California State Assembly

PUBLIC SAFETY

REGINALD BYRON JONES-SAWYER SR.
CHAIR

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AGENDA

Tuesday, April 27, 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 624	Bauer-Kahan	Juveniles: transfer to court of criminal jurisdiction: appeals.
2.	AB 939	Cervantes	Sex offenses: evidence.
3.	AB 28	Chau	Hate crimes.
4.	AB 481	Chiu	Law enforcement agencies: military equipment: funding, acquisition, and use.
5.	AB 886	Chiu	Victims.
6.	AB 1259	Chiu	Criminal procedure: motion to vacate.
7.	AB 1245	Cooley	Resentencing.
8.	AB 821	Cooper	Sexually violent predators: placement outside county of domicile: notice and hearing.
9.	AB 700	Cunningham	Criminal procedure: arraignment and trial.
10.	AB 958	Gipson	Peace officers: law enforcement cliques.
11.	AB 1165	Gipson	Juvenile facilities: storage and use of chemical agents.
12.	AB 506	Lorena Gonzalez	Youth service organizations: mandated reporters.
13.	AB 89	Jones-Sawyer	Peace officers: minimum qualifications.
14.	AB 1347	Jones-Sawyer	Bail: premiums.
15.	AB 1509	Lee	Enhancements: firearms.
16.	AB 1336	Nguyen	Hate crimes: task force.
17.	AB 1480	Rodriguez	Employers: prohibited disclosure of information: arrest or detention.
18.	AB 1281	Blanca Rubio	Criminal procedure: protective orders.
19.	AB 1127	Santiago	Serious or violent felonies: enhancements: juveniles.
20.	AB 913	Smith	Collateral recovery.
21.	AB 1308	Ting	Arrest and conviction record relief.
22.	AB 1452	Ting	State prison.
23.	AB 1540	Ting	Criminal procedure: resentencing.

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 27, 2021
Counsel: Cheryl Anderson

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

AB 624 (Bauer-Kahan) – As Amended April 21, 2021

SUMMARY: Authorizes immediate appellate review of an order transferring a minor from the juvenile court to a court of criminal jurisdiction if a notice of appeal is filed within 30 days of the transfer order. Specifically, **this bill**:

1) Authorizes immediate appellate review of an order transferring a minor from the juvenile court to a court of criminal jurisdiction if a notice of appeal is filed within 30 days of the transfer order. Specifies that the order transferring the minor from the juvenile court to a court of criminal jurisdiction may not be heard on appeal from the judgment of conviction.

2) Provides that upon request of the minor, the superior court must issue a stay of the criminal court proceedings until a final determination of the appeal. The superior court retains jurisdiction to modify or lift the stay upon request of the minor.

3) States that the appeal shall have precedence in the court to which the appeal is taken and shall be determined as soon as practicable after the notice of appeal is filed.

4) Requires the Judicial Council to adopt rules of court to ensure all of the following:

   a) The juvenile court advises the minor of the right to appeal, of the necessary steps and time for taking an appeal, and of the right to the appointment of counsel if the minor is unable to retain counsel;

   b) Following the timely filing of a notice of appeal, the record is promptly prepared and transmitted from the superior court to the appellate court; and,

   c) Adequate time requirements exist for counsel and court personnel to implement the objectives of this section.

5) States it is the intent of the Legislature that this provision provide for an expedited review on the merits by the appellate court of an order transferring the minor from the juvenile court to a court of criminal jurisdiction.

EXISTING LAW:

1) Subjects a minor between 12 and 17 years of age, inclusive, who violates any federal, state, or local law or ordinance, and a minor under 12 years of age who is alleged to have committed murder or a specified sex offenses, to the jurisdiction of the juvenile court, which may adjudge the minor to be a ward of the court. (Welf. & Inst. Code, § 602.)

2) Authorizes the district attorney to make a motion to transfer a minor from juvenile court to a court of criminal jurisdiction in a case in which a minor is alleged to have committed a felony when the minor was 16 years of age or older, or in a case in which a specified serious offense is alleged to have been committed by a minor when the minor was 14 or 15 years of age, but the minor was not apprehended prior to the end of juvenile court jurisdiction. (Welf. & Inst. Code, § 707.)

3) Requires the court to order the probation officer to submit a report on the behavioral patterns and social history of the minor when a prosecutor makes a motion to transfer a juvenile case to adult criminal court. (Welf. & Inst. Code § 707, subd. (a)(1).)

4) Requires the court to consider the following criteria when deciding to transfer the case:

   a) The degree of criminal sophistication exhibited by the minor;

   b) Whether the minor can be rehabilitated prior to the expiration of the juvenile court's jurisdiction;

   c) The minor's previous delinquent history;

   d) Success of previous attempts by the juvenile court to rehabilitate the minor; and,

   e) The circumstances and gravity of the offense alleged in the petition to have been committed by the minor. (Welf. & Inst. Code § 707, subd. (a)(3).)

