California State Assembly

PUBLIC SAFETY

REGINALD BYRON JONES-SAWYER SR.
CHAIR

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AGENDA

Tuesday, April 20, 2021
1:30 p.m. -- State Capitol, Room 4202

HEARD IN FILE ORDER

LIMITED TESTIMONY FOR SUPPORT AND OPPOSITION

TWO WITNESSES PER SIDE - FIVE MINUTES TOTAL

1.	AB 625	Arambula	State Public Defender: indigent defense: study.
2.	AB 1440	Bauer-Kahan	Civil rights crimes.
3.	AB 960	Bonta	Medical parole.
4.	AB 990	Bonta	Prisons: inmate visitation.
5.	AB 939	Cervantes	Sex offenses: evidence.
6.	AB 1247	Chau	Criminal procedure: limitations of actions.
7.	AB 1474	Gabriel	Sentencing: consideration of costs.
8.	AB 1165	Gipson	Juvenile facilities: storage and use of chemical agents.
9.	AB 1003	Lorena Gonzalez	Wage theft: grand theft.
10.	AB 94	Jones-Sawyer	Correctional officers.
11.	AB 750	Jones-Sawyer	Crimes: perjury.
12.	AB 124	Kamlager	Criminal procedure.
13.	AB 127	Kamlager	Arrest warrants: declaration of probable cause.
14.	AB 760	Lackey	Prisoners: friction ridge impressions.
15.	AB 1228	Lee	Supervised persons: release.
16.	AB 1224	Levine	Sentencing: special circumstances.
17.	AB 1191	McCarty	Firearms: tracing.
18.	AB 557	Muratsuchi	Hate crimes: hotline.
19.	AB 1057	Petrie-Norris	Firearms.
20.	AB 1193	Blanca Rubio	Solicitation of prostitution from a minor.
21.	AB 1210	Ting	Board of Parole Hearings: commissioners.
22.	AB 1225	Waldron	The Dignity for Incarcerated Women Act.

MOTION FOR RECONSIDERATION

23.	AB 266	Cooper	Violent felonies: hate crimes.

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 20, 2021
Chief Counsel: Gregory Pagan

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

AB 625 (Arambula) – As Amended March 25, 2021

SUMMARY: Directs the State Public Defender to undertake a study to determine the appropriate ratio of public defenders and indigent defense attorneys to misdemeanor and felony indigent defendants and submit a report with their findings and recommendations to the Legislature no later than January 1, 2024.

EXISTING LAW:

1) Provides that there is established in the Office of Emergency Services (OES), a program of financial assistance to provide for statewide programs of education, training, and research for local public prosecutors and public defenders. All funds made available to the office for education and training shall be administered by the Director of OES. (Pen. Code, § 11501, subd. (a).)

2) States that the Director of OES is authorized to allocate and award funds to public agencies or private nonprofit organizations for the purpose of establishing statewide programs of education, training, and research for public prosecutors and public defenders, which programs meet specified criteria. (Pen. Code, § 11501, subd. (b.).)

3) Provides that the criteria for selection of education, training, and research programs for local public prosecutors, and public defenders shall be developed by the OES in consultation with an advisory group entitled the Prosecutors and Public Defenders Education and Training Advisory Committee, as specified. (Pen. Code, § 11502, subd. (a).)

4) States that the Governor shall appoint a State Public Defender, subject to confirmation by the Senate. The State Public Defender shall be a member of the State Bar, shall have been a member of the State Bar during the five years preceding appointment, and shall have had substantial experience accused or convicted persons in criminal or juvenile proceedings during that time. (Gov. Code, § 15400.)

5) Provides that the State Public Defender shall be appointed for a term of four years commencing on January 1, 1976, and shall serve until the appointment of his or her successor. Any vacancy shall be filled for the balance of the unexpired term, and the State Public shall receive a salary, as specified. (Gov. Code, § 15401.)

6) States that the State Public Defender may employ deputies and other employees, contract with county public defenders, private attorneys, and nonprofit corporations and establish and operate offices as they may need for the proper performance of their duties. The State Public Defender may provide for participation by those attorneys and organizations in the performance of the State Public Defender duties. The attorneys and organizations shall serve

under the supervision and control of the State Public Defender and shall be compensated for their services, as specified. The State Public Defender may also enter into reciprocal or mutual assistance agreements with the board of supervisors of one or more counties to provide for the exchange of personnel on a temporary basis to perform public defender duties in a county where the public defender has properly refused to represent a party because of a conflict of interest. (Gov. Code, § 15402.)

7) Provides that the State Public Defender shall formulate plans for the representation of indigent defendants in the Supreme Court and in each appellate district, as specified. Each plan shall be adopted on the approval of the court to which the plan is applicable. Any such plan may be modified or replaced by the State Public Defender with the approval of the court to which the plan is applicable. (Gov. Code. § 15403.)

FISCAL EFFECT: Unknown.

COMMENTS:

1) **Author's Statement**: According to the author, "Despite the U.S. and California Constitutions guaranteeing the right to counsel, in many places economically disadvantaged defendants are not represented or are underrepresented. Indigent defendants are often forced to wait in jail for long periods of time before their sentencing. Public defenders or assigned counsel are too often forced to oversee countless numbers of cases at once, giving short shrift to investigation, case preparation, and legal research. They often meet their clients for the first time minutes before critical proceedings. Moreover, prosecutors are frequently equipped with greater resources and larger staffs than that of public defenders. Access to an attorney means little if they lack the time, resources, or skills to be an effective advocate. The absence of strong, well-resourced indigent defense systems offends the U.S. and California Constitutions, leads to deeply unfair results, and contributes to our overburdened jail and prison systems. AB 625 will improve California's indigent defense systems to ensure quality representation for all defendants, regardless of income or social status."

2) **Argument in Support**: According to the *California Attorneys for Criminal Justice,* "AB 625 would direct the State Public Defender to study the indigent defendant caseloads of public defenders and defense attorney. The caseloads of public defenders and indigent defense attorneys are notoriously large. Attorneys handling caseloads of upwards of 100 cases at a time is not unheard of, prosecutors get all of the resources, putting public defenders in a position to do more with less. Public defenders must work day and night to protect the constitutional rights of the accused and deserve sufficient resources. CACJ believes that the responsibility and the work that a public defender does deserves full and adequate funding.

"AB 625 will further shed light on these issues by requiring to undertake a study to determine the appropriate ratio of public defenders and indigent defense attorneys to misdemeanor and felony indigent defendants. This study will hopefully lead to greater resources being devoted by the state to indigent defense."

REGISTERED SUPPORT / OPPOSITION:

Support

California Attorneys for Criminal Justice

Opposition

None

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

Date of Hearing: April 20, 2021
Counsel: Cheryl Anderson

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

AB 1440 (Bauer-Kahan) – As Introduced February 19, 2021

SUMMARY: Increases the penalty for a misdemeanor civil rights violation (hate crime), making it alternatively punishable as a felony by 16 months, or two, or three years in the county jail.

EXISTING LAW:

1) 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).)

1) 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).)

2) 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 their hours of employment or school attendance. (Pen. Code, § 422.6, subd. (c).)

3) Makes any other 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.)

4) 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).)

5) 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).)

6) 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).)

7) States that any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement made (either verbally, in writing, or by means of an electronic device) is to be taken as a threat, even if there is no intent of carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened a gravity of purpose and an immediate prospect of execution, and which thereby causes the person reasonably to be in sustained fear for their own safety or that of their family, is guilty of a crime punishable either as a misdemeanor or felony in state prison, as specified. (Pen. Code, § 422.)

8) Provides that any person who knowingly threatens to use a weapon of mass destruction with the specific intent that the statement, as defined, or a statement made by means of an electronic device, is to be taken as a threat, even if there is no intent of carrying it out, which on its face and under the circumstances in which it is made, is so unequivocal, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution, and thereby causes the person reasonably to be in sustained fear of for personal safety or that of their family is guilty of a crime. (Pen. Code, § 11418.5, subd. (a).)

9) Provides that any person who, with intent to annoy, telephones or makes contact by means of an electronic communication device with another and addresses to or about the other person any obscene language or addresses to the other person any threat to inflict injury to the person or property of the person addressed or any member of his or her family, is guilty of a misdemeanor. (Pen. Code, § 653m.)

10) Requires a peace officer to release persons arrested for misdemeanors with a written notice to appear in court, containing the name and address of the person, the offense charged, and the time when, and place where, the person shall appear in court, except in specified circumstances. (Pen. Code, § 853.6.)

11) Provides that an officer may take a person charged with a misdemeanor into custody if there is a reasonable likelihood that the offense would continue or resume or that the safety of a person or property would be imminently endangered by release of the person arrested. (Pen. Code, § 853.6, subd. (i)(7).)

FISCAL EFFECT: Unknown.

COMMENTS:

1) **Author's Statement**: According to the author, "In the summer of 2019, a man made violent threats against a synagogue in my district. In the man's a home, police found an illegally modified assault weapon – designed for maximum destruction - and high-capacity magazines.

"He was arrested for the charge of the threat and weapons, but only days later the man posted bail and was released from custody. Members of the Jewish community were rightly terrified. The District Attorney's hands were tied with only the possibility of a misdemeanor charge.

"In 2020, due to COVID-19, hate crimes against Asian Americans spiked. Hateful and racist threats have been spewed at the API community, tied to the virus's origin in China. We cannot allow these terroristic threats of violence to continue in our state.

"AB 1440 strengthens law against individuals making domestic terroristic threats by allowing a District Attorney the option of a felony charge for people who threaten hate crimes against individuals or groups based on race, religion, or gender. DA's must have the option of denying bail for the most dangerous individuals in order to protect vulnerable people from extremist threats of violence."

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) **Necessity of this Bill**: According to information provided by the author's office, the problem this bill seeks to address is that "[c]urrently, when an individual makes terrorist threats against a protected class, district attorneys cannot charge that person with a felony hate crime. Terrorist threats against protected classes can only be charged as misdemeanors."

   Under existing law, criminal threats is a wobbler, punishable by up to one year in the county jail, or by imprisonment in state prison for 16 months, two, or three years, and/or a fine. (Pen. Code, § 422.) Where the criminal threat constitutes a hate crime, the sentence is subject to an enhancement of an additional one, two, or three years. (Pen. Code, § 422.75, subd. (a).)

4) **Prison and Jail Overcrowding**: **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].)

   While well intentioned, authorizing lengthier sentences for civil rights violations, irrespective of the nature of the underlying act, will put additional pressure on county jail populations.

5) **Argument in Support**: According to the *Peace Officers Research Association of California (PORAC)*: "Current law 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. Current law also 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. This bill would make the above crimes punishable either as a misdemeanor or as a felony, to be served in county jail for 16 months, or 2 or 3 years.

   "PORAC believes that domestic terrorism and hate-motivated violence against minority groups needs to be taken extremely seriously. By giving district attorneys the ability to charge these threats as misdemeanors or felonies, while also allowing for higher bail and longer pretrial detention, we hope that hate crimes will decrease and victims will get the justice they deserve."

6) **Argument in Opposition**: According to the *American Civil Liberties Union,* "This bill would allow the imposition of felony penalties for hate crimes punishable under Penal Code section 422.6, taking what are currently misdemeanors and turning them into wobblers. This effect of the bill goes far beyond the author's stated intent of allowing felony prosecution in cases involving terroristic threats against a protected class – it allows imposition of felony penalties across a broad range of offenses, including vandalism and other low-level offenses when carried out because the victim belongs to a protected class. While we appreciate the author's willingness to engage with us in discussion of our concern regarding the bill's overbreadth, we do not believe the proposed change to the law is needed to address serious, hate-motivated threats. Opening up a large number of misdemeanor offenses to felony prosecution, as proposed in AB 1440, will do nothing to prevent hate crimes, instead only contributing to California's continuing overreliance on incarceration.

   "Existing law allows a crime that is punishable as a felony under other laws to be prosecuted as such, and also as a hate crime under section 422.6. Section 422.6 expressly states, 'Conduct that violates this and any other provision of law … may be charged under all applicable provisions.' Thus, in the 2019 Concord case involving online threats of a mass shooting against Jewish people, the offender could have been charged with many different offenses, including some such as criminal threats under section 422, punishable as felonies. The prosecution could also have charged a violation of section 422.6, without giving up the ability to prosecute for the non-hate-crime felonies. It is unclear why a change in law is needed to allow cases like this one to be prosecuted both as felonies, if the offense rises to that level, and as hate crimes.

   "Felony penalties for offenses appropriately categorized as misdemeanors will not deter future hate crimes. To prevent hate crimes, we must seek solutions beyond the ineffective step of increasing penalties: we must work to find ways to address the underlying causes that motivate people to seek to harm people simply because of who they are."

7) **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 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.

c) AB 1356 (Bauer-Kahan), would do the same thing as this bill, among other things. AB 1356 passed out of this committee and is pending in the Committee on Privacy and Consumer Protection.

8) **Prior Legislation**:

a) AB 2925 (Bauer-Kahan), of the 2019-2020 Legislative Session, was substantially similar to this bill. AB 2925 was not heard in this committee.

b) AB 907 (Grayson), of the 2018-2019 Legislative Session, would have created a new crime of threatening a school or place of worship. AB 907 was held on the Senate Appropriations Committee suspense file.

REGISTERED SUPPORT / OPPOSITION:

Support

California District Attorneys Association
Peace Officers Research Association of California (PORAC)

Opposition

ACLU California Action
California Public Defenders Association (CPDA)
San Francisco Public Defender

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

Date of Hearing: April 20, 2021
Counsel: David Billingsley

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

AB 960 (Bonta) – As Amended April 12, 2021

As Proposed to be Amended in Committee

SUMMARY: Creates a medical parole panel at each California Department of Corrections and Rehabilitation (CDCR) prison. Expands the criteria for medical parole. Specifically, **this bill**:

1) Specifies that notwithstanding any other law, and except as otherwise provided in this bill, an incarcerated person shall be granted medical parole if the medical parole panel of an institution in which an incarcerated person is incarcerated determines that the incarcerated person meets any of the following criteria:

   a) An incarcerated person is in debilitating pain or has a debilitating disease. For the purpose of this section "debilitating disease" shall have the same meaning as "chronic and seriously debilitating," as defined;

   b) An incarcerated person is permanently medically incapacitated with a medical condition that renders the incarcerated person permanently unable to perform activities of basic daily living, resulting in the incarcerated person requiring 24-hour care, and that incapacitation did not exist at the time of sentencing; or,

   c) An incarcerated person qualifies for treatment in hospice care. An incarcerated person qualifies for hospice care under the following criteria:

      i) The hospice primary care provider or Chief Medical Executive or designee certifies a prognosis of six months or less if the disease follows its expected course;

      ii) The patient or designated legal representative agrees to palliative goals and philosophy of hospice services;

      iii) The custody level is appropriate and there cannot be any other precluding custody considerations;

      iv) The hospice has the ability to meet the needs of the patient according to the level and intensity of care required; and,

      v) The patient follows safety measures and the plan for medical and nonmedical emergencies.

2) States that medical parole panel shall consider an incarcerated person's chronological age in conjunction with each of the above criteria in evaluating whether the incarcerated person

meets the criteria for medical parole.

3) Specifies that the following persons are not entitled to medical parole:

   a) An incarcerated person sentenced to death or life in prison without possibility of parole;

   b) An incarcerated person who is serving a sentence for which parole, as specified, is prohibited by any initiative statute; and,

   c) An incarcerated person who was convicted of first-degree murder if the victim was a peace officer, as defined.

4) Provides that a medical parole panel shall be present at each institution and comprised of the following three members:

   a) A CDCR psychologist or social worker;

   b) A representative of California Correctional Health Care Services; and

   c) The incarcerated person's primary care provider.

5) Specifies that a prison's medical parole panel is the state's parole authority for the purposes of medical parole decisions and is responsible for protecting victims' rights during the medical parole process.

6) States that when a physician employed by the CDCR who is the primary care provider for an incarcerated person identifies an incarcerated person that the primary care provider believes meets the medical criteria for medical parole, the primary care physician shall recommend to the institution's medical parole panel that the incarcerated person be considered for medical parole.

7) States that within three business days of an incarcerated person being referred to the medical parole panel for, the CDCR shall notify registered victims and the prosecuting agency or agencies of the incarcerated person's pending medical parole review and provide the victims an opportunity to participate in the medical parole process and to provide information to the medical parole panel to be considered before the medical parole of the incarcerated person.

8) Provides that within 45 days of the medical parole panel's receipt of the recommendation, the medical parole panel shall convene and make an independent judgment regarding whether the incarcerated individual meets the criteria for medical parole

9) Requires the medical parole panel to consider the safety of any victim in their review and consideration of an incarcerated person for medical parole.

10) Requires the medical parole panel to make an independent judgment whether the conditions under which the incarcerated person would be released pose a reasonable threat to public safety, and make a written finding thereto.

11) Requires the CDCR secretary to issue a directive to medical staff employed by the department that details the guidelines and procedures for the medical parole process as described in this section.

12) States that CDCR shall provide incarcerated persons with information regarding the medical parole process described in this section in a manner and format prescribed by CDCR.

13) Specifies that on or before January 1, 2023, CDCR shall create a page on its internet website where information regarding the medical parole process shall be accessible to the public.

EXISTING LAW:

1) Specifies that the court shall have the discretion to resentence or recall if the court finds that the following facts exist:

   a) The prisoner is terminally ill with an incurable condition caused by an illness or disease that would produce death within 12 months, as determined by a physician employed by the department and the conditions under which the prisoner would be released or receive treatment do not pose a threat to public safety; or

   b) The prisoner is permanently medically incapacitated with a medical condition that renders them permanently unable to perform activities of basic daily living, and results in the prisoner requiring 24-hour total care, including, but not limited to, coma, persistent vegetative state, brain death, ventilator-dependency, loss of control of muscular or neurological function, and that incapacitation did not exist at the time of the original sentencing and the conditions under which the prisoner would be released or receive treatment do not pose a threat to public safety (Pen. Code, §1170, subd. (e)(2)(A)-(C).)

2) States that within 10 days of receipt of a positive recommendation by the secretary of California Department of Corrections (CDCR), the court shall hold a hearing to consider whether the prisoner's sentence should be recalled. (Pen. Code, §1170, subd. (e)(3).)

3) Specifies that any physician employed by the CDCR who determines that a prisoner has 12 months or less to live shall notify the chief medical officer of the prognosis. If the Chief medical officer concurs with the prognosis, they shall notify the warden. Within 48 hours of receiving notification, the warden or the warden's representative shall notify the prisoner of the recall and resentencing procedures, and shall arrange for the prisoner to designate a family member or other outside agent to be notified as to the prisoner's medical condition and prognosis, and as to the recall and resentencing procedures. (Pen. Code, §1170, subd. (e)(4).)

4) Specifies that if the secretary determines that the prisoner satisfies the criteria set forth in paragraph (2), the secretary may recommend to the court that the prisoner's sentence be recalled. The secretary shall submit a recommendation for release within 30 days. (Pen. Code, §1170, subd. (e)(6).)

5) States the medical release does not apply to a prisoner sentenced to death or a term of life without the possibility of parole. (Pen. Code, §1170, subd. (e)(12).)

6) Specifies that except as specified, any prisoner who the head physician of the prison where the prisoner is located determines is permanently medically incapacitated with a medical condition that renders him or her permanently unable to perform activities of basic daily living, and results in the prisoner requiring 24-hour care, and that incapacitation did not exist at the time of sentencing, shall be granted medical parole if the Board of Parole Hearings (BPH) determines that the conditions under which the prisoner would be released would not reasonably pose a threat to public safety. (Pen. Code, § 3550, subd. (a).)

7) States that medical parole does not apply to any prisoner sentenced to death or life in prison without possibility of parole or to any inmate who is serving a sentence for which parole is prohibited by any initiative statute. (Pen. Code, § 3550, subd. (b).)

8) 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.)

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

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "Due to a combination of overcrowding and staff mismanagement, incarcerated people were left particularly vulnerable to the COVID-19 virus, and infections have now been reported at every single institution. There is a need to amend the Medical parole program to assure there is a streamlined process, ensure transparency that allows applicants to remain informed, and expand who qualifies for relief.

   "AB 960 would authorize the creation of Medical Parole panels at each California Department of Corrections and Rehabilitation (CDCR) facility. These panels would be staffed by medical experts who would make final determinations on medical parole cases. AB 960 would also expand eligibility criteria for medical parole."

2) **Compassionate Release:** An incarcerated person or their family member or advocate can request a compassionate release through the Chief Medical Executive at the prison or the CDCR Secretary. If a prison doctor determines that a person meets the medical requirements, the doctor must start the compassionate release process. A person meets the medical requires if they are terminally ill with an incurable condition or the person is permanently medically incapacitated with a medical condition that renders them permanently unable to perform activities of basic daily living, and results in the prisoner requiring 24-hour total care. (Pen. Code, §1170, subd. (e).)

