SB 230 also requires POST to implement a course or courses of instruction for the regular and periodic training of law enforcement officers in the use of force. That training includes instruction on the duty to intercede when another officer uses excessive force.

3) **POST Training on Duty to Intercede:** POST has developed use of force standards and guidelines for law enforcement agencies. Those standards include guidance on interceding when another officer is uses excessive force.

   POST's standards and guidelines direct law enforcement agencies to have a policy which encourages officers to intercede when another officer is using or is about to use unnecessary or excessive force. That intercession should occur before a situation escalates to the use of the unnecessary or excessive force. Intercession may be verbal and/or physical. (https://post.ca.gov/Portals/0/post_docs/publications/Use_Of_Force_Standards_Guidelines.pdf)

   Those standards also direct officers who observe force that is clearly beyond that which is necessary as determined by an objectively reasonable officer under the circumstances, should take appropriate action to cause the unnecessary or excessive force to immediately cease. "Intercession may be verbal and/or physical. The duty of an officer to intercede is not relieved by nor should it be deferrable to other officers or supervisors at the scene. Supervisors who observe force that is clearly beyond that which is necessary as determined by an objectively reasonable officer under the circumstances, should issue a verbal command to the officer and take appropriate action to cause the unnecessary or excessive force to immediately cease."

   POST training serves as a platform to educate officers on these standards. The POST-certified Regular Basic Course (basic academy) is the training standard for police officers, deputy sheriffs, school district police officers, district attorney investigators, as well as a few other classifications of peace officers. The basic academy includes a minimum of 664 hours of POST-developed training and testing in 42 separate areas of instruction called Learning Domains.

   Academy students are subject to various written, skill, exercise, and scenario-based tests. Students must also participate in a physical conditioning program which culminates in a Work Sample Test Battery (physical ability test) at the end of the academy. Students must pass all tests in order to graduate from the basic academy. (https://post.ca.gov/peace-officer-basic-training)

Learning Domain #20 concerns the use of force by peace officers. Learning Domain #20 includes instruction on the legal standards governing use of force, the importance of complete documentation when force has been used, and the need to intervene if another officer is using excessive force.

This bill would require the duty to intervene training in the basic academy to include at least eight hours of both classroom instruction and extensive simulator-based training or live scenario based-training. It is not clear if mandating this minimum training time would require POST to compromise training in some other area.

4) **Continuing Professional Training Requirement:** POST is also responsible for supervising the continuing training for officers after they are employed by a law enforcement agency. Every peace officer (other than certain Reserve Peace Officers), Public Safety Dispatcher, and Public Safety Dispatch Supervisor shall satisfactorily complete the continuing professional training requirement of 24 or more hours of POST-qualifying training during every two-year CPT cycle. Effective January 1, 2002, certain peace officers in specific duty assignments must satisfy a portion of the continuing professional training requirement by completing Perishable Skills and Communications training. (https://post.ca.gov/refresher-training)

   Perishable Skills training consists of a minimum of 12 hours in each two-year period. Of the total 12 hours required, a minimum of 4 hours of each of the three following areas shall be completed:

   a) Arrest and Control;

   b) Driver Training/Awareness or Driving Simulator; and

   c) Tactical Firearms or Force Options Simulator. (Id.)

   This bill would require every law enforcement officer to complete an updated course of instruction on the duty to intercede every two years and requiring that instruction to include the same elements to be included in the basic training on duty to intercede.

5) **Active Bystandership for Law Enforcement (ABLE) Project and EPIC Program:** Dr. Ervin Staub developed training of police officers designed to teach them tools to make it more likely that officers will intervene when they witness another officer engage in misconduct. The training is called Ethical Policing Is Courageous (EPIC). It was first introduced by the police force in the Louisiana city of New Orleans in 2014.
   It emphasizes the responsibility of bystanders. Every officer is reminded of their duty to act if they see bad behavior.

   The Georgetown Innovative Policing Program created the ABLE (Active Bystandership for Law Enforcement) Project to prepare officers to successfully intervene to prevent harm and to create a law enforcement culture that supports peer intervention. The ABLE Project builds off the EPIC Peer Intervention Program.

   These programs define a "bystander" as a witness who is in a position to know what is happening and is in a position to take action. A ''passive bystander,'' then, is someone who

fails to take action where the circumstances would seem to require action. While use of force, de-escalation techniques, and other force-related topics are commonplace in police academies, a focus on how those who witness the use of excessive force can stop or mitigate it still is not. (https://epic.nola.gov/epic/media/Assets/Aronie-Lopez,-Keeping-Each-Other-Safe.pdf) (citing research by Staub, 2007.)