   The timeline for CDCR consider compassionate release is intended to be completed within 30 days. A prison doctor first determines whether the person meets the medical criteria. The prison's Chief Medical Executive and the Statewide Chief Medical Executive must approve or reject the doctor's findings within 5 working days. If the person is not sentenced to death or LWOP, a report will be prepared on public safety case factors like the person's criminal history, prison behavior, and post-release plans. The CDCR Secretary (or someone

designated by the CDCR Secretary) then decides whether to send the person's case to the sentencing court with a recommendation for compassionate release. A recommendation must include medical evaluations, postrelease plans, and eligibility findings. When deciding whether to grant or deny compassionate release, CDCR officials may not rely on factors or criteria other than statutory criteria; for example, it is improper to consider whether a person's period of incarceration has been proportionate to the seriousness of their crime. A recommendation from CDCR includes an evaluation safety to the public if the person is released The court that imposed the prison sentence must hold a hearing within 10 days of receiving a compassionate release recommendation from the CDCR Secretary. (https://prisonlaw.com/wp-content/uploads/2020/12/Comp-Release-Med-Parole-Dec-2020.pdf) The court is responsible for the final determination regarding compassionate release. In addition to the medical criteria, the court must also find that the conditions under which the prisoner would be released or receive treatment do not pose a threat to public safety. (Pen. Code, §, 1170, subd. (e).)

3) **Medical Parole:** CDCR inmates can also be eligible for medical parole granted by the Board of Parole Hearings (BPH). Inmates must meet certain criteria to be eligible for referral to BPH for a medical parole hearing. First, the head physician of the institution where the inmate is housed must determine that the inmate suffers from a significant and permanent medical condition resulting in the inmate being permanently medically incapacitated. Additionally, the inmate must be unable to perform one or more activities of basic daily living such that the inmate qualifies for placement in a licensed health care facility in the community. Inmates serving a sentence of life without the possibility of parole or serving a death sentence are not eligible for expanded medical parole.

   Medical parole hearings are conducted like parole suitability hearings, with a few exceptions. First, expanded medical parole hearings can be conducted without the inmate present. The inmate may attend, but he or she does not have a right to attend. Second, the Board will be determining whether the inmate will pose an unreasonable risk to public safety if placed in a licensed health care facility in the community. (https://www.cdcr.ca.gov/bph/mph-overview/)

   If a hearing panel approves an inmate's release to medical parole, the panel's approval is conditioned upon California Correctional Health Care Services identifying a licensed health care facility that meets the specific requirements identified by the hearing panel. The hearing panel will specify facility requirements it finds necessary for the inmate's placement not to pose an unreasonable risk to public safety. The panel may also condition the inmate's placement on his or her compliance with a variety of other requirements such as medical evaluations, compliance with nursing facility rules, alcohol and drug restrictions, and restrictions on communication with specified persons. (Id.)

   If an inmate is approved for expanded medical parole and is placed in a licensed health care facility in the community, the California Department of Corrections and Rehabilitation and California Correctional Health Care Services will monitor the inmate's medical condition and behavior while he or she is placed in a licensed health care facility. In the event the inmate shows significant improvements in his or her medical condition, such that he or she is no longer eligible for expanded medical parole, the inmate will be removed from expanded medical parole and returned to prison. (Id.)

   This bill would create medical parole panels at each of California's prisons. The evaluation

of medical parole would be transferred from BPH to the medical parole panel at the prison in which the inmate is housed. The medical parole panels would consist of: A CDCR psychologist or social worker; a representative of California Correctional Health Care Services; and the inmate's primary care provider. The criteria for medical parole would be expanded to include an inmate that has a chronic and seriously debilitating disease, the inmate permanently medically incapacitated, or the inmate that qualifies for treatment in hospice care.

The medical parole panel would be required to consider the safety of any victim in their review and consideration of an incarcerated person for medical parole. This bill would also require the medical parole panel to make an independent judgment whether the conditions under which the incarcerated person would be released pose a reasonable threat to public safety, and make a written finding thereto. It is not clear that the medical personnel on the medical parole panel is best qualified to evaluate the danger an inmate poses to the public. It is also not clear whether such a finding would necessarily preclude medical parole. However, given the physical condition of an inmate released due to medical parole, it does seem unlikely that they would present a threat to public safety. Individuals that are currently statutorily ineligible for medical parole (inmates sentenced to death or LWOP) would continue to be ineligible under the process described in this bill. This bill would remove the provision which allows a person released on medical parole to be returned to custody if they recover.

4) **Aging Prison Population:** Between 2000 and 2017, the share of California prisoners age 50 or older more than quintupled, from 4% to 23%. During the same time period, the proportion of prisoners younger than age 25 halved, from 20% to 10%. The average male prisoner is now almost 40 years old. The average female prisoner is slightly younger, at 38. Aging prisoners may be contributing to California's prison health care costs—now highest in the nation. The state spent $19,796 per inmate on health care in fiscal year 2015, according to the Pew Charitable Trusts. These costs were more than three times the national average and 25% more than in 2010. (https://www.ppic.org/publication/californias-prison-population/) Medical care provided inside prison is not covered by federal government health insurance (Medicaid or Medicare), so the cost of providing services for aging prisoners is mostly carried by the state.

   Compared to the general population, aging inmates have a significantly higher risk of both communicable and noncommunicable diseases, including hypertension, asthma, arthritis, cancer, and hepatitis. Aging inmates are more likely to have a history of psychiatric conditions, physical illnesses, and substance abuse and are also more likely to report a significant perceived reduction in personal health. (https://www.researchgate.net/publication/315719037_Medical_Parole_and_Aging_Prisoners) Although this bill does not specifically address the elderly population in prison, it is the elderly that are most likely to have the types of medical conditions that would make a person eligible for medical parole under the provisions of this bill. Research has conclusively shown that long before age 50, most people have outlived the years in which they are most likely to commit crimes. (https://www.aclu.org/files/assets/elderlyprisonreport_20120613_1.pdf).

5) **Argument in Support**: According to the *Union of American Physicians and Dentists*, "AB 960 would expand eligibility for medical parole beyond the current definition of basically

being on one's deathbed as Compassionate Release currently requires.
"

This bill would create a medical parole panel, comprised of a department psychologist, a primary care provider, and a representative from California Correctional Health Care Services, at each institution to act as the state's parole authority for the purpose of medical parole decisions. The bill would require the panel to protect victims' rights in the medical parole process."

6) **Related Legislation**: AB 1210 (Ting), would require some of commissioners for BPH to have specified experience or expertise. AB 1210 is set for hearing in the Assembly Public Safety Committee on April 20, 2021.

7) **Prior Legislation**:

   a) SB 118 (Committee on Budget and Fiscal Review), (Chapter 29, Statutes of 2020) expanded the compassionate release program so that individuals diagnosed with terminal illnesses and less than a year to live would be eligible for early release.

   b) AB 3234 (Ting), Chapter 334, Statutes of 2020, expanded the elderly parole program so that individuals who are aged 50 years and older and have experienced at least 20 years of continuous incarceration will be eligible for relief.

   c) SB 6 (Galgiani), Chapter 886, Statutes of 2016, exempted from medical parole and compassionate release a prisoner who was convicted of the first-degree murder of a peace officer or a person who had been a peace officer

   d) AB 1448 (Weber), Chapter 676, Statutes of 2017, codified the current Elderly Parole Program which is administered by the BPH.

REGISTERED SUPPORT / OPPOSITION:

Support

Union of American Physicians and Dentists (Co-Sponsor)
A New Path
Afscme, Afl-cio
American Civil Liberties Union/northern California/southern California/san Diego and Imperial Counties
California Coalition for Women Prisoners
California for Safety and Justice
California Public Defenders Association (CPDA)
California United for A Responsible Budget (CURB)
Community Legal Services in East Palo Alto
Cure California
Ella Baker Center for Human Rights
Grip Training Institute/insight-out
Immigrant Defense Advocates
Initiate Justice
Legal Services for Prisoners With Children

Mourning Our Losses
Prisoner Advocacy Network
Progressive Doctors
Public Health Justice Collective
Re:store Justice
Repeal California's Three Strikes Law Coalition
Root & Rebound
San Francisco Public Defender's Office
Showing Up for Racial Justice (SURJ) Bay Area
Showing Up for Racial Justice (SURJ) San Diego
Starting Over INC.
The Transformative In-prison Workgroup
Time for Change Foundation
Transitions Clinic Network
UCSF White Coats for Black Lives
Uncommon Law
We the People - San Diego
Young Women's Freedom Center

Opposition

None

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

Amended Mock-up for 2021-2022 AB-960 (~~Bonta~~ *Ting*(A))

Mock-up based on Version Number 98 - Amended Assembly 4/12/21
Submitted by: David Billingsley, Assembly Public Safety Committee

Substitute Ting for Bonta as Author

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

SECTION 1. Section 3550 of the Penal Code is amended to read:

3550. (a) Notwithstanding any other law, except as provided in subdivision (c), an incarcerated person shall be granted medical parole if the medical parole panel of an institution in which an incarcerated person is incarcerated determines that the incarcerated person meets any of the following criteria:

(1) An incarcerated person is in debilitating pain or has a debilitating disease. For the purpose of this section "debilitating disease" shall have the same meaning as "chronic and seriously debilitating" as set forth in subdivision (e) of Section 1367.21 of the Health and Safety Code.

(2) An incarcerated person is permanently medically incapacitated with a medical condition that renders the incarcerated person permanently unable to perform activities of basic daily living, resulting in the incarcerated person requiring 24-hour care, and that incapacitation did not exist at the time of sentencing.

(3) An incarcerated person qualifies for treatment in hospice care. An incarcerated person qualifies for hospice care under the following criteria:

(A) The hospice primary care provider or Chief Medical Executive or designee certifies a prognosis of six months or less if the disease follows its expected course.

(B) The patient or designated legal representative agrees to palliative goals and philosophy of hospice services.

(C) The custody level is appropriate and there cannot be any other precluding custody considerations.

(D) The hospice has the ability to meet the needs of the patient according to the level and intensity of care required.

(E) The patient follows safety measures and the plan for medical and nonmedical emergencies.

(4) The medical parole panel shall consider an incarcerated person's chronological age in conjunction with each of the ~~above~~ criteria ***described above,*** in evaluating whether the incarcerated person meets the criteria for medical parole.

(b) A medical parole panel shall be present at each institution and comprised of the following three members:

(1) A department psychologist or social worker.

(2) A representative of California Correctional Health Care Services.

(3) The incarcerated person's primary care provider.

(c) This section does not alter or diminish the rights conferred under the Victims' Bill of Rights Act of 2008 (Marsy's Law). An institution's medical parole panel is the state's parole authority for the purposes of medical parole decisions pursuant to this section and is responsible for protecting victims' rights during the medical parole process. Subdivision (a) does not apply to any of the following:

(1) An incarcerated person sentenced to death or life in prison without possibility of parole.

(2) An incarcerated person who is serving a sentence for which parole, pursuant to subdivision (a), is prohibited by any initiative statute.

(3) An incarcerated person who was convicted of first-degree murder if the victim was a peace officer, as defined in Section 830.1, 830.2, 830.3, 830.31, 830.32, 830.33, 830.34, 830.35, 830.36, 830.37, 830.4, 830.5, 830.6, 830.10, 830.11, or 830.12, who was killed while engaged in the performance of their duties, and the individual knew, or reasonably should have known, that the victim was a peace officer engaged in the performance of their duties, or the victim was a peace officer or a former peace officer under any of the above-enumerated sections, and was intentionally killed in retaliation for the performance of their official duties.

(d) When a physician employed by the Department of Corrections and Rehabilitation who is the primary care provider for an incarcerated person identifies an incarcerated person that the primary care provider believes meets the medical criteria for medical parole specified in subdivision (a), the primary care physician shall recommend to the institution's medical parole panel that the incarcerated person be considered for medical parole.

(e) Within three business days of an incarcerated person being referred to the medical parole panel for consideration under this section, the department shall notify registered victims and the prosecuting agency or agencies of the incarcerated person's pending medical parole review and provide the victims an opportunity to participate in the medical parole process and to provide information to the medical parole panel to be considered before the medical parole of the incarcerated person. The notice shall clearly state the expected medical parole panel review date.

(f) (1) Within 45 days of the medical parole panel's receipt of the recommendation, the medical parole panel shall convene and make an independent judgment regarding whether the incarcerated individual meets the criteria for medical parole specified in subdivision (a), and make a written finding thereto.

(2) The medical parole panel shall consider the safety of any victim in their review and consideration of an incarcerated person for medical parole. The medical parole panel shall make an independent judgment whether the conditions under which the incarcerated person would be released pose a reasonable threat to public safety, and make a written finding thereto.

(g) The Department of Corrections and Rehabilitation shall complete parole plans for incarcerated persons referred to the medical parole panel for medical parole consideration. The parole plans shall include, but not be limited to, the incarcerated person's plan for residency and medical care.

(h) Notwithstanding any other law, the board or the Division of Adult Parole Operations shall have the authority to impose any reasonable conditions on incarcerated persons subject to medical parole supervision pursuant to subdivision (a), including, but not limited to, the requirement that the parolee submit to electronic monitoring.

(i) The Department of Corrections and Rehabilitation shall, at the time an incarcerated person is placed on medical parole supervision pursuant to subdivision (a), ensure that the incarcerated person has applied for any federal entitlement programs for which the incarcerated person is eligible, and has in their possession a discharge medical summary, full medical records, parole medications, and all property belonging to the incarcerated person that was under the control of the department. Any additional records shall be sent to the incarcerated person's forwarding address after release to health care-related parole supervision.

(j) (1) Notwithstanding any other law, the Department of Corrections and Rehabilitation shall give notice to the county of commitment and the proposed county of release, if that county is different than the county of commitment, of any medical parole release pursuant to this section.

(2) Notice shall be made at least 15 days, or as soon as feasible, prior to the time any medical parole hearing or medical parole release is scheduled for an incarcerated person receiving medical parole consideration.

(k) The secretary shall issue a directive to medical staff employed by the department that details the guidelines and procedures for the medical parole process as described in this section. The department shall provide incarcerated persons with information regarding the medical parole process described in this section in a manner and format prescribed by the department.

SEC. 2. Section 3551 is added to the Penal Code, to read:

3551. On or before January 1, 2023, the department shall create a page on its internet website where information regarding the medical parole process described in Section 3550 shall be accessible to the public.

Date of Hearing: April 20, 2021
Counsel: Nikki Moore

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

AB 990 (Bonta) – As Amended April 15, 2021

As Proposed to be Amended in Committee

SUMMARY: Establishes the right of visitation as a protected civil right for a person in custody of the California Department of Corrections and Rehabilitation ("CDCR"), changes the standard of review for when CDCR limits civil rights, and codifies specific procedures and visitation rules, including requiring CDCR permit in-person visitation at least four days per week. Specifically, **this bill**:

1) Establishes that a person in custody of CDCR may be deprived of rights only as necessary and the limitation is narrowly tailored to further the legitimate security interests of the government.

2) Requires any amendments to CDCR's visitation policy to consider the right of visitation, and requires CDCR to adopt regulations necessary to effectuate the provisions of this pursuant to the Administrative Procedure Act.

3) Provides that the follow are not justification to deny a person visitation:

   a) As a disciplinary sanction against the incarcerated person that is not based on any violation of a law or regulation by the incarcerated person that occurred during the incarcerated person's visit with the affected visitor.

   b) Due to an omission or inaccuracy on the visitor application if the omitted or correct information is provided on the visitor's criminal history report, as issued by the Department of Justice.

   c) Because of a visitor's criminal, juvenile delinquency, or other history of involvement with law enforcement, whether or not it resulted in a criminal conviction, other than as specified, a visitor's current status of being under parole, postrelease community supervision, probation, or informal probation supervision, or a visitor's previous incarceration, including incarceration in the facility where the visit will take place.

   d) Due to the nature of the incarcerated person's criminal, juvenile delinquency, or other history of involvement with law enforcement, regardless of whether it resulted in a criminal conviction, other than a conviction for an offense as specified, except when required by Section 1202.05.

4) Permits CDCR to limit, for up to one year, a person's right of visitation if the visitor has engaged in specified activity to warrant being prohibited from visiting a person, by bringing contraband to a CDCR facility, for engaging in sexual conduct during a family visit, for

committing violence during a visit, or for attempting to aid in an escape.

5) States that an incarcerated person shall not be required to withhold consent to a visit as a disciplinary sanction, as a means of avoiding a disciplinary sanction, or as a condition of participating in programming or enjoying any privilege while incarcerated.

6) Establishes that in-person contact visits, noncontact visits, and family visits shall each be provided at least four days per week. Requires CDCR to ensure sufficient visiting and calling space and times for every person who seeks a visit or call when requested.

7) Requires that emergency phone calls between made available to persons inside and outside CDCR custody when:

   a) Incarcerated person has been hospitalized for a serious medical reason.

8) Establishes a designated person as a medical contact for an incarcerated person, and sets forth procedures for notifying that person of medical issues about an incarcerated person.

9) Requires CDCR to maintain a dedicated line for outside people to call to inform the department that a family member, approved visitor or caller, or primary support person of the incarcerated person has been hospitalized, becomes critically ill, or has died. CDCR shall notify the incarcerated person of this call.

10) Requires emergency in-person contact visits be made available whenever an incarcerated person is hospitalized or moved to a medical unit within the facility and the incarcerated person is in critical or more serious medical condition.

11) Makes legislative findings and declarations.

EXISTING LAW:

1) Provides that a person in CDCR custody may be deprived of rights only as is reasonably related to legitimate penological interests. (Pen. Code, § 2600.)

2) Enumerates specific civil rights of prisoners including, to own, sell, and convey property; correspond confidentially with any member of the State Bar and holder of public office; purchase, receive, and read newspapers, periodicals, and books; initiate civil actions; marry; create power of appointment, create a will; and to receive certain benefits. (Pen Code, § 2601.)

FISCAL EFFECT: Unknown.

COMMENTS:

1) **Author's Statement**: According to the author, "AB 990, strengthens visiting rights for family members of incarcerated people. This bill will support the children left behind in

communities that are heavily impacted by incarceration, will improve in-custody conduct, and reduce recidivism.

"The loss of family connections has received renewed attention due to the COVID pandemic, which has led to the wholesale cancellation of in-person visits and only minimal increases in phone communications in our state prisons. Unfortunately, significant barriers to visiting and phone contact existed before the pandemic and have only been exacerbated since. These barriers include denials of visits for reasons unrelated to visiting conduct or security, limited hours, and onerous regulations. Staying connected with incarcerated individuals can be costly. Families have to account for transportation costs, long travel times, and fees for phone calls. This bill addresses many of these barriers.

"AB 990 is a comprehensive bill that removes barriers to family visitations and helps ensure we keep Californian families connected. This bill demonstrates California's commitment to rehabilitating individuals who are incarcerated. Denying incarcerated people the right to see their loved ones impacts the mental health and well-being of both the individual and their family members. With this measure, we can ensure we are not punishing innocent family members of incarcerated individuals by denying them the right to visit their loved one, while simultaneously eliminating barriers to one of the most successful methods of reducing recidivism and improving in-custody conduct: keeping families connected."

2) **Purpose of this Bill**: This bill seeks to overhaul the right of visitation at county jails and state prisons to provide incarcerated people and their loved ones with more robust access to communications and visits. This bill would require CDCR to hold visiting hours at least four days per week. This bill would also limit CDCR's ability to deny a person the right to visit an incarcerated person, and prevent CDCR from withholding visitation rights as a form of discipline. Additionally, this bill sets forth procedures for an incarcerated person with CDCR to designate an emergency medical contact, and grant speedy access to communications and visits when a person is in serious medical peril.

3) **Elevating Visitation Right to an Enumerated Civil Right:** This bill seeks to codify the right of visitation as a civil right that shall only be limited in a way that is narrowly tailored to further the legitimate security interests of the government. This amends current law, which has established that a person in CDCR custody may be deprived of enumerated civil rights only as is reasonably related to legitimate penological interests.

The findings and declarations of this bill offer the justification for greater access to visitation for incarcerated people, and the public generally: "Therefore, it is the intent of the Legislature to strengthen visiting rights to support the emotional health of Californians and their incarcerated loved ones, to improve in-custody conduct, and to reduce recidivism. By strengthening these visiting rights, it is further the intent of the Legislature to align California law with the practices that social science tells us are most effective for incarcerated individuals, their family members and loved ones, and for society as a whole."

The expansion of the standard for limiting a person's civil rights in prison applies to all civil rights afforded to an incarcerated person, not just the new right of visitation. These civil rights under existing law including the right to own, sell, and convey property; to correspond confidentially with any member of the State Bar and holder of public office; to purchase,

receive, and read newspapers, periodicals, and books; to initiate civil actions; to marry; to create power of appointment; to create a will; and to receive certain benefits. Under current law, these rights may only be curtailed as reasonably necessary to further a legitimate penological interest. By raising the standard to one that is narrowly tailored to further a legitimate security interest, this bill would narrow the ability of CDCR to limit these enumerated rights, including visitation rights.

Supporters of the bill argue that this change in standard is appropriate:

"Former sections 2600-2601 remained basically the same until 1994,[1] when the Legislature changed the legal standard in section 2600 to 'reasonably related to legitimate penological interests,' the highly deferential standard adopted by the United States Supreme Court for the enforcement of federal rights in actions against state prison officials.[2] Two years later, the Legislature removed the right to 'personal visits' from section 2601.[3] The author's goal was to make visiting a privilege rather than a right (except as guaranteed by the Constitution). In the sponsor's words, 'Only then can inmates be taught that they are accountable for their actions" and disabused of the "misguided notion that people deserve something for nothing.'[4]

"This antiquated view is inconsistent with the Legislature's current policy that incarceration is for rehabilitation and not merely punishment.[5]"

Supporters also affirm that the purpose of changing the standard is to create greater judicial oversight of CDCR's decisions: This bill "[r]estores the legal standard in Penal Code section 2600 to language similar to the original 1975 law, with the addition of 'narrowly tailored': 'necessary and narrowly tailored to further the legitimate security interests of the government.' (AB 990, § 2 [Pen. Code, § 2600, subd. (a)].) The bill adopts the same standard in section 2601 and specifies that the standard of appellate judicial review is for legal error and substantial evidence, not the lesser 'some evidence' standard often applied to prison decisions. (AB 990, § 3.) These language changes are designed to ensure that the rights adopted in AB 990 are enforceable in court."

4) **Applicable Agencies**: This bill applies to both state prison and county jail, with respect to the establishment of visitation as a civil right. It also changes the standard for judicial review, as discussed above, for any limitation of an enumerated civil right imposed by either a county jail or state prison. This bill only applies to a person who is serving a felony sentence in a county facility, not a lesser sentence.

In opposition, the California State Sheriffs' Association writes that AB 990 "would provide that a person serving a felony sentence in a county jail has a right to receive personal visits and

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[1] See Sen. Comm. on Judiciary Bill Analysis of SB 1260 (1993-1994 Reg. Session) as amended March 16, 1994, at p. 4.
[2] See Sen. Comm. on Judiciary Bill Analysis of SB 1260 (1993-1994 Reg. Session) as amended March 16, 1994, at p. 3 [citing *Turner v. Safley* (1987) 482 U.S. 78]; Stats. 1994, ch. 555, § 1.
[3] Stats. 1996, ch. 132, § 1 (SB 1221).
[4] Sen. Comm. on Crim. Proced. Bill Analysis, SB 1221 (1995-1996 Reg. Session), as introduced, at pp. 2-3. Sen. Comm. on Crim. Proced. Bill Analysis, SB 1221 (1995-1996 Reg. Session), as introduced, at pp. 2-3.
[5] See Pen. Code, § 1170, subd. (a)(1); cf. Sen. Comm. on Crim. Proced. Bill Analysis, SB 1221 (1995-1996 Reg. Session), as introduced, at pp. 7-8 [noting section 1170 then provided the purpose of incarceration was punishment].

that the inmate may only be deprived of that right if it is necessary and narrowly tailored to further the legitimate security interests of the government.

"Sheriffs understand the benefits of visitation for incarcerated persons and their visitors, but this bill goes too far in mandating visitation at the expense of several other important considerations. By limiting the ability to suspend visitation to issues related to security, jail authorities would be prohibited from conditioning visitation and terms of visitation on behavior and discipline considerations. This language would also preclude the suspension of visitation that has been adopted by prisons and most jails because of the COVID-19 pandemic, which necessitated limiting access to, and movement within, correctional facilities for the medical safety of inmates and staff. Future challenges like other pandemics, natural disasters, and even logistical realities like power outages and HVAC breakdowns would not suffice as legitimate reasons to cancel visitation.

"Additionally, some jail facilities provide visitation via video technology. This process has been permitted under statute and regulation in place at the time and AB 990 would ostensibly impose massive, mandated costs if in-person visitation were required by this bill."

5) **CDCR Has Increased Access to Telephone and Video Calls**: CDCR has taken substantial efforts to increase telephone and video communications for incarcerated people and their family and friends. Recently, CDCR partnered with the California Department of Technology (CDT) to contract with Global Tel*Link Corporation (GTL) to provide reduced telephone rates for calls with an incarcerated person. As of March 19, nationwide calls are 2.5 cents per minute, down 5.1 cents per minute for calls within California, and 18.5 cents per minute for calls outside of California. Each incarcerated person receives 15 minutes of free phone calls every two weeks.

   Additionally, CDCR is in the process of providing tablets to every single incarcerated person. It expects that all adult institutions will have implemented tablets by the end of 2021, and all fire camps by the end of March 2022. These tablets will permit secured emailing, allow for monitored video calls, in addition to their many other uses, with each incarcerated person receiving 15 minutes of free video phone calls every two weeks, 20 cents a minute after that. Setting up a GTL account is free of charge to family and friends. CDCR does not receive commission for telephone calls or any other services that require a fee from users.

6) **Practical Considerations**

   a) **Visitation**: *A prior version of this bill required CDCR to allow for visitation seven days per week for 12 hours per day. This version requires a minimum of four days of visitation.* Outside the pandemic restrictions—which prohibited in-person visitation—CDCR permits visiting two days per week; in the past CDCR has hosted visitation for a maximum of four days per week. Much of the education and programming offered by CDCR are hosted in the visitor spaces. This bill could have the unintended consequence of reducing rehabilitative and educational programming for individuals in custody.

   b) **Denial of Right to Visit**: This bill codifies rules regarding when a visitor may be denied access to visit an incarcerated person. The list does not appear to be exhaustive to adequately account for all possible conduct and information to be considered in denying a

person the ability to visit a person. Specifically, this bill does not contemplate activity occurring prior to, and unrelated to, a visit. This bill does not, however, purport to limit CDCR's right to deny access based on other factors it deems appropriate and includes in, or has included in, its regulations.

7) **Emergency Medical Contact**: This bill sets forth procedures for emergency phone calls to be made available to persons outside of CDCR and to incarcerated people, as specified. Sponsors of the bill state, "Numerous families have received no notice of the serious illness or death of their incarcerated loved ones due to COVID, much less an opportunity to call or visit in their loved ones' final hours. Our bill would ensure that incarcerated people and their loved ones can reach each other in a medical emergency. (AB 990, § 6 [Pen. Code, § 6401.5, subds. (e), (f)].)."

This bill would require CDCR to provide persons outside the facility the means to initiate a phone call to an incarcerated person when 1) the incarcerated person has been admitted to the hospital for a serious medical reason, and 2) when a family member, approved visitor or caller, or primary support person has been hospitalized, becomes critically ill, or has died. The incarcerated person shall be notified of any calls received pursuant to this section.

Additionally, this bill seeks to provide that emergency in-person contact visits and video calls shall be made available whenever an incarcerated person is hospitalized or moved to a medical unit within the facility and the incarcerated person is in critical or more serious medical condition. "If in-person contact visits are unavailable at the facility due to a public health emergency or are inconsistent with the patient's current medical treatment needs, as determined by their medical provider, video calls shall be made available. Any visitor approval process shall be conducted within 24 hours. However, no visitor approval process shall be required when the patient is in imminent danger of dying."

Existing CDCR Inmate Visiting Guidelines do not detail regulations regarding emergency visits, but do instruct families on the limitations on emergency visits for persons not already approved to visit an incarcerated person: "Sometimes emergency or hardship visits are allowed before a person has been approved to visit. Such visits are at the discretion of prison staff (usually the Visiting Sergeant or Lieutenant) and are usually to accommodate an unexpected visitor traveling from a distance in excess of 250 miles. You should not rely on receiving approval to visit without going through the normal visiting application process. Whenever possible, you should plan ahead for visits and have each adult who might want to visit submit applications before they embark on a trip that will include a visit to a prisoner." (Available at https://www.cdcr.ca.gov/visitors/inmate-visiting-guidelines/.)

8) **Argument in Support**: According to the *UC Berkeley's Underground Scholar's Initiative*, "Research shows that visits improve the mental health of the whole family – and promote healthy child development -- while reducing recidivism. Yet only a small percentage of people incarcerated in California prisons receive any visits, much less regular visits. Multiple barriers get in the way:
- unreasonable exclusion of visitors for reasons unrelated to visiting security
- infrequent and inconvenient visiting hours
- disrespectful and harassing screening procedures and supervision of visits
- unpredictable cancellations

• placement of incarcerated people far from their hometowns, which burdens families with long travel times and costs.

"AB 990 will remove many of these barriers and promote prison visiting for the benefit of communities across California inside and outside of our prisons."

9) **Argument in Opposition**: According to the *California Correctional Peace Officers Association*, "CCPOA has several issues with the bill. The first of which is the expansion of the current visitation days and hours.... The additional workload would place an unreasonable burden on our current correctional officers and necessarily leave inappropriate and unsafe staff to inmate ratios in other areas of state prison facilities. Without providing the needed correctional officer presence during visitation, the safety of visitors would not be guaranteed.

....

"The list of reasons for which a visitation can be denied is far too restrictive as well as the reasons for which a visitation cannot be denied. For example, the bills definition of 'masturbation' only includes skin-to-skin contact and fails to address relevant concerns when it occurs through the clothing. As long as the visitor has provided a criminal history, they cannot be denied a visit unless they have committed a very narrow list of offenses within a prison or jail. AB 990 would allow visitors unlimited access to inmate visitation even if they have criminal records indicating they are part of a criminal organization or enterprise associated with the inmate. These new rules for visitation would enable incarcerated leaders of criminal organizations to more easily exert their influence and manage their organizations from within the prison facility. CCPOA also finds it problematic that, without exception, visitation cannot be denied for any disciplinary action or status that occurred outside of visitation. There are certainly relevant and practical reasons for actions within an institution to have real, but temporary, consequences."

10) **Related Legislation**: AB 717 (Stone), would require CDCR and the Department of Motor Vehicles to ensure that a person being released from CDCR custody has an identification card or a driver's license. AB 717 is pending before the Assembly Appropriations Committee.

11) **Prior Legislation**:

a) SB 555 (Mitchell), of the 2017-2018 Legislative Session, would prohibit a county jail from collecting commission fees for providing telephone services to inmates, and would have imposed other restrictions on a county's ability to contract for commissary and communication services. SB 555 was vetoed by the governor.

b) SB 1146 (Stone), of the 2017-2018 Legislative Session, would have authorized prison authorities to open and inspect outgoing inmate mail for the purpose of enforcing restraining and protective orders, excluding confidential correspondence between an inmate and their attorney. SB 1146 failed passage in this committee.

REGISTERED SUPPORT / OPPOSITION:

Support

Alliance for Boys and Men of Color (Co-Sponsor)
Communities United for Restorative Youth Justice (CURYJ) (Co-Sponsor)
Felony Murder Elimination Project (Co-Sponsor)
Young Women's Freedom Center (Co-Sponsor)
A New Way of Life Re-entry Project
ACLU California Action
All of Us or None Los Angeles
All of Us or None San Diego
Anti-recidivism Coalition
Asian Prisoner Support Committee
Asian Solidarity Collective
Blameless and Forever Free Ministries
California Coalition for Women Prisoners
California Families Against Solitary Confinement (CFASC)
California Immigrant Policy Center
California Prison Focus
California Public Defenders Association (CPDA)
California United for A Responsible Budget (CURB)
Cat Clark Consulting Services LLC
Center for Empowering Refugees and Immigrants
Center on Juvenile and Criminal Justice
Chabot College
Children's Defense Fund-california
Community Legal Services in East Palo Alto
Community Works
Congregations Organized for Prophetic Engagement (COPE)
Ella Baker Center for Human Rights
Faith in The Valley
Father's & Families of San Joaquin
Friends Committee on Legislation of California
Homeboy Industries
Immigrant Legal Resource Center
Initiate Justice
Kern County Participatory Defense
Legal Aid At Work
Legal Services for Prisoners With Children
Long Beach Immigrant Rights Coalition
Mental Health Advocacy Services
National Center for Youth Law
National Institute for Criminal Justice Reform
Pillars of The Community
Pride in Truth
Prison From-theinside-out INC
Re:store Justice

Root & Rebound
San Bernardino Fatherhood
San Francisco District Attorney's Office
San Francisco Public Defender's Office
Santa Cruz Barrios Unidos INC.
Secure Justice
Showing Up for Racial Justice (SURJ) Bay Area
Showing Up for Racial Justice (SURJ) San Diego
Showing Up for Racial Justice North County
Silicon Valley De-bug
Starting Over INC.
Surj Contra Costa County
Team Justice
The Transformative In-prison Workgroup
Think Dignity
Time for Change Foundation
Timelist Group
UC Berkeley's Underground Scholars Initiative (USI)
Uncommon Law
Underground Scholars Initiative Berkeley
Underground Scholars Initiative, University of California Davis
We the People - San Diego

Oppose

California Correctional Peace Officers Association
California State Sheriffs' Association
Riverside Sheriffs' Association

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

Amended Mock-up for 2021-2022 AB-990 (~~Bonta~~ *Santiago*(A))

Mock-up based on Version Number 98 - Amended Assembly 4/15/21
Submitted by: Nikki Moore, Assembly Public Safety

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

SECTION 1. (a) The Legislature finds and declares all of the following:

(1) The United States Supreme Court has recognized a constitutional right to maintain parent-child relationships absent a compelling government interest, such as protecting a child from an "unfit" parent (Santosky v. Kramer (1982) 455 U.S. 745, 753.). The United States Court of Appeals for the Ninth Circuit has recognized that this constitutional right logically encompasses a right to maintain a relationship with a life partner. (United States v. Wolf Child (2012) 699 F.3d 1082, 1091.).

(2) In 2009, the Legislature passed Senate Concurrent Resolution No. 20 (Resolution Chapter 88 of the Statutes of 2009), which encouraged the Department of Corrections and Rehabilitation to use the bill of rights created by the San Francisco Children of Incarcerated Parents Partnership as a framework for analysis and determination of procedures when making decisions about services for the children of incarcerated parents.

(3) The bill of rights created by the San Francisco Children of Incarcerated Parents Partnership includes all of the following:

(A) The child has the right to speak with, see, and touch their parent. Actions to realize this right include, but are not limited to, providing access to visiting rooms that are child-centered, nonintimidating, and conducive to bonding, considering proximity to family when siting prisons and assigning incarcerated persons, and encouraging child welfare departments to facilitate contact.

(B) The child has the right to support as that child faces a parent's incarceration. Actions to realize this right include, but are not limited to, training adults who work with young people to recognize the needs and concerns of children whose parents are incarcerated, providing access to specially trained therapists, counselors, and mentors, and allocating 5 percent of the corrections-related budget to support the families of incarcerated persons.

(C) The child has a right to a lifelong relationship with their parent. Actions to realize this right include, but are not limited to, reexamining the federal Adoption and Safe Families Act of 1997, designating a family services coordinator at prisons and jails, supporting incarcerated parents on reentry, and focusing on rehabilitation and alternatives to incarceration.

(4) The principles announced in the bill of rights created by the San Francisco Children of Incarcerated Parents Partnership additionally apply to close family members and loved ones of incarcerated people, including individuals not traditionally defined as family members.

(5) The United Nations has established minimum standards for the treatment of incarcerated people that require regular communication with family and friends by visits, telephone, electronic or digital communications, and mail. Moreover, "disciplinary sanctions or restrictive measures shall not include the prohibition of family contact."

(6) The American Bar Association has established minimum standards for incarcerated people that require sufficient visiting space, convenient visiting times, family-friendly environments, and no unreasonable exclusions of visitors based on criminal convictions.

(7) Research confirms that incarceration imposes heavy burdens on the families of incarcerated people, including trauma for the children of incarcerated parents, as recognized on the adverse childhood experience index, in addition to the high costs of maintaining contact by telephone and visits. Consistent visits also have the potential for reducing the likelihood of intergenerational criminality.

(8) Isolation from lack of visits and limited phone communications adversely affect the mental health of incarcerated people, and that isolation contributes to mental suffering and conflict within prisons. Research shows that visits and family programming reduce disciplinary infractions, increase the chances of successful parole, and decrease recidivism rates upon release and reentry into the community. Forty to 80 percent of incarcerated people rely on their families immediately after release to overcome reentry obstacles, including unemployment, debt, and homelessness.

(9) The COVID-19 pandemic has exacerbated these burdens for families and adverse effects of isolation for incarcerated persons. Since March 2020, in-person visits have been canceled, and this policy exists as of January 2021. Only limited free phone calls have been provided. Since December 2020, limited video calling has become available.

(b) Therefore, it is the intent of the Legislature to strengthen visiting rights to support the emotional health of Californians and their incarcerated loved ones, to improve in-custody conduct, and to reduce recidivism. By strengthening these visiting rights, it is further the intent of the Legislature to align California law with the practices that social science tells us are most effective for incarcerated individuals, their family members and loved ones, and for society as a whole.

SEC. 2. Section 2600 of the Penal Code is amended to read:

2600. (a) A person sentenced to imprisonment in a state prison or to imprisonment pursuant to subdivision (h) of Section 1170 may during that period of confinement be deprived of rights if the deprivation of those rights is necessary and narrowly tailored to further the legitimate security interests of the government.

(b) This section does not overturn the decision in Thor v. Superior Court, 5 Cal. 4th 725.

SEC. 3. Section 2601 of the Penal Code is amended to read:

2601. Each person described in Section 2600 shall have all of the following civil rights set forth under subdivisions (a) to (i), inclusive. These rights may not be infringed upon, except as necessary and only if narrowly tailored to further the legitimate security interests of the government. Any governmental action related to these rights may be reviewed in court for legal error and under a substantial evidence standard of review.

(a) Except as provided in Section 2225 of the Civil Code, to inherit, own, sell, or convey real or personal property, including all written and artistic material produced or created by the person during the period of imprisonment. However, to the extent authorized in Section 2600, the Department of Corrections and Rehabilitation may restrict or prohibit sales or conveyances that are made for business purposes.

(b) To correspond, confidentially, with any member of the State Bar of California or holder of public office, provided that the prison authorities may open and inspect incoming mail to search for contraband.

(c) (1) To purchase, receive, and read any and all newspapers, periodicals, and books accepted for distribution by the United States Post Office. Pursuant to this section, prison authorities may exclude any of the following matter:

(A) Obscene publications or writings, and mail containing information concerning where, how, or from whom this matter may be obtained.

(B) Any matter of a character tending to incite murder, arson, riot, violent racism, or any other form of violence.

(C) Any matter concerning gambling or a lottery.

(2) This section does not limit the right of prison authorities to do either of the following:

(A) Open and inspect any and all packages received by an inmate.

(B) Establish reasonable restrictions on the number of newspapers, magazines, and books that the inmate may have in their cell or elsewhere in the prison at one time.

(d) To initiate civil actions, subject to a three dollar ($3) filing fee to be collected by the Department of Corrections and Rehabilitation, in addition to any other filing fee authorized by law, and subject to Title 3a (commencing with Section 391) of the Code of Civil Procedure.

(e) To marry.

(f) To create a power of appointment.

(g) To make a will.

(h) To receive all benefits provided for in Sections 3370 and 3371 of the Labor Code and in Section 5069.

(i) To receive personal visits.

SEC. 4. Section 6400 of the Penal Code is amended to read:

6400. Amendments to existing regulations and any future regulations adopted by the Department of Corrections and Rehabilitation that may impact the visitation of inmates shall do all of the following:

(a) Recognize and consider the right to personal visits as a civil right pursuant to subdivision (i) of Section 2601.

(b) Recognize and consider the value of visiting as a means to improve the safety of prisons for both staff and inmates.

(c) Recognize and consider the important role of inmate visitation in establishing and maintaining a meaningful connection with family and community.

(d) Recognize and consider the important role of inmate visitation in preparing an inmate for successful release and rehabilitation.

SEC. 5. Section 6401 is added to the Penal Code, to read:

6401. (a) An in-person contact visit shall not be denied for any of the following reasons:

(1) As a disciplinary sanction against the incarcerated person that is not based on any violation of a law or regulation by the incarcerated person that occurred during the incarcerated person's visit with the affected visitor.

(2) Due to an omission or inaccuracy on the visitor application if the omitted or correct information is provided on the visitor's criminal history report, as issued by the Department of Justice to the visitor, and the visitor provided government-issued identification.

(3) Because of a visitor's criminal, juvenile delinquency, or other history of involvement with law enforcement, whether or not it resulted in a criminal conviction, other than a conviction for an offense listed in paragraph (5), a visitor's current status of being under parole, postrelease community supervision, probation, or informal probation supervision, or a visitor's previous incarceration, including incarceration in the facility where the visit will take place.

(4) Due to the nature of the incarcerated person's criminal, juvenile delinquency, or other history of involvement with law enforcement, regardless of whether it resulted in a criminal conviction, other than a conviction for an offense set forth under paragraph (5), except when required by Section 1202.05.

(5) A visitor or incarcerated person may be denied visits for up to one year after the commission of one of the following offenses:

(A) Bringing contraband into the facility during a visit. For purposes of this subparagraph, contraband excludes any lawful amount of alcohol or other intoxicants for personal use in a vehicle parked on facility grounds.

(B) (i) Engaging in sexual intercourse, penetration, masturbation, or oral copulation during a visit with a person other than a family visit or engaging in any sexual conduct with a child during a visit.

(ii) For purposes of this subparagraph, "masturbation" means skin-to-skin contact with genitalia.