Intervention training starts with recognizing the factors that contribute to passive bystandership – from fear of retaliation to the inhibiting influence passive bystanders can exert on each other. (https://www.law.georgetown.edu/news/georgetown-laws-innovative-policing-program-launches-project-able/) Police officers need to get comfortable both giving and receiving such interventions. Officers are trained to slowly escalate their interventions when time allows, starting with a probing statement, followed by a question, a challenge, and then rising to physical intervention. It also teaches them to accept intervention from their colleagues. It's a technique the program borrowed from the military and other professions like nursing, where a momentary mistake can be fatal. (https://www.mprnews.org/story/2020/08/04/active-bystander-training-teaching-cops-to-say-something-if-they-see-something)

This bill would require POST's training at the Basic Academy to include specific elements in the training on duty to intercede which include, among other elements:

a) Discussion of the science of active bystandership, including an exploration of social science experiments that help explain the inhibitors to intervention;

b) Interactive discussions of where, how, and why deliberate intervention training has worked in other professions;

c) Multiple practical skills and tactics targeted at increasing the frequency and effectiveness of interventions, including actual practice using those skills and tactics; and

d) Meaningful live, facilitated scenario-based role plays; and

e) A focus on the importance of developing a law enforcement culture where intervention is not only encouraged, but expected, among members of a law enforcement organization regardless of the risk of the intervenor or the individual being intervened upon.

6) **Argument in Support**: According to the *Southern Christian Leadership Conference of California*, "We are familiar with the studies surrounding workplace culture and the apprehension that employees have in confronting a coworker that engages in misconduct. This is not unique to policing, but the implications of law enforcement misconduct have shaken this nation, especially African American communities, to its core for too long.

"We believe that accountability is strongly needed as a remedy to misconduct. We also believe that the instruction and training that you are proposing in AB 931 is necessary to set expectations, help individual law enforcement officers understand the types of apprehension and subconscious bias they are likely to encounter in very tense situations, and help them understand how to overcome these inhibitors to intervening when necessary. We are also very hopeful that this training will drive culture change in many departments by setting

expectations for behavior."

7) **Related Legislation**:

a) AB 26 (Holden), would require use of force policies for law enforcement agencies to include the requirement that officers immediately report potential excessive force, and further describes the requirement to "intercede" if another officer uses excessive force. AB 26 is pending before the Assembly Appropriations Committee.

b) AB 60 (Salas), would create a process to decertify police officers. AB 60 is pending in the Assembly Public Safety Committee.

c) SB 2 (Bradford), would create a process to decertify police officers and expand the scope of the Bane Act. SB 2 is pending before the Senate Public Safety Committee.

d) SB 16 (Skinner), would make more incidents of police misconduct available to the public. SB 16 is pending before the Senate Judiciary Committee

8) **Prior Legislation**:

a) AB 1022 (Holden), of the 2019-2020 Legislative Session, would have clarified and strengthened policies related to law enforcement officers' duty to intervene when excessive force is used. AB 1022 was held on the Senate Appropriations Suspense File.

b) SB 731 (Bradford), of the 2019-2020 Legislative Session, would have created a process for decertification of police officers. SB 731 was never heard on the Assembly Floor.

c) AB 1022 (Holden), of the 2019-2020 Legislative Session, would have disqualified a person from being a peace officer if they have been found by a law enforcement agency that employees them to have either used excessive force that resulted in great bodily injury or death or to have failed to intercede in that incident as required by a law enforcement agency's policies. AB 1022 was held on the Senate Appropriations Suspense File.

d) AB 243 (Kamlager),of the 2019-2020 Legislative Session, would have required require those peace officers currently required to take the refresher course every five years, and additional peace officers, as specified, to instead take refresher training on racial and identity profiling, including the understanding of implicit bias and the promotion of bias-reducing strategies, at least every 2 years. AB 243 was held in the Senate Appropriations Committee.

e) SB 230, Caballero, Chapter 285, Statutes of 2019, requires each law enforcement agency to maintain a policy that provides guidelines on the use of force, utilizing deescalation techniques and other alternatives to force when feasible, specific guidelines for the application of deadly force, and factors for evaluating and reviewing all use of force incidents, among other things.

f) AB 1506 (McCarty), Chapter 326, Statutes of 2020, requires a state prosecutor to investigate incidents of an officer-involved shooting resulting in the death of an unarmed civilian, as defined.

g) AB 2327 (Quirk), Chapter 966, Statutes of 2018, requires a peace officer seeking employment with a law enforcement agency to give written permission for the hiring law enforcement agency to view his or her general personnel file and any separate disciplinary file. Requires each law enforcement agency to make a record of any investigations of misconduct involving a peace officer in his or her general personnel file or a separate file designated by the department or agency.

h) AB 619 (Weber), of the 2015-2016 Legislative Session, would have required law enforcement agencies to report use of force incidents to the Attorney General (AG) and would have required the AG to annually issue a report containing this information. AB 619 was held in the Assembly Appropriations Committee.

REGISTERED SUPPORT / OPPOSITION:

Support

Baptist Minister Conference of Los Angeles
National Action Network Los Angeles
Southern Christian Leadership Conference of Southern California

Opposition

None

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