(C) Committing violence during a visit or the visiting screening process.

(D) Attempting, or aiding in, an escape during a visit.

(b) An incarcerated person shall not be required to withhold consent to a visit as a disciplinary sanction, as a means of avoiding a disciplinary sanction, or as a condition of participating in programming or enjoying any privilege while incarcerated.

(c) To the extent that visiting rules and standards, as prescribed in Title 15 of the California Code of Regulations, conflict with this section, the Department of Corrections and Rehabilitation shall adopt regulations that conform with this section.

SEC. 6. Section 6401.5 is added to the Penal Code, to read:

6401.5. (a) In-person contact visits, noncontact visits, and family visits shall be provided no less frequently than four days a week. Sufficient visiting and calling space and times shall be made available to allow every person who seeks a contact visit, a noncontact visit, family visit, a phone call, or a video call with an incarcerated person to have that visit or call with that person when requested.

(b) Emergency phone calls shall be made available to persons outside of the Department of Corrections and Rehabilitation and to incarcerated people, as specified under paragraphs (1) and (2). The Department of Corrections and Rehabilitation shall provide persons outside the facility the means to initiate a phone call to an incarcerated person in either of the circumstances described in paragraphs (1) and (2).

(1) When the incarcerated person has been admitted to the hospital for a serious medical reason.

(A) At least once a year, and within 30 calendar days of an infectious disease outbreak in a department facility, every incarcerated person shall be asked whom they want covered by the following documents and shall be assisted in completing the necessary paperwork for the following documents:

(i) Approved visitor list. If the incarcerated person would like to add a visitor, the department shall provide a visitor application form for the incarcerated person to sign and send to the potential visitor, who may then complete and submit it to the visiting department of the facility.

(ii) Medical release of information form.

(iii) Medical power of attorney form.

(iv) Next of Kin form authorizing control over body and possessions in case of death.

(B) Within 24 hours of an incarcerated person being hospitalized for a serious medical reason, the Department of Corrections and Rehabilitation shall inform all persons covered by the current medical release of information form about the incarcerated person's health status, and shall facilitate phone calls between the incarcerated person and those persons if the incarcerated person consents.

(C) If the incarcerated person is able to provide knowing and voluntary consent, the Department of Corrections and Rehabilitation shall, within 24 hours of admission, ask the incarcerated person whether they want to add people to any of the forms included in clauses (i) to (iv), inclusive, of subparagraph (A) who have not previously been designated. The Department of Corrections and Rehabilitation shall promptly assist, as necessary, the incarcerated person in completing the paperwork. The Department of Corrections and Rehabilitation shall promptly inform the newly designated persons on the medical release form of the incarcerated person's condition and facilitate a phone call between the incarcerated person and the newly designated person. The department shall also facilitate other outgoing phone calls by the incarcerated person at the incarcerated person's request.

(D) If a person outside of the Department of Corrections and Rehabilitation seeks information about an incarcerated person who has been admitted to a hospital for a serious medical reason, and that person is not covered by the incarcerated person's medical release, the Department of Corrections and Rehabilitation shall, within 24 hours, ask the incarcerated person if they want to include the inquiring person in the scope of their medical release, or talk by phone with the person,

or both. As applicable, the Department of Corrections and Rehabilitation shall amend the medical release, including assisting the incarcerated person with the necessary paperwork, if the incarcerated person is able to provide knowing and voluntary consent and shall inform the inquiring person of the incarcerated person's medical condition. As applicable, the department shall facilitate a phone call between the incarcerated person and the newly designated person. The patient shall be informed that they have the right to refuse consent and their refusal shall not be communicated to the inquiring party, and there shall be no adverse consequences from medical or department staff for refusing.

(2) The Department of Corrections and Rehabilitation shall maintain a dedicated line for outside people to call to inform the department that a family member, approved visitor or caller, or primary support person, as designated in subdivision (a) of Section 6405, if the incarcerated person has been hospitalized, becomes critically ill, or has died. Upon receipt of these calls, the Department of Corrections and Rehabilitation shall notify the incarcerated person.

(c) Emergency in-person contact visits and video calls shall be made available whenever an incarcerated person is hospitalized or moved to a medical unit within the facility and the incarcerated person is in critical or more serious medical condition. If in-person contact visits are unavailable at the facility due to a public health emergency or are inconsistent with the patient's current medical treatment needs, as determined by their medical provider, video calls shall be made available. Any visitor approval process shall be conducted within 24 hours. However, no visitor approval process shall be required when the patient is in imminent danger of dying.

(d) For purposes of this section, hospital shall include an on-site facility set up to provide hospital-like services during a public health emergency.

SEC. 7. The Department of Corrections and Rehabilitation shall adopt regulations necessary to effectuate this act, including emergency regulations, pursuant to the Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code).

Date of Hearing: April 20, 2021
Counsel: Matthew Fleming

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

AB 939 (Cervantes) – As Amended March 18, 2021

SUMMARY: Prohibits the admission of evidence of the manner in which a victim was dressed, when offered by either the prosecution or the defendant on the issue of consent, during the prosecution of specified sex crimes even if the evidence is determined to be relevant outside the presence of the jury and the interests of justice favor its admission.

EXISTING LAW:

1) States that relevant evidence shall not be excluded in any criminal proceeding, unless enacted by a two-thirds vote of the membership in each house of the Legislature. (Cal. Const. Art. I, § 28, subd. (f)(2).)

2) States that in any prosecution for specified sex offenses, evidence of the manner in which the victim was dressed at the time of the commission of the offense shall not be admissible when offered by either party on the issue of consent, unless the evidence is determined by the court to be relevant and admissible in the interests of justice. (Evid. Code, § 1103, subd. (c)(2).)

3) States that the proponent of the evidence of the manner in which the victim was dressed at the time of the commission of the offense shall make an offer of proof outside the hearing of the jury. The court shall then make its determination and at that time, state the reasons for its ruling on the record. (*Ibid.*)

4) Provides that the court may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. (Evid. Code, § 352.)

5) Prohibits, except as specified, the introduction of evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) when offered to prove his or her conduct on a specified occasion. (Evid. Code, § 1101, subd. (a).)

6) States that in any prosecution for specified sex offenses, opinion evidence, reputation evidence, and evidence of specific instances of the complaining witness' sexual conduct, or any of that evidence, is not admissible by the defendant in order to prove consent. (Evid. Code, § 1103, subd. (c)(1).)

7) Mandates the following procedure prior to the introduction of evidence of sexual conduct of the complaining witness is offered to attack the credibility of the complaining witness:

a) A written motion shall be made by the defendant to the court and prosecutor stating that the defense has an offer of proof of the relevancy of evidence of the sexual conduct of the complaining witness proposed to be presented and its relevancy in attacking the credibility of the complaining witness;

b) The written motion shall be accompanied by an affidavit in which the offer of proof shall be stated. The affidavit shall be filed under seal and only unsealed by the court to determine if the offer of proof is sufficient to order a hearing. After that determination, the affidavit shall be resealed by the court;

c) If the court finds that the offer of proof is sufficient, the court shall order a hearing out of the presence of the jury, if any, and at the hearing allow the questioning of the complaining witness regarding the offer of proof made by the defendant;

d) At the conclusion of the hearing, if the court finds that evidence proposed to be offered by the defendant regarding the sexual conduct of the complaining witness is relevant, and is not inadmissible, the court may make an order stating what evidence may be introduced by the defendant, and the nature of the questions to be permitted. The defendant may then offer evidence pursuant to the order of the court; and,

e) An affidavit resealed by the court shall remain sealed, unless the defendant raises an issue on appeal or collateral review relating to the offer of proof contained in the sealed document. If the defendant raises that issue on appeal, the court shall allow the Attorney General and appellate counsel for the defendant access to the sealed affidavit. If the issue is raised on collateral review, the court shall allow the district attorney and defendant's counsel access to the sealed affidavit. The use of the information contained in the affidavit shall be limited solely to the pending proceeding. (Evid. Code § 782.)

8) Mandates the following procedure prior to the introduction of possession of condoms as evidence that a crime was committed:

a) The prosecutor shall make a written motion to the court and to the defendant stating that the prosecution has an offer of proof of the relevancy of the possession by the defendant of one or more condoms;

b) The written motion shall be accompanied by an affidavit in which the offer of proof and shall be filed under seal and only unsealed by the court to determine if the offer of proof is sufficient to order a hearing. After that determination, the affidavit shall be resealed by the court;

c) If the court finds that the offer of proof is sufficient, the court shall order a hearing out of the presence of the jury, if any, and at the hearing allow questioning regarding the offer of proof made by the prosecution;

d) At the conclusion of the hearing, if the court finds that evidence proposed to be offered by the prosecutor regarding the possession of condoms is relevant and is not inadmissible, the court may make an order stating what evidence may be introduced by

the prosecutor; and,

e) An affidavit resealed by the court shall remain sealed, unless the defendant raises an issue on appeal or collateral review relating to the offer of proof contained in the sealed document. If the defendant raises that issue on appeal, the court shall allow the Attorney General and appellate counsel for the defendant access to the sealed affidavit. If the issue is raised on collateral review, the court shall allow the district attorney and defendant's counsel access to the sealed affidavit and the use of the information contained in the affidavit shall be limited solely to the pending proceeding. (Evid. Code § 782.1.)

9) States that in prosecutions for specified sex offenses in which consent is at issue, "consent" shall be defined to mean positive cooperation in act or attitude pursuant to an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved. A current or previous dating or marital relationship shall not be sufficient to constitute consent where consent is at issue in a prosecution for specified sex offenses. Nothing in this section shall affect the admissibility of evidence or the burden of proof on the issue of consent. (Pen. Code, § 261.6.)

10) States that in prosecutions for specified sex offenses in which consent is at issue, evidence that the victim suggested, requested, or otherwise communicated to the defendant that the defendant use a condom or other birth control device, without additional evidence of consent, is not sufficient to constitute consent. (Pen. Code, § 261.7.)

FISCAL EFFECT: Unknown.

COMMENTS:

1) **Author's Statement**: According to the author, "Assembly Bill 939 seeks to address the ambiguity in current law to ensure that we do not further traumatize survivors of sexual violence. There are deep negative implications for Rape and Sexual Harassment cases when we make clothing probative of intent. Assembly Bill 939 will prohibit the courts from admitting evidence that deals with the sexual characterization of their clothing if the courts decide that it must be admissible in the 'interest of justice.' We need trauma-informed policies that ensure that we do not victim blame in the pursuit of justice. Current law fails to consider the power imbalance that exists between survivor and perpetrator. When we maintain inadequate policies, we enable violence, silence survivors, and reduce access to justice. Assembly Bill 939 will reinforce and improve court procedures to ensure that we address policy weaknesses and ensure trauma-informed practices."

2) **The Need for this Bill**: Current law generally prohibits the introduction of evidence by either prosecution or defense of what a victim was wearing at the time of a sexual assault. Most evidence is generally admissible if it is relevant to any issue in the case. For evidence of the victim's clothing to be admissible as evidence of either consent or lack thereof, the party offering the evidence must first make an offer of proof as to how the evidence would be relevant. That offer of proof must take place outside the presence of the jury. Once the offer of proof has been made, the judge must determine that the evidence is, in fact, relevant to the issue of consent, and also that admitting the evidence would be in the interests of justice. The court must also state the reasons for making the determination on the record. Only after making those findings and stating its reasons for the findings, may the court admit the

evidence and allow it to be presented to the jury.

Evidence of what a victim was wearing is highly unlikely to bear any relevance to the issue of whether the victim consented to the sexual contact. There are few published cases that deal with this issue, probably because attorneys rarely try to admit evidence in this manner. Cases that have addressed the issue indicate that existing law properly excludes inflammatory evidence that is not relevant. For example, in *People v. Medina*, the court addressed evidence of the victim's "69" t-shirt in a prosecution for lewd and lascivious acts with a minor. (2003 Cal. App. Unpub. LEXIS 12248, 2003 WL 2309701.) The appellate court found that evidence of the "69" t-shirt was properly excluded by the trial court in a hearing outside the presence of the jury, and that it was irrelevant to any issue in the case. (*Id.* at *29-30.)

Existing law provides judicial discretion to admit evidence if it is relevant in an outlier case. It requires special hearing to determine the relevance of the evidence, and even upon a finding that the evidence is relevant, the judge must still determine admitting the evidence would be in the interests of justice. Existing law is consistent with California's Constitution which requires the admission of relevant evidence in a criminal case. This bill would prohibit the introduction of evidence in all cases, regardless of relevance or whether the interests of justice favor its admission.

3) **Proposition 8 Truth in Evidence**: In 1982, the California voters passed Proposition 8, also known as the Victim's Bill of Rights. The initiative enacted the "Right to Truth in Evidence," and adopted a constitutional provision pertaining specifically to evidence in criminal proceedings. The provision of the California Constitution prohibits the exclusion of relevant evidence in criminal cases. Pursuant to a two thirds vote by the Legislature is required to prohibit the introduction of relevant evidence. Because this bill would exclude potentially relevant evidence in a criminal proceeding it has been marked as a two thirds vote.

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

5) **Argument in Opposition**: According to the *California Attorneys for Criminal Justice*: "CACJ is mindful of the significance and importance of Denim Day. CACJ does not condone sexual assault and supports the campaign to eradicate misconceptions surrounding sexual assault and to prevent sexual violence. This opposition to AB939 is not intended to demean such awareness. Nor is CACJ's opposition intended to defeat the prosecution of rape and other sexual assault crimes. Rather, CACJ's opposition to AB939 arises from the bill's proposed attempt to exclude relevant evidence period.

"In 1982, the California electorate approved the "Victim's Bill of Rights" initiative. One of these most far reaching provision, the 'Right to Truth in Evidence,' created a new evidence code that only applies to criminal matters. That evidence code section, Section 28(d) provides:.

> 'Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding . . . . Nothing in this section shall affect any existing statutory rule of evidence relating to privilege or hearsay, or Evidence Code Sections 352, 782 or 1103. . . .'

"As a result, Section 28(d) created an amendment to the California Constitution. The overarching effect of Section 28(d) gives the prosecution and the defense a constitutional right to introduce relevant evidence. Of course, the introduction of any evidence in a criminal matter is subject to the court's discretion under Evidence Code Section 352.

"It is against this backdrop that CACJ opposes the proposed bill. Evidence Code Section 1103, as currently enacted, mandates that evidence of the manner in which the victim was dressed at the time of the commission of the shall not be admissible whether offered by either party on the issue of consent unless the evidence has been determined by the court to be both relevant and admissible in the interest of justice.

"Thus, Evidence Code Section 1103 currently places a firm limitation on the introduction of the manner in which the victim was dressed. Moreover, Section 1103 requires that the court exercise its discretion and find that the introduction of such evidence be in the interest of justice before such evidence can be admitted. This requirement comports with the provisions of Section 28(d).

"The issue with this bill is that it is in direct violation of the Truth in Evidence provision of the 'Victim's Bill of Rights' initiative. This bill seeks the exclusion of evidence without regard to whether such evidence is relevant or in the interest of justice. This bill prevents the judge's evaluation of potential evidence. As enacted, Section 1103 provides adequate protection that introduction of the manner of clothing will not be introduced without the court's independent evaluation which includes not just relevance, but also consideration of the victim in the interest of justice."

6) **Prior Legislation**:

a) AB 336 (Ammiano), Chapter 403, Statutes of 2014, established an evidentiary procedure for admitting condoms into evidence.

b) AB 1926 (Wildman), Chapter 127, Statutes of 1998, made evidence of the manner in which the complaining witness was dressed inadmissible, with the exception of the condition of the clothing, at the time the offense was committed, when offered by either party on the issue of consent, unless the court found the evidence relevant and admissible in the interests of justice.

REGISTERED SUPPORT / OPPOSITION:

Support

None

Opposition

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

San Francisco Public Defender

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

Date of Hearing: April 20, 2021
Counsel: Nikki Moore

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

AB 1247 (Chau) – As Introduced February 19, 2021

SUMMARY: Permits the tolling of the statute of limitations for the prosecution of a felony offense for specified computer crimes until the discovery of the commission of the offense, but no more than nine years from the commission of the offense, for crimes committed after January 1, 2021 or for crimes for which the statute of limitations has not lapsed as of that date.

EXISTING LAW:

1) Makes it unlawful to:

   a) Knowingly access and without permission alter, damage, delete, destroy, or otherwise uses any data, computer, computer system, or computer network in order to either (A) devise or execute any scheme or artifice to defraud, deceive, or extort, or (B) wrongfully control or obtain money, property, or data. (Pen. Code, § subd. (c)(1).)

   b) Knowingly access and without permission take, copy, or make use of any data from a computer, computer system, or computer network, or takes or copies any supporting documentation, whether existing or residing internal or external to a computer, computer system, or computer network. (Pen. Code, § subd. (c)(2).)

   c) Knowingly and without permission use or cause to be used computer services. (Pen. Code, § subd. (c)(3).)

   d) Knowingly accesses and without permission add, alter, damage, delete, or destroy any data, computer software, or computer programs which reside or exist internal or external to a computer, computer system, or computer network. (Pen. Code, § subd. (c)(4).)

   e) Knowingly and without permission disrupt or cause the disruption of computer services or deny or cause the denial of computer services to an authorized user of a computer, computer system, or computer network. (Pen. Code, § subd. (c)(5).)

   f) Knowingly and without permission provide or assist in providing a means of accessing a computer, computer system, or computer network in violation of this section. (Pen. Code, § subd. (c)(6).)

   g) Knowingly and without permission access or cause to be accessed any computer, computer system, or computer network. (Pen. Code, § subd. (c)(7).)

h) Knowingly introduce any computer contaminant into any computer, computer system, or computer network. (Pen. Code, § subd. (c)(8).)

i) Knowingly and without permission use the internet domain name or profile of another individual, corporation, or entity in connection with the sending of one or more electronic mail messages or posts and thereby damage or cause damage to a computer, computer data, computer system, or computer network. (Pen. Code, § subd. (c)(9).)

j) Knowingly and without permission disrupt or cause the disruption of government computer services or denies or causes the denial of government computer services to an authorized user of a government computer, computer system, or computer network. (Pen. Code, § subd. (c)(10).)

k) Knowingly access and without permission add, alter, damage, delete, or destroy any data, computer software, or computer programs which reside or exist internal or external to a public safety infrastructure computer system computer, computer system, or computer network. (Pen. Code, § subd. (c)(11).)

l) Knowingly and without permission disrupt or cause the disruption of public safety infrastructure computer system computer services or denies or causes the denial of computer services to an authorized user of a public safety infrastructure computer system computer, computer system, or computer network. (Pen. Code, § subd. (c)(12).)

m) Knowingly and without permission provide or assist in providing a means of accessing a computer, computer system, or public safety infrastructure computer system computer, computer system, or computer network in violation of this section. (Pen. Code, § subd. (c)(13).)

n) Knowingly introduce any computer contaminant into any public safety infrastructure computer system computer, computer system, or computer network. (Pen. Code, § subd. (c)(14).)

2) States that no action may be brought pursuant to this subdivision unless it is initiated within three years of the date of the act complained of, or the date of the discovery of the damage, whichever is later. (Pen. Code, § subd. (e)(5).)

3) Provides that prosecution for crimes punishable by imprisonment for eight years or more must commence within six years after commission of the offense, unless otherwise provided by law. (Pen. Code, § 800.)

4) Provides that prosecution for a felony punishable by imprisonment for less than eight years must commence within three years commission of the offense, except as specified. (Pen. Code, § 801.)

5) Provides that prosecution for crimes involving fraud, breach of a fiduciary duty, embezzlement of funds from an elder or dependent adult, or misconduct by a public official does not start to run until the discovery of the offense and prosecution must be commenced within four years after discovery of the crime or within four years after completion,

whichever is later. (Pen. Code, §§ 801.5 & 803, subd. (c).)

6) Provides that the prosecution of a misdemeanor must commence within one year of the commission of the offense, unless otherwise provided by law. (Pen. Code, § 802 subd. (a).)

7) States that, unless otherwise provided by law, a statute of limitations is not tolled or extended for any reason. (Pen. Code, § 803, subd. (a).)

8) States that, for specified crimes, the statute of limitations does not begin to run until the offense has been discovered, or could have reasonably been discovered. (Pen. Code, § 803, subd. (e).)

9) Provides that if more than one statute of limitations period applies to a crime, the time for commencing an action shall be governed by the period that expires later in time. (Pen. Code § 803.6, subd. (a).)

10) States that a prosecution is commenced when one of the following occurs:

   a) An indictment or information is filed;

   b) A complaint charging a misdemeanor or infraction is filed;

   c) The defendant is arraigned on a complaint that charges him or her with a felony; or,

   d) An arrest warrant or bench warrant is issued. (Pen. Code, § 804.)

FISCAL EFFECT: Unknown.

COMMENTS:

1) **Author's Statement**: According to the author, "Each year, computer hackers and their attacks leave a digital trail of destruction, including the loss of access to accounts, stolen credit cards, social security numbers, and other related fraud. In 2020, as COVID-19 raged on, data leaks affected 155.8 million Americans, while companies faced significantly more digital threats as the pandemic forced many businesses to adapt to remote working. This opened up corporate networks to personal devices and cloud-based services, making them more vulnerable to breaches.

   "Cybercriminals go to great lengths to conceal their own identity and crimes, and it may be too late to prosecute and hold them accountable once they are discovered, potentially years later. The pandemic has had a visible toll on a business's ability to keep their doors open, suffering a cyber-attack and not having the financial means to fight it will permanently close their doors. With so many having to work remotely, it is not yet understood how many people are going to be affected in the coming months, and years, or the extent of data breaches occurring during this time.

   "The statute of limitations for computer hacking is three years after discovery, if prosecuted civilly. But the statute of limitations for computer hacking prosecuted as a felony commences from the date of the offense -- not the date of discovery -- which is inconsistent and

counterintuitive. AB 1247 would ensure that victims do not feel powerless and that they have enough time to seek out remedies for having their personal information stolen."

2) **Statute of Limitations**: The statute of limitations requires commencement of a prosecution within a certain period of time after the commission of a crime. A prosecution is initiated by filing an indictment or information, filing a complaint, certifying a case to superior court, or issuing an arrest or bench warrant. (Pen. Code, § 804.)

The statute of limitations serves several important purposes in a criminal prosecution, including staleness, prompt investigation, and finality. The statute of limitations protects persons accused of crime from having to face charges based on evidence that may be unreliable, and from losing access to the evidentiary means to defend against the accusation. With the passage of time, memory fades, witnesses die or otherwise become unavailable, and physical evidence becomes unobtainable or contaminated.

The statute of limitations also imposes a priority among crimes for investigation and prosecution. The deadline serves to motivate the police and to ensure against bureaucratic delays in investigating crimes. Additionally, the statute of limitations reflects society's lack of desire to prosecute for crimes committed in the distant past. The interest in finality represents a societal evaluation of the time after which it is neither profitable nor desirable to commence a prosecution.

These principals are reflected in court decisions. The United States Supreme Court has stated that statutes of limitations are the primary guarantee against bringing overly stale criminal charges. (*United States v. Ewell* (1966) 383 U.S. 116, 122.) There is a measure of predictability provided by specifying a limit beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced. Such laws reflect legislative assessments of the relative interests of the state and the defendant in administering and receiving justice.

More recently, in *Stogner v. California* (2003) 539 U.S. 607, the Court underscored the basis for statutes of limitations: "Significantly, a statute of limitations reflects a legislative judgment that, after a certain time, no quantum of evidence is sufficient to convict. And that judgment typically rests, in large part, upon evidentiary concerns - for example, concern that the passage of time has eroded memories or made witnesses or other evidence unavailable." (*Id.* at p. 615.)

The failure of a prosecution to be commenced within the applicable period of limitation is a complete defense to the charge. The statute of limitations is jurisdictional and may be raised as a defense at any time, before or after judgment. (*People v. Morris* (1988) 46 Cal.3d 1, 13.) The defense may only be waived under limited circumstances. (See *Cowan v. Superior Court* (1996) 14 Cal.4th 367.)

The court is required to construe application of the statute of limitations strictly in favor of the defendants. (*People v. Zamora* (1976) 18 Cal.3d 538, 574; *People v. Lee* (2000) 82 Cal.App.4th 1352, 1357-1358.)

The amount of time in which a prosecuting agency may charge an alleged defendant varies based on the crime. In general, the limitations period is related to the seriousness of the

offense as reflected in the length of punishment established by the Legislature. (*People v. Turner* (2005) 134 Cal.App.4th 1591, 1594-1595; see, e.g., Pen. Code, §§ 799-805.) After a comprehensive review of criminal statutes of limitation in 1984, the Law Revision Commission recommended that the length of a "limitations statute should generally be based on the seriousness of the crime." (17 Cal. Law Revision Com. Rep. (1984) p. 313.) The Legislature overhauled the entire statutory scheme with this recommendation in mind. In *People v. Turner*, *supra*, 134 Cal.App.4th 1591, the court summarized the recommendations of the Law Revision Commission:

> The use of seriousness of the crime as the primary factor in determining the length of the applicable statute of limitations was designed to strike the right balance between the societal interest in pursuing and punishing those who commit serious crimes, and the importance of barring stale claims. It also served the procedural need to provid[e] predictability and promote uniformity of treatment for perpetrators and victims of all serious crimes. The commission suggested that the seriousness of an offense could easily be determined in the first instance by the classification of the crime as a felony rather than a misdemeanor. Within the class of felonies, a long term of imprisonment is a determination that it is one of the more serious felonies; and imposition of the death penalty or life in prison is a determination that society views the crime as the most serious. (*People v. Turner*, *supra*, 134 Cal.App.4th at pp. 1594-1595, citations omitted.)

There are, however, some statutes of limitations not necessarily based on the seriousness of the offense. The Legislature has acknowledged that some crimes by their design are difficult to detect and may be immediately undiscoverable upon their completion. So for example, crimes involving fraud, breach of a fiduciary duty, bribes to a public official or employee, and those involving hidden recordings have statutes of limitations which begin to run upon discovery that the crime was committed. (See Pen. Code, § 803, subd. (c), see also Pen. Code, § 803, subd. (e).)

This bill would provide that a charge for the crime of computer hacking may be filed be up to three years after discovery of the crime, but no longer than nine years from the commission of the crime.

3) **Ex Post Facto:** In *Stogner v. United States*, *supra*, 539 U.S. 607 the Supreme Court ruled that a law enacted after expiration of a previously applicable limitations period violates the Ex Post Facto Clause when it is applied to revive a previously time-barred prosecution. (*Id.* at pp. 610-611, 616.) However, extension of an existing statute of limitations is not ex post facto as long as the prior limitations period has not expired. (*Id.* at pp. 618-619.)

   SB 239 (Chang), of 2019-20 of Legislative Session, is a prior version of this bill. SB 239 did not account for the principles of the Ex Post Facto Clause. However, this bill specifically does not apply to crimes for which the statute of limitations has run.

4) **Argument in Support**: According to the *National Insurance Crime Bureau*, "Most cyberattacks are not immediate, single, conspicuous events in which the computer or network is infiltrated and the damage is immediately evident. Often they are a chain of events in which the cybercriminal seeks to remain undetected for as long as possible or until they choose to reveal the

attack, as is the case with ransomware. Infiltrations could go unnoticed for months or years. For example, Microsoft security intelligence detected an uptick in ransomware attacks in April 2020; they theorized that hackers infiltrated target networks months prior but unleashed the ransomware at a time when organizations, burdened by COVID-19 disruptions, would feel particularly pressured to pay ransoms."

5) **Related Legislation**: SB 23 (Rubio), would toll the statute of limitations of one year for a violation of privacy by distributing an intimate photograph or image until the date of discovery, but not more than six years after an image was intentionally distributed. SB 23 is pending before the Senate Appropriations Committee

6) **Prior Legislation**:

   a) SB 922 (Chang), of the 2019-20 Legislative Session, was identical to this bill. SB 922 was held in the Assembly Appropriations Committee.

   b) SB 239 (Chang), of the 2019-20 Legislative Session, provided that, notwithstanding any other statutes of limitations, for the crime of unauthorized access to computers, a criminal complaint may be filed within three years after the discovery of offense. SB 239 was held in the Assembly Appropriations Committee.

   c) AB 32 (Waldron), Chapter 614, Statutes of 2015, increased specified fines related to computer crimes from a maximum of five thousand dollars ($5,000), to a maximum of ten thousand dollars ($10,000), and tolled the statute of limitations for illegally acquiring digital images of a person that displays an intimate body part of a person.

   d) AB 1649 (Waldron), Chapter 379, Statutes of 2014, specified the penalties for any person who disrupts or causes the disruption of, adds, alters, damages, destroys, provides or assists in providing a means of accessing, or introduces any computer contaminant into a "government computer system" or a "public safety infrastructure computer system," as specified.

REGISTERED SUPPORT / OPPOSITION:

Support

California District Attorneys Association
California State Sheriffs' Association
National Insurance Crime Bureau

Opposition

None

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

Date of Hearing: April 20, 2021
Counsel: David Billingsley

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

AB 1474 (Gabriel) – As Introduced February 19, 2021

SUMMARY: Requires prosecutors and judges to state on the record the estimated cost of incarceration or supervision for any proposed sentence in a criminal case. Specifically, **this bill**:

1) Requires a prosecutor, at the time of sentencing, to state on the record the estimated cost of incarceration or supervision for any proposed sentence.

2) Specifies that if a presentence report is required, the probation department shall, as part of the presentence report, prepare an estimated cost of incarceration or supervision for any proposed sentence and provide that information to the court and to the defendant before sentencing.

3) States that the estimated cost of incarceration or supervision shall be based on the applicable average annual costs compiled annually by the Legislative Analyst's Office (LAO) or the Board of State and Community Corrections (BSCC), as described in this bill.

4) Requires the court, at sentencing, to state on the record the estimated cost of the imposed sentence and any consideration given to cost in imposing the sentence.

5) Specifies that the Legislative Analyst's Office shall, by no later than July 1, 2022, and annually thereafter, compile the average annual costs of incarceration and postcustody supervision for an inmate in the custody of, or under the supervision of, the Department of Corrections and Rehabilitation (CDCR) and shall provide that information to each city, county, or city and county prosecutor's office and the chief probation officer of each county, and shall make the information available to the public by posting it on the internet website of the LAO.

6) States that BSCC shall, by no later than July 1, 2022, and annually thereafter, compile the average annual costs of incarceration and supervision for a person in the custody of, or under the supervision of, each county sheriff or probation department, and shall provide that information to each city, county, or city and county prosecutor's office and the chief probation officer of each county, and shall make the information available to the public by posting it on the board's internet website.

7) Specifies that the requirements of this bill regarding documentation of costs by prosecutors, probation officers, and judges shall become operative on July 1, 2022.

EXISTING LAW:

1) Requires a superior court to send to DOJ a disposition report regarding every case it disposes of resulting from an arrest that was reported to DOJ. (Pen. Code, § 13151.)

2) Mandates that when a disposition report is in regards to a charge that is dismissed, the report shall state whether dismissal was based on one of the following reasons: 1) dismissal in furtherance of justice, 2) case compromised, defendant discharged because restitution or other satisfaction was made to the injured person, 3) court found insufficient cause to believe defendant guilty of a public offense; 4) dismissal due to delay; 5) accusation set aside as specified; 6) defective accusation; 7) defendant became a witness for the people and was discharged; 8) insufficient evidence; 9) judgment arrested; 10) mistrial; or, 11) any other dismissal by which the case was terminated. In addition to the dismissal label, the court shall set forth the particular reasons for the disposition. (Pen. Code, § 13151.1.)

3) States that the Legislature finds and declares that the purpose of sentencing is public safety achieved through punishment, rehabilitation, and restorative justice. When a sentence includes incarceration, this purpose is best served by terms that are proportionate to the seriousness of the offense with provision for uniformity in the sentences of offenders committing the same offense under similar circumstances. (Pen. Code, § 1170, subd. (a)(1).)

4) Requires a court to state the reasons for its sentence choice on the record at the time of sentencing. (Pen. Code, § 1170, subd. (c).)

5) Establishes the California Community Corrections Performance Incentives Act, which is a system of performance-based funding to county probation departments when they demonstrate success in reducing the number of individuals on adult felony probation, mandatory supervision, and individuals on post release community supervision, going to state prison because of committing new crimes or violating the terms of probation. (Pen. Code §§ 1228 et seq.)

6) Specifies that the funds provided to each county from the California Community Corrections Performance Incentives Act shall be used for specified purposes relating to supervision and rehabilitative services for adult felony offenders subject to probation and for evidence-based community corrections practices and programs. (Pen. Code, § 1230.)

7) Finds and declares that the provision of probation services is an essential element in the administration of criminal justice. The safety of the public, which shall be a primary goal through the enforcement of court-ordered conditions of probation; the nature of the offense; the interests of justice, including punishment, reintegration of the offender into the community, and enforcement of conditions of probation; the loss to the victim; and the needs of the defendant shall be the primary considerations in the granting of probation. (Pen. Code, § 1202.7.)

FISCAL EFFECT: Unknown.

COMMENTS:

1) **Author's Statement**: According to the author, "In recent years, California has implemented a number of notable reforms in our approach to criminal and juvenile justice. These reforms have aimed to reduce mass incarceration, promote pathways to rehabilitation, and more

effectively advance public safety.

"Despite these reforms, California continues to lead the nation in spending on corrections. Indeed, over the past decade, CDCR spending has increased by over $3 billion, or approximately 30%. As a result, California currently spends more on corrections than Texas and New York combined. Excessive spending on corrections has resulted in diminished revenues for other public policy priorities, including education, housing, human services, public health, and environmental protection.

"AB 1474 builds on bipartisan momentum to promote fiscal accountability and end California's failed experiment with mass incarceration. Modeled after successful protocols that have been adopted in Philadelphia and Northern Virginia, AB 1474 will bring additional transparency to the sentencing process and help prosecutors and judges to consider the broader impacts of the sentences they recommend and impose. In so doing, AB 1474 will help to ensure that taxpayer resources are spent wisely and in a manner that truly advances justice and public safety."

2) **SB 678 (Leno) and Criminal Justice Realignment 2011:** SB 678 (Leno), Chapter 608, Statutes of 2009, established a system of performance based funding that shares state General Fund savings with county probation departments when they demonstrate success in reducing the number of adult felony probationers going to state prison because of committing new crimes or violating the terms of probation. SB 678 was designed to alleviate state prison overcrowding and save state General Fund monies by reducing the number of adult felony probationers who are sent to state prison for committing a new crime or violating the terms of probation, and to meet these objectives without compromising public safety. The SB 678 program shares state savings from lower prison costs with county probation departments that implement evidence-based supervision practices and achieve a reduction in the number of locally supervised felony offenders who are revoked to state prison. The SB 678 program has been successful in supporting probation departments' increased use of evidence-based practices and lowering the percentage of individuals returned to custody without evident negative impact to public safety. Through the SB 678 performance based funding mechanism county probation departments have received a total of $708.2 million since program inception, including a $129.7 million allocation in the Governor's Budget for distribution in fiscal year (FY) 2016-2017. (www.courts.ca.gov/documents/lr-2016-ccc-performance-incentives-act-2009-PC1232.pdf)

   In 2011, the Legislature passed Public Safety Realignment which created mandatory supervision and post release community supervision. Counties are responsible for individuals in those supervisory programs, in addition to individuals on supervised on probation. The program started by SB 678 has been expanded to include individuals on mandatory supervision and post release community supervision.

   Public safety realignment transferred substantial authority and funds from the state to the counties to manage lower-level felon populations. Realignment shifted the penalty for a number of felony offenses from state prison to county jail. That resulted in a significant shift in convicted offenders being incarcerated and supervised exclusively by the counties. In order to offset some of the increased costs to the counties, the state provided more money to the counties. In spite of the additional money going to counties, the fact that counties are responsible for the costs of incarcerating realigned individuals forces counties to evaluate

whether that incarceration is the best way for the county to spend that money. To the extent that a county convicts a defendant and sentence that defendant to state prison, there is a risk that if only the state bears the cost of that prison sentence there is no financial disincentive at the county level to impose prison sentences.

A significant motivation for Realignment was prison over-crowding. That concern was motivated both by the federal court case mandating that California reduce their prison population to 137.5% of design capacity, but also because of a desire to control the increasing costs to the state of incarcerating individuals. The Legislature has made a number of significant criminal justice reforms aimed at encouraging the criminal justice system to explore alternatives to incarceration. Those measures have recognized the high costs of housing individuals in jails and prisons.

3) **County and State Costs of Incarceration and Supervision:** Within California, some costs are born by the counties and some costs are born by the state in the administration of the criminal justice and custodial systems. The criminal justice system in California is primarily organized on a county level. Each county has an elected district attorney responsible for prosecuting crimes within the county. The judiciary within that county has jurisdiction exclusively over the crimes committed within that county. The costs of the prosecuting cases are born by the counties. Each county has a jail or jails which are run by the County Sheriff's Department. The costs of running the jails are largely born by the counties. On the other hand, the state prison system is run by the state and the state bears cost of the housing incarcerated individuals in prison.

   As discussed above, there have been Legislative measures which have resulted in more responsibilities and corresponding costs being born by counties in terms of incarcerating and supervising individuals that have been convicted of criminal offenses. SB 678 provided monetary incentives for counties not to send individuals that are supervised on probation, post-release community supervision, or mandatory supervision to prison. Presumably those incentives would be relevant prosecutors, who are funded by the counties.

   This bill would require prosecutors and judges to state on the record the estimated cost of incarceration or supervision for any proposed sentence in a criminal case. Probation officers would also be required to include the costs of supervision in a probation or other presentence report. Requiring such information serves the purpose of insuring costs transparency for public and policy makers at the county and state level. This bill would not require prosecutors or judges to use the cost information in any particular manner.

4) **Cost Considerations by Prosecutors and Judges:** Prosecutors and Judges don't traditionally consider economic costs in making sentencing recommendations (prosecutors) or pronouncing sentence (judges). These actors are presumably making decisions on sentencing within the overarching concept of meeting the "interest of justice." More specifically, the theory of punishment usually relies on justification of deterrence, incapacitation, retribution, or rehabilitation, in fashioning a sentence. Although costs are clearly an important factor from an overall policy perspective of determining whether sentencing choices or approaches are effective, that is not a consideration ordinarily engaged in by prosecutors of judges.

5) **Calculating Costs Can be Complicated:** This bill would calculate costs as the average annual costs of incarceration and postcustody supervision for an inmate in the custody of, or under the supervision of the state (prison or parole) or counties (jail, probation, post-release community supervision, and mandatory supervision). However, to truly evaluate costs, one needs to know the full costs/savings of any course of action. It might cost a certain amount to provide mental health treatment to a probationer, but by providing that treatment it could save money in the future because that individual doesn't commit a new crime (savings), doesn't need to be prosecuted or incarcerated in the future (savings), or as able to be productive tax paying member of the community (savings). Unfortunately, to calculate future savings of any sentencing decision is extremely complicated. The cost calculations as described in this bill will be limited to the direct costs of the sentence. Such information is valuable, but if such information was to be used by judges and prosecutors to make sentencing decisions, it should be recognized that there are other costs/and savings which are part of any sentence.

6) **Argument in Support**: According to the *Smart Justice California*, "Over the past decade, the state has taken various actions to significantly reduce the number of incarcerated people under the supervision of the California Department of Corrections and Rehabilitation (CDCR). Despite the ongoing decline, spending on state corrections remains high. Over the same period of time, CDCR spending increased by over $3 billion from about $9.7 billion in 2010-11 to an estimated $13.3 billion in 2019-20.

"Prosecutors and judges historically haven't had to consider the fiscal costs of incarceration. There is little, if any, data to suggest that longer prison sentences reduce rates of recidivism – in fact, multiple studies have found that extra time behind bars produces an increase in recidivism. Thus, longer prison terms boost taxpayer costs but have no proven impact in reducing in crime.

"Publicly stating the estimated costs of a sentence during sentencing will add much-needed transparency to the sentencing process and potentially incentivize prosecutors to push for more cost-effective alternatives to lengthy sentences behind bars."

7) **Argument in Opposition**: According to the *California District Attorneys Association*, "This bill requires the probation department to prepare an estimate of the costs associated with incarceration or supervised release for a proposed sentence. The information must be included in the pre-sentence report. This requirement taxes the resources and limited budget of the probation department. The bill also requires the prosecutor at the time of the sentencing to state on the record the cost of incarcerating a defendant. Assembly Bill 1474 focuses exclusively on the cost of incarceration but ignores the financial and emotional costs of crimes as it relates to the innocent victims."

8) **Prior Legislation**:

   a) AB 1331 (Bonta), Chapter 581, Statutes of 2019, expanded the data that law enforcement entities are required to report to the Department of Justice related to every arrest to include the Criminal Investigation and Identification (CII) number and incident report number.

b) SB 678 (Leno), Chapter 608, Statutes of 2009, established a system of performance based funding that shares state General Fund savings with county probation departments when they demonstrate success in reducing the number of adult felony probationers going to state prison because of committing new crimes or violating the terms of probation.

REGISTERED SUPPORT / OPPOSITION:

Support

Blameless and Forever Free Ministries
California Attorneys for Criminal Justice
California Public Defenders Association (CPDA)
Communities United for Restorative Youth Justice (CURYJ)
Fuel
Heals Project- Helping End All Life Sentences
Immigrant Legal Resource Center
Initiate Justice
Legal Services for Prisoners With Children
No Justice Under Capitalism
Prison Policy Initiative
Re:store Justice
Secure Justice
Smart Justice California
Ucsf White Coats for Black Lives
Usc Suzanne Dworak Peck School of Social Work's Unchained Scholars
Young Women's Freedom Center
Ywca Berkeley/oakland

Oppose

California District Attorneys Association

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

Date of Hearing: April 20, 2021
Counsel: David Billingsley

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

AB 1165 (Gipson) – As Introduced February 18, 2021

SUMMARY: Prohibits the use of pepper spray and other chemical agents in juvenile detention facilities. Specifically, **this bill**:

1) Specifies that a chemical agent shall not be used or stored inside, or on the grounds of, a juvenile facility.

2) Prohibits an entity that manages, operates, or owns a juvenile facility from purchasing, renting, acquiring, owning, or storing a chemical agent.

3) States that an entity that manages, operates, or owns a juvenile facility shall dispose of all chemical agents in its possession on or before December 21, 2022, and shall notify the Board of State and Community Corrections (BSCC) when all chemical agents in its possession have been disposed.

4) Defines the following terms for purposes of this bill:

   a) "Chemical agent" means a chemical-based agent designed to debilitate or incapacitate a person, including, but not limited to, any of the following:

      i) Phenacyl chloride or chloroacetophenone gas, commonly known as CN gas, tear gas, or mace;

      ii) 2-chlorobenzalmalononitrile or orthochlorobenzalmalononitrile gas, commonly known as CS gas;

      iii) Dibenzoxazepine, commonly known as CR gas or DBO;

      iv) Oleoresin capsicum spray, commonly known as OC spray, capsaicin spray, capsicum spray, or pepper spray; or,

      v) Any lachrymatory agent or lachrymator that causes irritation, a temporary burning sensation, bronchoconstriction, nausea, vomiting, inflammation of mucous membranes, blepharospasm, inflammation of eyes, or other systemic effects including dizziness, disorientation, panic, or loss of control of motor activity.

   b) "Juvenile facility" means any of the following:

      i) A juvenile hall, as described in Section 850;

ii) A juvenile camp or ranch;

iii) A facility of the Department of Corrections and Rehabilitation, Division of Juvenile Justice;

iv) A regional youth educational facility;

v) A youth correctional center;

vi) A juvenile regional facility; or,

vii) Any other local or state facility used for the confinement of minors or wards.

EXISTING LAW:

1) States that minors under the jurisdiction of the juvenile court who are in need of protective services shall receive care, treatment, and guidance consistent with their best interest and the best interest of the public. (Welf. & Inst. Code, § 202, subd. (c).)

2) Specifies that minors under the jurisdiction of the juvenile court as a consequence of delinquent conduct shall, in conformity with the interests of public safety and protection, receive care, treatment, and guidance that is consistent with their best interest, that holds them accountable for their behavior, and that is appropriate for their circumstances. This guidance may include punishment that is consistent with the rehabilitative objectives of this chapter. (Welf. & Inst. Code, § 202, subd. (c).)

3) States that when the minor is no longer a ward of the juvenile court, the guidance he or she received should enable him or her to be a law-abiding and productive member of his or her family and the community. (Welf. & Inst. Code, § 202, subd. (c).)

4) Provides that the juvenile hall shall not be in, or connected with, any jail or prison, and shall not be deemed to be, nor be treated as, a penal institution. It shall be a safe and supportive homelike environment. (Welf. & Inst. Code, § 851.)

5) In order to provide appropriate facilities for the housing of wards of the juvenile court in the counties of their residence or in adjacent counties so that those wards may be kept under direct supervision of the court, and in order to more advantageously apply the salutary effect of a safe and supportive home and family environment upon them, and also in order to secure a better classification and segregation of those wards according to their capacities, interests, and responsiveness to control and responsibility, and to give better opportunity for reform and encouragement of self–discipline in those wards, juvenile ranches or camps may be established, as provided in this article. (Welf. & Inst. Code, § 880.)

6) States that the juvenile facility administrator, in cooperation with the responsible physician, shall develop and implement written policies and procedures for the use of force, which may include chemical agents. Force shall never be applied as punishment, discipline or treatment. (Code of Regulations, Title 15, § 1357.)

7) Requires juvenile facilities that authorize chemical agents as a force option to include policies and procedures that:

   a) Identify who is approved to carry and/or utilize chemical agents in the facility and the type, size and the approved method of deployment for those chemical agents;

   b) Mandate that chemical agents only be used when there is an imminent threat to the youth's safety or the safety of others and only when de-escalation efforts have been unsuccessful or are not reasonably possible;

   c) Outline the facility's approved methods and timelines for decontamination from chemical agents. This shall include that youth who have been exposed to chemical agents shall not be left unattended until that youth is fully decontaminated or is no longer suffering the effects of the chemical agent;

   d) Define the role, notification, and follow-up procedures required after use of force incidents involving chemical agents for medical, mental health staff and parents or legal guardians; and,

   e) Provide for the documentation of each incident of use of chemical agents, including the reasons for which it was used, efforts to de-escalate prior to use, youth and staff involved, the date, time and location of use, decontamination procedures applied and identification of any injuries sustained as a result of such use. (Code of Regulations, Title 15, § 1357, subd. (b)(1)-(5).)

FISCAL EFFECT: Unknown.

COMMENTS:

1) **Author's Statement**: According to the author, "Many youth in facilities have come from underserved communities that have experienced intergenerational trauma while facing poverty and violence, and they enter a system where they are met with more brutality. In settings meant to be rehabilitative, staff should already be equipped with positive behavioral management and de-escalation techniques that don't rely on a tool that creates undeniable rifts in relationships between staff and youth. AB 1165 will simply bring California up to speed with reforms already made in the majority of states across the U.S., to put the well-being and health of youth in facilities first."

2) **Pepper Spray**: Pepper spray, or oleoresin capsicum (OC) spray, is a type of chemical restraint that contains capsaicinoids extracted from the resin of hot peppers. According to a report published by the National Institute of Justice, pepper spray, "incapacitates subjects by inducing an almost immediate burning sensation of the skin and burning, tearing, and swelling of the eyes. When it is inhaled, the respiratory tract is inflamed, resulting in a swelling of the mucous membranes…and temporarily restricting breathing to short, shallow breaths. (http://cjca.net/attachments/article/172/CJCA.Issue.Brief.OCSpray.pdf)

   In *U.S. v. Neill* (1999), 166 F.3rd 943, the 9th Circuit Court of Appeal held that, "Pepper spray qualifies as a 'dangerous weapon' because it may cause 'serious injury,' namely 'extreme physical pain or the protracted impairment of a function of a bodily member, organ

or mental faculty'...."

3) **Purpose of California's Juvenile Justice System:** The juvenile justice system in California is intended to promote rehabilitation and seeks to further the best interest of the minor.

"Minors under the jurisdiction of the juvenile court as a consequence of delinquent conduct shall, in conformity with the interests of public safety and protection, receive care, treatment, and guidance that is consistent with their best interest, that holds them accountable for their behavior, and that is appropriate for their circumstances. This guidance may include punishment that is consistent with the rehabilitative objectives of this chapter." (Welf. & Inst. Code, § 202, subd. (c).)

California law also emphasizes the distinction between juvenile halls and adult penal facilities.

". . ., the juvenile hall shall not be in, or connected with, any jail or prison, and shall not be deemed to be, nor be treated as, a penal institution. It shall be a safe and supportive homelike environment." (Welf. and Inst. Code, § 851.)

4) **Use of Pepper Spray in Juvenile Facilities:** While pepper spray is widely accepted and used by law enforcement and adult corrections agencies across the country, its use is not common in juvenile correctional agencies. There is concern about the health hazards of pepper spray and concern about the negative impact on staff-youth relationships, the key to successful juvenile rehabilitative programming. Very few states authorize its use and in the states that allow its use in policy, most prohibit the use except as a last resort and with many conditions and few facilities put it into practice. The chemical is banned for use in juvenile facilities in 35 states.

The Council of Juvenile Corrective Administrators (Council) explored the use of pepper spray in juvenile facilities in an issue brief published in 2011. The Council concluded that overreliance on restraints, whether they are chemical, physical, mechanical or other, compromised relationships between staff and youths, one of the critical features of safe facilities. (http://cjca.net/wp-content/uploads/2018/02/CJCA.Issue_.Brief_.OCSpray.pdf) The issue brief examined the policies of states regarding use of pepper spray in juvenile facilities and reviewed studies on the use of pepper spray. The Council noted that while few academic studies have focused specifically on pepper spray use in juvenile settings, recent research on other types of restraint use (physical and mechanical) in juvenile confinement settings shows that applying restraints disrupts correctional climates by creating anger and feelings of unfair use of authority, in addition to negatively impacting staff. One recent study found that restraints are often applied as punishment rather than in response to immediate threats of violence. Youth in juvenile facilities have described incidents of restraint as causing physical and emotional pain. Another study found that facilities with high numbers of restraint incidents are more likely to have higher rates of safety problems, including youth and staff injury, suicidal behavior, youths injured by staff and fear among youths. (*Id.*)

Within California, several counties have already eliminated chemical agents in juvenile facilities. On February 12, 2019, the Los Angeles Board of Supervisors voted to phase out the use of pepper spray in juvenile facilities. On June 15, 2020, Attorney General Xavier Becerra issued a statement indicating support for legislation that forbids "the use of pepper

spray against children in juvenile detention. (https://oag.ca.gov/news/press-releases/attorney-general-becerra-calls-broad-police-reforms-and-proactive-efforts)

5) **Potential Concerns About Prohibiting the Use of Chemical Restraints in Juvenile Facilities:** The following are potential concerns related to prohibiting the use of chemical restraints in juvenile facilities:

   a) Eliminating the use of pepper spray will increase reliance on physical force, as opposed to de-escalation techniques;

   b) De-escalation might not be effective in situations where pepper spray might provide control of the situation; and,

   c) Elimination of pepper spray might raise the chance that a situation could result in harm to a juvenile or a staff member, because physical force would be needed.

   Jurisdictions that do not use chemical agents emphasize that the best safety tool is a positive relationship between youth and staff. A positive relationship between youth and staff can foster an atmosphere which makes it less likely for there to be conflicts within the juvenile facility. De-escalation is stressed as an alternative to chemical agents. If there is a physical confrontation, youth are physically separated.

   If de-escalation is not emphasized or not effective, then it is likely that probation officers will rely on other uses of physical force or physical restraints. Other methods of force or restraint can be equally damaging to youth as pepper spray, and also damage the relationship between staff and youth. To meet the goals of this bill, juvenile facilities that are currently relying on chemical restraints would need to ensure that they don't simply switch to other forms of physical restraints.

6) **California is in the Process of Phasing Out its State Juvenile Facilities:** State juvenile facilities were part of the Division of Juvenile Justice (DJJ). DJJ only houses juveniles who have been charged and found responsible for more serious and violent crimes. SB 823 (Committee Budget and Fiscal Review), Chapter 337, Statutes of 2020, prohibits further commitment of juveniles to the DJJ, as of July 21, 2021, except as specified. SB 823 also established the Juvenile Justice Realignment Block Grant program to provide county-based custody, care, and supervision of youth who are realigned from the Division of Juvenile Justice or who would have otherwise been eligible for commitment to DJJ.

   The offenders that previously were housed in DJJ will now be the responsibilities of counties. Those individuals could be housed in existing juvenile hall. Counties could also establish separate facilities for those individuals. To the extent that some juveniles will still be held in state facilities, this bill would prohibit the use of chemical agents in state, as well as county juvenile facilities.

7) **Argument in Support**: According to the *Asian Americans Advancing Justice* "The harmful nature of chemical agents makes their use counterproductive to the rehabilitative goals of the juvenile justice system. Use of chemical agents on youth is inconsistent with the requirement that juvenile halls not be operated as penal institutions and instead "shall be a safe and supportive homelike environment." Permitting juvenile facility staff to carry and use

destructive chemical agents creates a punitive, fear-inducing environment, which impedes the development of trusting, healthy relationships between staff and youth that are essential to facility safety and facilitating successful reentry.

"Thirty-five other states and several California counties (Marin, Sacramento, San Francisco, Santa Clara, Santa Cruz, Solano, Sonoma, and pending in Los Angeles) recognize that chemical agents are not needed to safely operate a facility. Operated by the City and County of San Francisco, the Youth Guidance Center juvenile facility "does not use these potentially dangerous interventions on youth, and should be a model for other juvenile facilities in this regard." A national survey by the Council of Juvenile Correctional Administrators observed that facilities that use pepper spray tend to be systems that adopt an overall more punitive and adult-correctional approach. This is consistent with experiences of youth at California juvenile facilities.

"Investigations into conditions in juvenile facilities in Kern, San Diego, Fresno, and San Francisco counties found that chemical agents are often directed disproportionately against youth with mental health, behavioral learning, and/or developmental disabilities—including many who are survivors of significant trauma—and constitutes abuse and neglect of these young people. Probation staff have been found to use chemical agents 'on youth in response to non-violent acts such as verbal defiance and 'peer friction,' for symptoms of mental health needs such as self-injury and threats of self-harm, and in a punitive manner after youth had been restrained.' Staff routinely punish these youth—including with isolation, restraint, and chemical force—for behavior related to their disabilities. Excessive use of chemical agents in turn creates significant liability for counties.

"Eliminating chemical agents from juvenile facilities is also a matter of racial justice. As compared to white youth, African-American youth are 7.5 times more likely to be ordered to institutional placement, and Latinx youth are 2.5 times more likely. The harms of chemical agents in juvenile facilities thus disproportionately impact youth of color, particularly Black, Latinx, and Indigenous youth."

8) **Argument in Opposition:** According to the *San Joaquin County Probation Officers Association*, "We recognize that OC pepper spray should be used in juvenile facilities only under limited circumstances, but AB 1165 would ban its use altogether. Unfortunately, there are circumstances that arise in juvenile facilities that cannot be de-escalated through verbal intervention. For instance, if there is an altercation between two or more juveniles, the supervising officers have two choices: physically engage, putting the health of the juveniles and staff alike at risk; or, be prepared to use OC pepper spray. In many instances, the mere mention of OC pepper spray deters further physical conflict for the juveniles, thereby avoiding its use.

"As a result, if passed AB 1165 will endanger both the minors in our custody and our probation peace officers responsible for their care. The only tool officers will have left to protect juveniles and staff from violent attacks will be the use of significant physical force.

Juvenile facilities now typically house individuals that have committed serious and violent offenses. It is not uncommon for juvenile facilities to be occupied by offenders convicted of crimes such as murder, rape, assault with a deadly weapon, carjacking, home invasion and terrorist threats, to name just a few of the serious and violent offenses committed by juvenile

offenders. Regrettably, a high percentage of these offenders are gang members and dangerous.

"Last year, SB 823 was passed and signed into law. Under SB 823, local county probation's juvenile detention facilities are now responsible for housing every individual sentenced to confinement in a juvenile court. Starting in June 2021, the States DJJ facilities will no longer accept new intakes and County Probation's Juvenile Detention Facilities will be responsible for housing and supervising 18–25-year-old adults in our juvenile facilities. Under AB 1165, sworn probation staff supervising this new sophisticated and dangerous adult population will not be allowed to carry and/or use OC pepper spray to protect themselves or the adult and juvenile offenders."

9) **Related Legislation**: AB 48 (Gonzales), would prohibit the use of kinetic energy projectiles or chemical agents by any law enforcement to disperse a protest, or demonstration, except in compliance with specified standards. AB 48 is awaiting hearing in the Assembly Appropriations Committee.

10) **Prior Legislation**:

a) AB 696 (Lackey), of the 2019-2020 Legislative Session, would have required the Board of State and Community Corrections (BSCC) to contract with a research entity to conduct a study on the efficacy and impacts of the use of pepper spray in juvenile halls. AB 696 was held in the Assembly Appropriations Committee.

b) AB 1321 (Gipson), of the 2019-2020 Legislative Session, would have required the BSCC to contract with a research entity to conduct a study on the efficacy and impacts of the use of pepper spray in juvenile halls. AB 1321 was gut and amended.

c) AB 2010 (Chau), of the 2017-2018 Legislative Session, would have eliminated the use of pepper spray in juvenile facilities with some exceptions. AB 2010 was held in the Assembly Public Safety Committee.

d) AB 1042 (Parra), of the 2003-2004 Legislative Session, would have required the Department of Mental Health (DMH) to issue pepper spray to medical technical assistants working in DMH facilities while on duty. AB 1042 was vetoed by the Governor.

REGISTERED SUPPORT / OPPOSITION:

Support

Children's Defense Fund - CA (Co-Sponsor)
Disability Rights California (Co-Sponsor)
Glide (Co-Sponsor)
Youth Law Center (Co-Sponsor)
American Civil Liberties Union/northern California/southern California/san Diego and Imperial Counties
Asian Americans Advancing Justice - California
California Alliance for Youth and Community Justice

California Association of Social Rehabilitation Agencies
California Coalition for Women Prisoners
California Public Defenders Association (CPDA)
Causa Justa::just CAUSE
Center for Community Action and Environmental Justice
Center on Juvenile and Criminal Justice
Ceres Policy Research
Children Now
Communities United for Restorative Youth Justice (CURYJ)
Ella Baker Center for Human Rights
Fresh Lifelines for Youth
Fresno Barrios Unidos
John Burton Advocates for Youth
Lawyers' Committee for Civil Rights
Milpa (motivating Individual Leadership for Public Advancement)
Monarch Services of Santa Cruz County
National Center for Youth Law
Pacific Juvenile Defender Center
Public Counsel
San Francisco Public Defender's Office
Showing Up for Racial Justice San Francisco
Sierra Club
Silicon Valley De-bug
The Art of Yoga Project
Underground Grit
Woman INC
Young Women's Freedom Center
Youth Alliance

Oppose

Afscme, Afl-cio
Association of Orange County Deputy Sheriff's
Fresno County Deputy Probation Officer's Association
N. California Probation Lodge 19, California Fraternal Order of Police
Riverside Sheriffs' Association
Sacramento County Probation Association
San Joaquin County Probation Officers Association
San Luis Obispo County Probation Peace Officers Association
San Mateo Probation and Detention Association
State Coalition of Probation Organizations

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

Date of Hearing: April 20, 2021
Counsel: Matthew Fleming

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

AB 1003 (Lorena Gonzalez) – As Introduced February 18, 2021

As Proposed to be Amended in Committee

SUMMARY: Creates a new offense for the intentional theft of wages by an employer, punishable as either a felony or a misdemeanor. Specifically, **this bill**:

1) Makes the intentional theft of wages in an amount greater $950 from any one employee, or $2,350, in aggregate, from more two or more employees, in any 12 consecutive month period, punishable as grand theft, an alternate felony/misdemeanor ("a wobbler.")

2) Defines "theft of wages" as the intentional deprivation of wages as defined, benefits, or other compensation, by fraudulent or other unlawful means, with the knowledge that such wages, benefits or other compensation is due to the employee under the law.

3) Specifies that wages benefits, or other compensation that are the subject of a prosecution under this section may be recovered in a civil action by the employee or the Labor Commissioner.

EXISTING LAW:

1) Prohibits the passage of ex post facto laws. (Cal. Const. Art. I, § 9.)

2) States that a person may not be imprisoned in a civil action for debt or tort, or in peacetime for a militia fine. (Cal. Const. Art. I, § 10.)

3) Makes it a misdemeanor offense to violate various sections of the labor code pertaining to employee compensation. (Lab. Code, § 215.)

4) Makes it a misdemeanor offense for any person, or an agent, manager, superintendent, or officer who having the ability to pay, willfully refuses to pay wages due and payable after demand has been made, or falsely denies the amount or validity thereof, or that the same is due, with intent to secure for himself, his employer or other person, any discount upon such indebtedness, or with intent to annoy, harass, oppress, hinder, delay, or defraud, the person to whom such indebtedness is due. (Lab. Code, § 216.)

5) Defines "wages" to include all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation. (Lab. Code, § 200.)

6) Defines the offense of theft in two degrees, the first of which is termed grand theft; the second, petty theft. (Pen. Code, § 486.)

7) Makes the offense of petty theft a misdemeanor punishable by six months in the county jail, and the offense of grand theft an alternate felony/misdemeanor (a "wobbler"), punishable by imprisonment in the county jail, except as specified. (Pen. Code, §§ 489 and 490.)

8) States that any person who receives money for the purpose of obtaining or paying for services, labor, materials or equipment and willfully fails to apply such money for such purpose by either willfully failing to complete the improvements for which funds were provided or willfully failing to pay for services, labor, materials or equipment provided incident to such construction, and wrongfully diverts the funds to a use other than that for which the funds were received, shall be guilty of a public offense and shall be punishable by a fine not exceeding ten thousand dollars ($10,000), or by imprisonment in a county jail not exceeding one year, or by imprisonment pursuant to subdivision (h) of Section 1170, or by both that fine and that imprisonment if the amount diverted is in excess of two thousand three hundred fifty dollars ($2,350). If the amount diverted is less than or equal to two thousand three hundred fifty dollars ($2,350), the person shall be guilty of a misdemeanor. (Pen. Code, § 484b.)

9) States that obtaining money labor or real or personal property by theft when it is taken by a servant, agent, or employee from his or her principal or employer and aggregates nine hundred fifty dollars ($950) or more in any 12 consecutive month period is grand theft. (Pen. Code, § 487, subd. (b)(3).)

10) States that obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars ($950) shall be considered petty theft and shall be punished as a misdemeanor, except for theft of specific items for which the threshold is two-hundred and fifty dollars $250, and except that such person may instead be punished with a felony if that person has one or more prior convictions for a violent felony, as defined, or for an offense registration as a sex offender. (Pen. Code, §§ 487; 488; 666.)

11) States that grand theft is committed when the money, labor, or real or personal property taken is of a value exceeding nine hundred fifty dollars ($950). (Pen. Code, § 487, subd. (a).)

12) Punishes most forms of grand theft as either a misdemeanor or a felony. (Pen. Code, § 489, subd. (c)(1).)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "AB 1003 will serve as a deterrent by making the intentional theft of wages or compensation over $950 by employers punishable as grand theft, consistent with the penalty for other forms of theft. For too long, corporations have gotten away with stealing from their employees and faced nothing more than a slap on the wrist. When the so-called consequences companies face are less severe than the crime itself,

it's no wonder that committing wage theft is treated as a simple business decision to boost an employer's bottom line. The system isn't working if we can't deter the most egregious actors from taking advantage of their own workers."

2) **Background**: The author also submitted the following information: "Wage theft occurs when employers fail to pay their workers all the earnings they are entitled. Examples of wage theft include paying less than minimum wage, not paying workers overtime, not allowing workers to take meal and rest breaks, requiring off the clock work, or taking workers' tips.

"According to the Economic Policy Institute (EPI), young workers, women, people of color, and immigrant workers are more likely than other workers to report being paid less than the minimum wage, primarily because they work in low-wage jobs and industries with rampant wage theft.

"A 2017 EPI analysis found that in the 10 most populous states in the country, 2.4 million workers lose $8 billion annually to minimum wage violations alone, impacting 17% of low wage workers. . It is estimated that wage theft costs the country up to $15 billion annually in minimum wage violations alone, compared to $12.7 billion annually in robberies, burglary, larcenies and auto theft combined. In California, minimum wage violations cost workers close to $2 billion annually.

"Wage theft occurs at all size of employers as well. A 2018 report by Good Jobs First and Jobs with Justice found that more than 450 large firms have each paid out $1 million or more in wage theft settlements within the last 20 years. In about half of the top ten industries represented in the largest settlements, the percentage of Black and Latino workers was greater than in the workforce as a whole.

"Currently, workers can pursue wage claims through the Labor Commissioner's office to seek recovery of unpaid wages and other damages, file smaller wage claims in the Small Claims Court, or bring a lawsuit in state or federal court for themselves or as part of a class action.

"Each year, over 30,000 workers in California file claims of wage theft, though the share of workers owed unpaid wages is likely greater. These workers face processes for recovering their wages that are lengthy, burdensome, or often unsuccessful in changing employer behavior.

"Even when employees collectively have millions of dollars stolen from their paychecks, employers often only face mild civil penalties for wage theft under federal law. In a 2015 study conducted by the Little Hoover Commission, they recommended that the Legislature should assess existing penalties for white collar crimes and make adjustments to ensure rewards do not outweigh the risks of participating in the underground economy and the Legislature should identify and refine areas where legal definitions are unclear or inconsistent.

"Existing wage theft penalties for wealthy corporations like Amazon, Walmart, and Wells Fargo often cost these companies less than actually paying their workers, making such mild consequences an ineffective deterrent that enables repeat offenses. Criminal penalties are

very rare, yet in any state in the country, if a person steals more than $2,500 in merchandise from a business, they may face felony charges.

"Wage theft hurts California's economy, responsible businesses, and workers, particularly low wage workers who can least afford to lose earnings. The COVID-19 pandemic has only further exacerbated the financial desperation low wage workers are facing, making many workers more vulnerable to wage theft."

3) **Amendments to be Taken in Committee**: As introduced, this bill would have made the intentional theft of wages by an employer in the amount of $950 or more an alternate felony/misdemeanor ("a wobbler.") The bill would have defined the intentional theft of wages to mean any violation of law that resulted in loss of wages, benefits or other compensation. In its original version the bill would have allowed for the $950 to be aggregated over multiple employees and over any period of time.

   The amendments proposed by the committee would continue to allow for aggregation of wages to reach the threshold amount specified by the bill, but would require such aggregation to take place within a 12 month consecutive period. In addition, the threshold amount would remain at $950 for theft of wages from an individual employee, but would be set at $2,350 when aggregated among two or more employees. The 12 moth consecutive period and $2,350 threshold amount are consistent with existing provisions of law that pertain to theft of labor or services. (*See* Pen. Code, §§ 484b and 487 subd. (b)(3).)

   The committee amendments would also narrow the conduct that would qualify as wage theft under the bill. Rather than defining wage theft as any violation of law that results in the loss of wages, benefits, or other compensation, the conduct would instead be limited to instances of deprivation of wages, benefits, or other compensation by fraudulent or other unlawful means, where the employer has knowledge that they are legally obligated to pay them to the employee. This amendment is aimed at trying to focus the bill's attention on the bad actors who are truly attempting to steal from their employees, as identified in the EPI's report, as opposed to employers who make a genuine mistake about owed wages, or employers who have a good-faith belief that they owe less than what the employee claims to be owed. This change also serves to avoid potential problems of constitutionality. As originally drafted, the bill may have been subject to a constitutional challenge on the basis California's prohibition on imprisonment for debts owed. (*See In re Trombley*, (1948) 31 Cal. 2d 801.) The committee amendments should ameliorate concerns with the debtor's prison provisions of the constitution.

4) **Deterrence of Criminal Behavior by Increasing Punishment**: A growing body of research has found that merely increasing the severity of punishment for a crime does little to deter a person from committing the crime. The idea behind this research is that a criminal is rarely considering, or even aware of, what potential sentence they might face if they are caught, charged, and convicted of the behavior. Instead, their thinking is normally limited to whether or not they can commit the crime without being caught.

   In 2014, the National Academy of Sciences (NAS) published a comprehensive report examining the state of imprisonment in the United States and taking a deep dive into research of its causes and consequences. (Travis, The Growth of Incarceration in the United States: Exploring Causes and Consequences," NAS, 2014, available at:

http://johnjay.jjay.cuny.edu/nrc/NAS_report_on_incarceration.pdf, [as of April 15, 2021].) The report discusses the effects on crime reduction through incapacitation and deterrence, and describes general deterrence compared to specific deterrence. The authors of the 2014 report discussed above conclude that incapacitation of certain dangerous offenders can have "large crime prevention benefits," but that incremental, lengthy prison sentences are ineffective for crime deterrence.

The National Institute of Justice (NIJ) has also looked into the concept of improving public safety through increased penalties. The NIJ is the research, development and evaluation agency of the United States Department of Justice (USDOJ). According to the NIJ website, it is an organization that is dedicated to improving knowledge and understanding of crime and justice issues through science. It aims to provide objective and independent knowledge and tools to inform the decision-making of the criminal and juvenile justice communities to reduce crime and advance justice, particularly at the state and local levels. (https://nij.ojp.gov/about-nij.) As early as 2016, the NIJ has been publishing its findings that increasing punishment for given offenses does little to deter criminals from engaging in that behavior. ("Five Things About Deterrence," NIJ, May 2016, available at: https://www.ojp.gov/pdffiles1/nij/247350.pdf, [as of April 15, 2021].) In fact, the NIJ has found that increasing penalties are generally ineffective and may exacerbate recidivism and actually reduce public safety. (Ibid.) Instead the NIJ, advocates for polices that "increase the perception that criminals will be caught and punished" because such perception is a vastly more powerful deterrent than increasing the punishment. (*Ibid.*)

Despite the research on the deterrent effect on crime generally, increasing penalties may have a greater deterrent effect on sophisticated actors. The intended targets of this bill are large companies who intentionally subvert wage and hour laws in order to increase their bottom line. Increasing penalties may have a greater deterrent effect on a sophisticated defendant that is familiar with the law.

5) **Jail Overcrowding and COVID-19**: Realignment began in October 2011. Since that time county jails have had oversight over most non-serious, non-violent, non-sexual felons and parolees who violate their parole. Before realignment, the maximum sentence in county jail was one year. Now that lower-level felons serve sentences in county jail a certain portion of the jail population is serving sentences that are much longer than one year. Those factors related to realignment have served to increase population pressure on county jails.

The Public Policy Institute of California (PPIC) has published reports discussing population impacts on California jails related to Realignment and Proposition 47. After realignment began, the jail population began to rise; as of October 2014, the month before the passage of Proposition 47, it stood at 82,005 inmates, a gain of 14% — and about 2,000 inmates over the rated capacity of 80,000 (set by the California Board of State and Community Corrections). To address these capacity constraints, counties released 14,321 pre-sentenced and sentenced inmates in October 2014 — an increase of 4,102 (or 40%) from September 2011. (Martin, "California's County Jails," PPIC, February, 2021, available at: http://www.ppic.org/publication/californias-county-jails, [as of April 15, 2021].).

COVID-19 has exacerbated the state's already existing concerns with prison and jail overcrowding. Given crowded conditions in some jails and jail systems' limited health care infrastructure, it has been hard to prevent outbreaks among inmates and staff. In February

2020 the average daily jail population stood at about 69,000. Criminal justice responses to the pandemic caused an immediate drop in the population, which declined 30% to roughly 48,500. However, the jail population then grew by 15% (almost 7,200 inmates) between May and September 2020. (*Id.*)

Although the long term impacts of the pandemic on county jail systems are unknown, there is no doubt that the pandemic has created a number of unique challenges. Local governments have directed law enforcement avoid arrests and bookings. (*Id.*) In addition, an emergency statewide zero-bail order was put in place to reduce the number of individuals coming into jails. (*Id.*) According to the PPIC, the number of weekly bookings dropped from about 17,000 in February 2020 to roughly 12,000 in September 2020. However, given crowded conditions in some jails and jail systems' limited health care infrastructure, it has been hard to prevent outbreaks among inmates and staff. In addition, the state prison system has not allowed transfers of jail inmates with prison sentences throughout most of the pandemic, requiring these inmates to be held in county jails until the state has the ability to safely place them in state prisons. (*Id.*).

This bill would create a new offense of wage theft that would be punishable as a felony with time to be served in the county jail. It therefore could exacerbate current issues with jail overcrowding and the COVID-19 pandemic. In light of such concerns, it may be worth closely examining any legislation that has the potential to increase county jail populations.

6) **Argument in Support**: According to *the Little Hoover Commission,* "The Little Hoover Commission supports AB 1003 (Gonzalez), which would make an employer's intentional theft of wages punishable as grand theft when collectively greater than $950. In its 2015 report, Level the Playing Field: Put California's Underground Economy Out of Business, the Commission found that the consequences for Labor Code violations did not incentivize voluntary compliance: The rewards of breaking the law outweigh the risk, it learned. Prosecutors explained that, 'White collar crimes are treated as a nuisance,' and stakeholders from multiple industries and levels of government told the Commission that the penalties "are meaningless and unenforced."

"Though the Commission encouraged the state to work with business owners to correct honest mistakes, and conduct outreach and education to prevent them in the first place, it also found that a small minority of business owners intentionally build their profit model off of the underground economy, viewing fees and penalties as the cost of doing business. This profit model comes at the expense of the people in their employ and law-abiding business owners who are unable to compete with the cost savings of breaking the law. To incentivize compliance with its laws, the Commission urged the Legislature to assess existing penalties for white collar crimes and, where appropriate, make adjustments to ensure that rewards of breaking the law do not outweigh the risk or the penalties imposed if caught breaking the law."

7) **Argument in Opposition**: According to the *Independent Physical Therapists of California,* "California already boasts the most complicated wage and hour laws in the nation. Not even our Labor Commissioner and the courts can agree on how to interpret them. Now comes AB 1003 to propose that 'any violation' of these confusing and ever-changing laws that aggregate over any number of employees and any length of time in an amount greater than $950 is prosecuted as grand theft.

"Do not misunderstand, oversight of criminal activity and suitable consequences are necessary for a safe society. However, AB 1003 puts a barrier of suspicion between employees and their employer before their relationship has even begun. As our State and Nation begin to emerge from the stranglehold Covid-19 has cruelly and disproportionately imposed on society this is not the time for complicating what is already complicated."

8) **Prior Legislation**:

a) AB 2416 (Stone), of the 2013 – 2014 Legislative Session, would have enacted the California Wage Theft Recovery Act and authorized an employee to have a lien on all property of the employer in California for the full amount of any wages and other compensation, penalties, and interest owed to the employee; and also authorizes the court to award to the prevailing plaintiff court costs and reasonable attorney's fees in a civil action. AB 2416 failed passage on the Senate floor.

b) AB 469 (Swanson), Chapter 655, Statutes of 2011, made it a misdemeanor if an employer willfully violates specified wage statutes or orders, or willfully fails to pay a final court judgment or final order of the Labor Commissioner for wages due.

c) AB 2187 (Arambula), of the 2009 – 2010 Legislative Session, would have increased criminal penalties for employers who willfully fail to pay wages due to an employee who resigns or is discharged. AB 2187 was vetoed.

REGISTERED SUPPORT / OPPOSITION:

Support

California Conference Board of The Amalgamated Transit Union
California Conference of Machinists
California District Attorneys Association
California Nurses Association
California Teamsters Public Affairs Council
Engineers and Scientists of California, Ifpte Local 20, Afl-cio
Little Hoover Commission
Professional and Technical Engineers, Ifpte Local 21, Afl-cio
Southwest Regional Council of Carpenters
Unite Here International Union, Afl-cio
Utility Workers Union of America

Oppose

Associated General Contractors
Auto Care Association
California Association for Health Services At Home
California Beer and Beverage Distributors
California Building Industry Association (CBIA)
California Chamber of Commerce

California Farm Bureau
California Hospital Association
California Manufacturers and Technology Association
California Restaurant Association
California Trucking Association
Chino Valley Chamber of Commerce
Civil Justice Association of California
Construction Employers' Association
Garden Grove Chamber of Commerce
Greater Bakersfield Chamber of Commerce
Greater Coachella Valley Chamber of Commerce
Greater Riverside Chambers of Commerce
Greater San Fernando Valley Chamber of Commerce
Housing Contractors of California
Independent Physical Therapists of California
Long Beach Area Chamber of Commerce
National Federation of Independent Business (NFIB)
North Orange County Chamber of Commerce
Oceanside Chamber of Commerce
Official Police Garages of Los Angeles
Oxnard Chamber of Commerce
Pleasanton Chamber of Commerce
Rancho Cordova Chamber of Commerce
Redondo Beach Chamber of Commerce
Roseville Area Chamber of Commerce
San Gabriel Valley Economic Partnership
Santa Maria Valley Chamber of Commerce
Simi Valley Chamber of Commerce
South Bay Association of Chambers of Commerce
Torrance Area Chamber of Commerce
Tulare Chamber of Commerce
Wine Institute

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

Amended Mock-up for 2021-2022 AB-1003 (Lorena Gonzalez (A))

Mock-up based on Version Number 99 - Introduced 2/18/21
Submitted by: Matthew Fleming, Assembly Public Safety Committee

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

SECTION 1. Section 487m is added to the Penal Code, to read:

487m. (a) Notwithstanding Sections 215 and 216 of the Labor Code, the intentional theft of wages in an amount greater than nine hundred fifty dollars ($950) **from any one employee**, **or two thousand three hundred fifty dollars ($2,350)** in aggregate **from more two or more employees**, by an employer ~~from one or more employees~~ **in any 12 consecutive month period,** may be punished as grand theft.

(b) For purposes of this section, "theft of wages" ~~includes any violation of the law that results in an employee being deprived~~ **is the intentional deprivation** of wages, as defined in Section 200 of the Labor Code, benefits, or other compensation**, by fraudulent or other unlawful means, with the knowledge that such wages, benefits or other compensation is** due to the employee under the law.

(c) ~~An act that is punished pursuant to this section shall not be punishable under any other criminal provision, but wages,~~ **Wages** benefits, or other compensation **that are the subject of a prosecution under this section** may be recovered in a civil action by the employee or the Labor Commissioner.

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

Date of Hearing: April 20, 2021
Counsel: Nikki Moore

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

AB 94 (Jones-Sawyer) – As Amended April 15, 2021

SUMMARY: Requires a correctional officer for the California Department of Corrections and Rehabilitation (CDCR) to have a mental health evaluation once every calendar year and requires reporting of the results of such exam if the exam shows that the person's mental health might adversely affect the workplace. Specifically, **this bill**:

1) Provides that the mental health evaluations shall be conducted by either of the following:

   a) A physician and surgeon licensed by the Medical Board of California or the Osteopathic Medical Board of California who has successfully completed a postgraduate medical residency education program in psychiatry accredited by the Accreditation Council for Graduate Medical Education, and has at least the equivalent of five full-time years of experience in the diagnosis and treatment of emotional and mental disorders, including the equivalent of three full-time years accrued after completion of the psychiatric residency program; or,

   b) A psychologist licensed by the Board of Psychology who has at least the equivalent of five full-time years of experience in the diagnosis and treatment of emotional and mental disorders, including the equivalent of three full-time years accrued after receipt of their doctorate degree.

2) Mandates that the mental health evaluation include a determination of whether the individual has an emotional or mental health condition that might adversely affect their exercise of the duties and powers of a correctional officer employed by CDCR.

3) Establishes that a mental health evaluation shall be confidential, unless the mental health evaluator determines that the individual has an emotional or mental health condition that might adversely affect their exercise of the duties and powers of a correctional officer, in which case the mental health evaluation shall be provided to the individual's supervisor and included in the individual's personnel file.

4) Requires a mental health evaluator who finds an emotional or mental health condition, whether or not it might adversely affect an individual's exercise of the duties and powers of a correctional officer, to provide the individual information on mental health resources or other resources that the individual can voluntarily access.

5) Provides that an individual determined to have an emotional or mental health condition that might adversely affect their exercise of the duties and powers of a correctional officer shall be prohibited from performing duties as a correctional officer that involve direct supervision of inmates. Further provides that the individual shall not be permitted to resume duties that

involve direct supervision of inmates until a mental health evaluator verifies that the individual does not have an emotional or mental health condition that might adversely affect their exercise of the duties and powers of a correctional officer. Verification shall be provided to the individual's supervisor and included in the individual's personnel file.

6) States that a determination that a correctional officer has an emotional or mental health condition that might adversely affect their exercise of the duties and powers of a correctional officer shall not be used for disciplinary purposes, and that removal of the officer from duties that constitute direct supervision of inmates pursuant to this section does not constitute discipline.

7) Provides that if a mental health evaluator determines that an individual has an emotional or mental health condition that might adversely affect their exercise of the duties and powers of a correctional officer, CDCR shall refer the individual to resources and provide an opportunity for the individual to address the emotional or mental health condition.

8) Makes legislative findings and declarations.

EXISTING LAW:

1) Requires that a peace officer be found to be free from any physical, emotional, or mental condition, including bias against race or ethnicity, gender, nationality, religion, disability, or sexual orientation, that might adversely affect the exercise of the powers of a peace officer. (Gov. Code, § 1031, subd. (f).)

2) Requires the following evaluations:

   a) An evaluation of physical condition, by a licensed physician and surgeon. (Gov. Code, § 1031, subd. (f)(1).)

   b) An evaluation of emotional and mental condition, by either of the following (Gov. Code, § 1031, subd. (f)(2)(a-b).):

      i) A physician and surgeon who holds a valid California license to practice medicine, has successfully completed a postgraduate medical residency education program in psychiatry accredited by the Accreditation Council for Graduate Medical Education, and has at least the equivalent of five full-time years of experience in the diagnosis and treatment of emotional and mental disorders, including the equivalent of three full-time years accrued after completion of the psychiatric residency program; or,

      ii) A psychologist licensed by the California Board of Psychology who has at least the equivalent of five full-time years of experience in the diagnosis and treatment of emotional and mental disorders, including the equivalent of three full-time years accrued postdoctorate. The physician and surgeon or psychologist shall also have met any applicable education and training procedures set forth by the Commission on Peace Officer Standards and Training designed for the conduct of preemployment psychological screening of peace officers.

3) Provides that the law shall not be construed to preclude the adoption of additional or higher standards, including age. (Gov. Code, § 1031, subd. (g).)

4) Establishes a Peer Support Program (PSP) as a resource for employees involved in violent, work related situations that may cause serious physical or emotional trauma to the employee. Provides for immediate intervention and counseling to alleviate trauma-related problems and to help an employee remain fully productive. (Department Operations Manual, § 31040.3.2.)

5) Requires the PSP to provide a) specific intervention services and resources, b) professional non-departmental counseling services in a timely manner that meets the employee's needs, and c) assistance through PSP team members and, if needed, facilitation of referrals for counseling by non-departmental licensed mental health professionals who are Psychological First Aid trained for the following situations: physical assault, sexual assault, a hostage incident, an incident causing serious injury/death to person, and direct involvement in critical incidents. (Department Operations Manual, § 31040.3.2.)

6) Establishes that PSP Team Leaders shall be designated as specified; states that each PSP team shall be comprised of ten or more staff with appropriate interest and skills; establishes that the headquarters' team shall include staff from each headquarters' location; and requires the PSP team shall have both male and female members. (Department Operations Manual, §§ 31040.3.2.5 to 31040.3.2.6.)

7) Establishes that a facility manager shall ensure that a local PSP program is available and used in the employee's and facility's best interests. (Department Operations Manual, § 31040.3.2.7.)

8) Requires a departmental coordinator to execute a master contract to provide non-departmental licensed mental health professionals who are trained to debrief and assist staff following an incident, if necessary. Requires a departmental coordinator to provide training to PSP team leaders; assist area PSP Team Leaders, committees, and management in the solution of trauma-related problems; ensure strict confidentiality of the employee's personal information; collect statistics and other pertinent data to monitor program effectiveness; and prepare an annual report summarizing the progress and effectiveness of the program. (Department Operations Manual, § 31040.3.2.8.)

9) Sets forth responsibilities for a supervisor and a PSP team leader in responding to an incident, as specified, and includes requirements to debrief following an incident. (Department Operations Manual, §§ 31040.3.2.9 and 31040.3.2.10.)

10) States that, mindful of the right of individuals to privacy, the Legislature finds and declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state. (Gov. Code, § 6250 et seq.)

11) States that an agency is not required to produce "personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy." (Gov. Code, § 6254, subd. (c).)

12) States that, except as provided, the personnel records of peace officers and custodial officers and records maintained by any state or local agency, or information obtained from these

records, are confidential and shall not be disclosed in any criminal or civil proceeding except by discovery pursuant to Sections 1043 and 1046 of the Evidence Code. (Pen. Code, § 832.7.)

FISCAL EFFECT: Unknown.

COMMENTS:

1) **Author's Statement**: According to the author, "Under existing law, correctional officers are required to undergo a pre-employment mental health screening to check for any emotional or mental condition that may negatively impact their ability to perform essential duties. And yet, despite being exposed to incidents involving serious injury and death at levels comparable to military veterans and a generally high stress work environment, there is no requirement for follow-up evaluations.

   "Early identification is a key to preventing more serious conditions, managing symptoms, and improving treatment outcomes. By requiring regular evaluations for all correctional officers, AB 94 not only promotes the well-being of the officers themselves, but also the health and safety of all staff and inmates in California's corrections system."

2) **Purpose of this Bill**: The legislative findings and declarations in this bill declare: "The emotional and mental well-being of correctional officers is critical to maintaining a safe environment for staff and inmates in the facilities of the Department of Corrections and Rehabilitation.

   "Correctional officers are exposed to violence at rates roughly comparable to military veterans."

   "Correctional officers have a high incidence of serious stress-related illnesses compared to average Americans."

   "One in three correctional officers have experienced at least one symptom of post-traumatic stress disorder."

   "Ten percent of correctional officers have experienced suicide ideation."

   "Mental health issues have serious negative impacts on correctional officers and their families and affect their ability to carry out their duties in a safe and appropriate manner."

   "Correctional officers' mental health needs are often overlooked until a response is necessitated by negative behavior or a significant event."

   "Correctional officers are currently required to have a mental health evaluation prior to employment with the Department of Corrections and Rehabilitation."

   "Routine observation and evaluation can improve early detection or even prevent serious mental health issues."

3) **Labor Issues**: There is no known precedent in California law for requiring a public employee to undergo a recurring mental health evaluation as a condition of employment. Whether a person may be disciplined based on such evaluation also raises novel issues in the employment context. This bill has been double referred to the Assembly Committee on Public Employment and Retirement to review these issues.

4) **Existing Mental Health Support Programs at CDCR**: CDCR reports that it has over 1,200 peer supporters statewide. According to CDCR, "the current Peer Support Program (PSP) was established to ensure CDCR staff involved in work-related critical incidents are provided with intervention and available resources to cope with the immediate effects of a traumatic incident." The PSP "provides peers who are trained to listen and offer emotional and practical support to help an employee deal with his/her situation in a confidential environment." The PSP exists to provide employees immediate counseling and related services when they are involved in specific violent, work related situations that may cause serious physical and emotional trauma. The purpose is to help "alleviate many trauma-related problems" and assist an employee in remaining "fully productive." (CDCR Department Operations Manual (DOM) Section 31040.3.2.) To accomplish this goal, the currently established PSP is tasked with providing specific intervention services and resources and facilitating referrals for counseling to non-departmental licensed mental health professionals. The program is operated by a facility in conjunction with the Office of Employee Wellness (OEW), which provides PSP training, lesson plans, and curriculum. OEW coordinates with the Office of Training and Professional Development to ensure that all employees receive information annually at the local level about the program.

   The Department Operations Manual (DOM) specifies how the current PSP is structured and shall operate. (DOM Section 31040.3.2.) The DOM states that every CDCR facility administrator shall ensure that a local PSP program is available and used in the employee's and Department's best interests, and the administrator is tasked with appointing all members of the PSP team and ensuring that they receive appropriate training. The PSP must include 10 or more staff, which is called a "team" and shall be comprised of both male and female staff who have "appropriate interest and skills."

   The DOM requires that a departmental PSP coordinator collect statistics and other pertinent data to monitor program effectiveness, and prepare an annual report summarizing the progress and effectiveness of the program.

5) **Current Utilization of PSPs**: The Officer Health and Wellness: Results from the California Correctional Officer Survey is a report based on a survey conducted from March to May 2017 of a sample of 8,334 correctional officers and sworn staff. The survey is a "large-scale effort to gather individual-level information on the thoughts, attitudes, and experiences of criminal justice personnel." When questioned about the utilization of CDCR's wellness resources, only three percent of responding employees reported utilizing PSPs. The report on the survey provides insight into the minimal use of PSPs: "The concerns officers raise about using the [Employee Assistant Program] help to explain these relatively low participation rates. Only 11% of officers say they do not need these resources, and only 7% say they do not believe that [Employee Assistant Program] would help.... In contrast, fully one-fifth of correctional officers express concern about confidentiality. Another 15% are concerned about the potential for negative consequences from management if they make use of these services. Specifically, 11% fear it would cause them to lose their job and 8% that it would result in

loss of their [Concealed Weapons Permit]. Relatedly, 13% of officers say they worry about negative judgment from coworkers."

6) **Argument in Support**: According to the *California Public Defenders Association*, "Although existing law requires applicants for the position of correctional officer with the California Department of Corrections and Rehabilitation to undergo a mental health evaluation, prior to beginning employment, to ensure they do not have an emotional or mental condition that might adversely affect their exercise of the duties and powers in the position it does not currently require reevaluation for such conditions after employment.

"As we have seen from the recent allegations in 2019 of 'gladiator' type fights occurring in CDCR prison in Corcoran and allegations of assault, abuse and retaliation against inmates with disabilities in CSP Los Angeles County, CSP Corcoran, Kern Valley State Prison's Substance Abuse and Treatment Facility, and California Institution for Women, the mental health and safety of those incarcerated and those working in the CDCR facilities require vigilant oversight to protect all inmates and staff in these facilities.

"AB 94 would require correctional officers employed by the Department of Corrections and Rehabilitation to undergo a confidential mental health evaluation every calendar year. The bill would also require the department to refer an individual with an emotional or mental condition that might adversely affect the individual's exercise of the duties and powers of a correctional officer to resources and provide an opportunity for the individual to address that condition."

7) **Argument in Opposition**: According to *California Correctional Peace Officers Association*, "More specifically, to cultivate a healthier workplace, CCPOA and the CCPOA Benefit Trust Fund have been advocates of ongoing resiliency training and awareness initiatives. The CCPOA Benefit Trust Fund has an ongoing Mental Health Awareness program, hosting statewide events to bolster officer wellness and promote available support services. The CCPOA Benefit Trust Fund also recently started offering free access to the iCrisis App, which connects an individual to trained professionals who will offer help. Additionally, earlier this year, we assisted with the launch of CDCR's Cordico App, which serves as another confidential wellness resource for employees. Further, we continue to work collaboratively with CDCR on the standardization of the Peer Support Program (PSP), which provides Correctional Officers with local peers – working correctional officers and supervisors - who are trained to listen and offer assistance. Through these efforts and others, CCPOA and the CCPOA Benefit Trust Fund have helped develop meaningful supports for correctional officers.

"We have also made critical strides in reducing stigma around mental health within the ranks. To encourage the use of wellness resources, we work diligently to dispel fears that opening up about acute stress might put an officer's job at risk or brand an officer 'unfit for duty.' However, being subjected to an annual mental health exam – as proposed by AB 94 – would completely undermine our progress and reignite officer concerns. To this end, the bill will not improve the conversation around mental health and ultimately have a chilling effect on officers reaching out for help.

"The annual mental health evaluation, required by AB 94, will only create additional stress on individual officers. The bill states that the evaluation will be 'confidential,' but then

specifies the evaluation results could be provided to the individual's supervisor and included in the individual's personnel file. This bill has serious implications for the rights of correctional officers under HIPPA, the California Workers' Compensation Act, ADA, and public records transparency initiatives.

"Finally, the bill asserts these mental health evaluations will not be used for disciplinary purposes. However, AB 94 also prohibits an individual from performing duties as a correctional officer involving the direct supervision of inmates. This drastically alters officers' opportunities for promotions, advancements, and work areas, in addition to creating a logistical quagmire.

"CCPOA and the CCPOA Benefit Trust Fund support equipping officers, dedicated employees who have worked tirelessly throughout the COVID-19 pandemic, with real tools and resources to stay mentally and physically healthy. Years of effort have been put into offering solutions to our officers and overcoming the stigma associated with mental health struggles. AB 94, however, runs counter to these goals. Instead, its effect will be devastating to correctional officers, their families, and the overall operation of California's correctional institutions. In sum, the bill is costly and a detriment to officer wellbeing. It will only reinforce existing stigmas and discourage officers from seeking help. For these reasons, we oppose AB 94."

8) **Related Legislation**: AB 89 (Jones-Sawyer), would establish minimum qualifications for being a correctional officer, by mandating a person be at least 25 years old or have a bachelor's degree. AB 89 is currently pending before this committee.

9) **Prior Legislation**:

   a) AB 2554 (Gipson), of the 2019-2020 Legislative Session, would have encouraged CDCR to establish a peer support and crisis referral program. AB 2554 was held in the Assembly Appropriations Committee.

   b) AB 803 (Gipson), of the 2019-2020 Legislative Session, would have required CDCR to establish a Peer Support Labor Management (PSLM) Committee tasked with crafting and updating a standardized statewide policy for CDCR's peer support program. AB 803 was vetoed by the Governor.

   c) AB 1116 (Grayson), Chapter 388, Statutes of 2018-2019, encourages a state or any local or regional public fire agency to establish a peer support and crisis referral service.

   d) AB 1117 (Grayson), Chapter 621, Statutes of 2018-2019, encourages a local or regional law enforcement agency to establish a peer support and crisis referral service.

   e) AB 1116 (Grayson), of the 2017-2018 Legislative Session, would have enacted the Peer Support and Crisis Referral Services Pilot Program to provide peer support and crisis referral services for California's correctional peace officers, parole officers, and firefighters. AB 1116 was vetoed by the Governor.

REGISTERED SUPPORT / OPPOSITION:

Support

California Public Defenders Association (CPDA)
Depression and Bipolar Support Alliance California

Opposition

California Correctional Peace Officers Association (CCPOA)
California Correctional Peace Officers Association Benefit Trust

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

Date of Hearing: April 20, 2021
Counsel: Nikki Moore

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

AB 750 (Jones-Sawyer) – As Amended April 12, 2021

SUMMARY: Expands the crime of a peace officer making a false report to include any material statement made or cause to be made in a peace officer report or to another peace officer, regarding the commission or investigation of any crime, knowing the statement to be false. Permits an exemption from this rule for writing or making a police report that includes the statements of another person that are false, unless the peace officer knows that statement to be false and is including the statement to present it as being true.

EXISTING LAW:

1) Establishes that a peace officer who files any report with the agency which employs them regarding the commission of any crime or any investigation of any crime, if they knowingly and intentionally make any statement regarding any material matter in the report which the officer knows to be false, whether or not the statement is certified or otherwise expressly reported as true, is guilty of filing a false report punishable by imprisonment in the county jail for up to one year, or in the state prison for one, two, or three years. Provides that this section shall not apply to the contents of any statement which the peace officer attributes in the report to any other person. (Pen. Code, § 118.1.)

2) Establishes that a person who, having taken an oath that they will testify, declare, depose, or certify truly before any competent tribunal, officer, or person, in any of the cases in which the oath may by law of the State of California be administered, willfully and contrary to the oath, states as true any material matter which they know to be false, and every person who testifies, declares, deposes, or certifies under penalty of perjury in any of the cases in which the testimony, declarations, depositions, or certification is permitted by law of the State of California under penalty of perjury and willfully states as true any material matter which he or she knows to be false, is guilty of perjury. (Pen. Code, § 118, subd. (a).)

3) Provides that no person shall be convicted of perjury where proof of falsity rests solely upon contradiction by testimony of a single person other than the defendant. Proof of falsity may be established by direct or indirect evidence. (Pen. Code, § 118, subd. (b).)

4) Makes it a misdemeanor to report to a peace officer, the Attorney General, or a deputy attorney general, or a district attorney, or a deputy district attorney that a felony or misdemeanor has been committed, knowing the report to be false. (Pen. Code, § 148.5, subd. (a).)

5) Makes it a misdemeanor to report to a peace officer that a felony or misdemeanor has been committed, knowing the report to be false if (1) the false information is given while the peace officer is engaged in the performance of their duties as a peace officer and (2) the person

providing the false information knows or should have known that the person receiving the information is a peace officer. (Pen. Code, § 148.5, subd. (b).)

6) States that, except as in other sections of the California Public Records Act ("CPRA"), 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).)

7) Provides, notwithstanding any other law, state and local law enforcement agencies shall make public the following information, except to the extent that disclosure of a particular item of information would endanger the safety of a person involved in an investigation or would endanger the successful completion of the investigation or a related investigation:

   a) The full name and booking information of all persons arrested;

   b) Calls for service logs and crime reports, subject to protections for protecting the confidentiality of victims; and,

   c) The addresses of individuals arrested by the agency and victims of a crime, where the requester declares under penalty of perjury that the request is made for a scholarly, journalistic, political, or governmental purpose, or that the request is made for investigation purposes by a licensed private investigator. (Gov. Code, § 6254, subd. (f).)

8) Provides that specified peace officer or custodial officer personnel records and records maintained by any state or local agency shall not be confidential and shall be made available for public inspection pursuant to the CPRA, including Reports, investigation, or findings of:

   a) Incidents involving the discharge of a firearm at a person by an officer;

   b) Incidents involving use of force by an officer which results in death or serious bodily injury;

   c) Any record relating to an incident where there was a sustained finding that an officer engaged in sexual assault of a member of the public; and,

   d) Any record relating to an incident where there was a sustained finding that an officer was dishonest relating to the reporting, investigation, or prosecution of a crime, or relating to the misconduct of another peace officer, including but not limited to perjury, false statements, filing false reports, destruction/falsifying/or concealing evidence, or any other dishonesty that undermines the integrity of the criminal justice system. (Pen. Code § 832.7, subd. (b)(1)(A)-(C).)

FISCAL EFFECT: Unknown.

COMMENTS:

1) **Author's Statement**: According to the author, "Current law provides an opportunity for one officer to make a false statement in a peace officer report and evade criminal charges by having a second officer write and file the report for them. It is imperative we ensure officer accountability for their false statements, especially when those false statements can determine individuals' experiences with the criminal justice system. AB-750 will close this existing loophole to ensure that peace officers who make false statements in reports are held accountable."

2) **Need for this Bill**: According to the author, "Under current state law, any peace officer who files a report with a false statement is guilty of filing a false police report. However, this current law is limited to the officer who knowingly makes and files a false report themselves, and does not include officers who make a false statement to the officer writing and filing the report. Thus, an officer who makes a false statement to the report-writing officer is not held responsible for their falsified statement, while the report-writing officer is not held responsible because the law does not apply to statements made by other officers.

   "For example, when Officer A tells their partner Officer B to write in their report that 'the suspect hit Officer A,' when said suspect did not hit the officer. If Officer B did not see whether or not Officer A was hit and simply writes what their partner said in the report, Officer A would escape punishment simply by having another officer write the police report. Officer A will not be held responsible because they did not write and file the report, nor could they be charged with aiding and abetting the false report. This is because Officer B committed no crime under existing law, as it specifically states that it does not apply to statements made by other persons.

   "In 2020, the Orange County District Attorney's Office (OCDA) conducted a review of 31 cases against deputy sheriffs involving systemic problems with report-writing and evidence-booking in the Orange County Sheriff's Department (OCSD). During their review, OCDA found a deputy knowingly wrote and filed a false report so the officer making the false statement could not be prosecuted. Both were exempt from prosecution as the officer making the falsified statement was not the report-writing officer.

   "Within their review, OCDA also found there were instances in which the officer who wrote and filed the report, which stated the evidence had been booked, was not written or filed by the same peace officer who either booked or was supposed to book the evidence. OCDA also found there were instances where officers would write in their reports that they booked the evidence when it was other deputies who had actually done, or were supposed to have done, so.

   "After conducting its criminal investigation and submitting its findings to OCDA for review, criminal charges were filed against deputy sheriffs on the basis of filing a false police report. However, the current law for prosecution under false police reporting could not hold the officers responsible, as those making the falsified statements were not the report writers. Closing this existing loophole to include peace officers who make false statements to report-writers will ensure officers will no longer be able to circumvent accountability for their falsified statements in police reports."

3) **Loophole in Existing Law**: A police report is an essential factual account in any incident resulting in a law enforcement encounter. The police report is a legal document and are recorded by trained employees. The report is a foundational document in any legal proceeding that follows. The public has a right to access certain factual information contained in police reports including the facts and circumstances of any incident eliciting a police response. (Gov. Code Section 6254(f).)

   This bill addresses a loophole in existing law, Penal Code Section 118.1, which makes it a crime to put false information in a police report. The loophole exists because current law imposes liability only on an officer who actually writes and files a false report. Technically, this excludes imposing criminal sanctions on an officer who makes a false statement of fact that is ultimately included in a police report by another officer. Clarifying the scope of the law, this bill ensures that the purpose of existing law—to deter dishonesty in the filing of police reports by any person—is accomplished.

   This bill will likely have the effect of ensuring greater honesty and accuracy in the substance of reports filed by officers, because officers will be liable for any false statement that they cause to be included in a report. This increases the integrity of the police reports, and in turn, the criminal justice system.

4) **Sustained Finding of Dishonesty**: Since 2019, the law has required the disclosure of police personnel records related to police misconduct in cases where there has been a sustained finding that a peace officer engaged in an act of dishonesty, as specified. The category of dishonesty covered includes "any sustained finding of perjury, false statements, filing false reports, destruction, falsifying, or concealing of evidence." (Penal Code Section 832.7(b)(1)(C).) This category of records to be disclosed would include any violation of Penal Code Section 118.1.

   This narrow category mandating disclosure of police personnel records related to dishonesty indicates the Legislature's acknowledgment that such dishonesty committed during the discharge of police duties is particularly problematic, as such dishonesty may implicate a member of the public's constitutional rights, including the right to a fair trial. As such, there is a substantial public interest in knowing about incidents of dishonesty in policing. By expanding the scope of unlawful activity, this bill furthers the purpose of shedding light on conduct that ultimately undermines policing.

5) **Argument in Support**: According to the *American Civil Liberties Union California Action*, "Under current state law, any peace officer who files a false report is guilty of perjury. However, current law is limited to the officer who knowingly makes and files a false report themselves and does not include officers who make a false statement to the report-writing officer. Thus, an officer who makes a false statement to the report-writing officer is not held responsible for their false statement, while the report-writing officer is not held responsible because the law does not apply to statements made by other officers.

   "In practice, an officer could tell their partner, a report-writing deputy, to include in their report that 'the suspect hit the officer,' when in reality the suspect did not do so. If the report-writing deputy did not see whether the first officer was hit, and the deputy simply writes what the first officer said into their report, the first officer would escape criminal charges by having the deputy write and file the peace officer report. This system provides officers an

avenue to escape accountability for their false peace officer reports.

"AB 750 is an helpful measure to ensure officer accountability for false statements, especially when those false statements can violate individuals' right to a fair trial and determine their experiences with the criminal justice system."

6) **Related Legislation**:

a) SB 16 (Skinner), would expand access to police personnel records, and establish fines and penalties for a police agency's failure to disclose records as required by the CPRA. SB 16 is currently pending before the Senate Judiciary Committee.

b) AB 409 (Seyarto), would require a police officer interviewing a witness or victim in a gang related incident to inform the victim or witness that the investigatory records exemption may result in the disclosure of their name to the public unless the person provides facts that disclosure would threaten their safety. AB 409 is pending before the Assembly Judiciary Committee.

7) **Prior Legislation**:

a) AB 2655 (Gipson), Chapter 219, Statutes of 2020, made it a crime for a first responder to use an electronic at the scene of an accident or crime to capture the image of a deceased person for any purpose other than an official law enforcement purpose or for a genuine public interest.

b) SB 1421 (Skinner), Chapter 998, Statutes of 2018, established a right to access specified police records, including video or audio footage of an incident regarding a police use of force that includes the discharge of a firearm or results in great bodily injury or death.

REGISTERED SUPPORT / OPPOSITION:

Support

American Civil Liberties Union/Northern California/Southern California/San Diego and Imperial Counties
California District Attorneys Association
Orange County District Attorney's Office

Opposition

None

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