5) Authorizes a minor to appeal from a proceeding to declare the minor a ward under the jurisdiction of the juvenile court in the same manner as any final judgment, and to appeal any subsequent order as from an order after judgment. (Welf. & Inst. Code, § 800.)

6) Provides that an order granting or denying a motion to transfer jurisdiction of a minor to the criminal court is not an appealable order. Appellate review of the order is by petition for extraordinary writ. (Cal. Rules of Court, rule 5.770(g); *People v. Grisso* (1980) 104 Cal.App.3d 380, 388, disapproved on other grounds in *People v. Marsh* (1984) 36 Cal.3d 134, 141; *People v. Chi Ko Wong* (1976) 18 Cal. 3d 698, 709.)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "The impact of this bill is far greater than just a procedural change in court proceedings, this is a policy that can change the trajectory of the lives of our youth. Disproportionally, Black and Brown kids are tried as adults and are faced with major sentences life in prison that would not be an option if they were tried in juvenile court. For example, in 2019, 42 of 76 Latino youth, or more than 55%, were sent to adult court but only 8 of 18, or under 45%, of White youth were sent to adult court. This bill will provide a right of appeal of a major life altering decision made by our judges, and update our code in line with other states who recognize the importance of this decision."

2) **Juvenile Court Transfer of a Minor to Adult Court**: Starting with Proposition 21 in March 2000, and continuing until the adoption of Proposition 57 in 2016, the prosecution was authorized in specified circumstances to file a criminal action against a minor directly in adult court. (*People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, 305.) In 2016, Proposition 57 eliminated direct filing in adult court. (*Lara, supra*, 4 Cal.5th at pp. 305-306; Welf. & Inst. Code, § 707.) Proposition 57 amended Welfare and Institutions Code section 707 to require a transfer hearing before a minor can be prosecuted in adult court. (*Lara, supra,* at p. 305.)

   The issue in a juvenile transfer hearing "is not whether the minor committed a specified act, but rather whether [they are] amendable to the care, treatment and training program available through the juvenile court facilities...." (*People v. Chi Ko Wong* (1976) 18 Cal.3d 698, 717, disapproved on another point in *People v. Green* (1980) 27 Cal.3d 1, 33.) As has been noted by our state High Court: "The result of a fitness hearing is not a final adjudication of guilt; but the certification of a juvenile offender to an adult court has been accurately characterized as 'the worst punishment the juvenile system is empowered to inflict.' (Note, *Separating the Criminal from the Delinquent: Due Process in Certification Procedure* (1967) 40 So.Cal.L.Rev. 158, 162.)" (*People v. Ramona* (1985) 37 Cal.3d 802, 810 [italics in original].)

   Under current law, the prosecution may move to transfer to adult court any minor 16 years of age or older alleged to have committed a felony criminal offense. (Welf. & Inst. Code, § 707, subd. (a)(1).) The prosecution may also move to transfer to adult court a minor 14 years or 15 years of age alleged to have committed a specified serious offense, but the minor was not apprehended prior to the end of juvenile court jurisdiction. (Welf. & Inst. Code, §§ 707, subd. (a)(2) & 707, subd. (b).) In making its transfer decision, the court must consider five criteria. These criteria are: the minor's degree of criminal sophistication, whether the minor can be rehabilitated in the time before the juvenile court would lose jurisdiction over the minor, the minor's prior history of delinquency, the success of prior attempts by the juvenile court to rehabilitate the minor, and the circumstances and gravity of the charged offense. (Welf. & Inst. Code, § 707, subd. (a)(3)(A)(i)–(E)(i).)

3) **Disparate Impact of Transfer Orders on Youth of Color**: According to information provided by the author's office, although the number of youth transferred to adult court each year is small, those transferred are mostly youth of color. In fact, data from 2019 shows that a greater percentage of Hispanic juveniles (55.3 percent) were found to be unfit for juvenile court compared to different race/ethnic groupings. (California Department of Justice, California Justice Information Services Division, *Juvenile Justice in California* (2019), at p. 39.) Of 45 adult court dispositions received by the California Department of Justice in 2019, 8.9 percent were white, 62.2 percent were Hispanic, 24.4 percent were black, and 4.4 percent were other race/ethnic groups. (*Id.*, at pp. 45, 47.)

4) **Review of a Juvenile Court Transfer Order:** The Supreme Court has held that a juvenile court's order transferring a minor to adult court "may normally be challenged only by extraordinary writ in collateral proceedings commenced prior to the commencement of the trial on those charges for which the defendant is certified as unfit for treatment within juvenile court facilities." (*People v. Chi Ko Wong, supra*, 18 Cal.3d 698, 714.) The Court reasoned that the statute authorizing juvenile appeals (Welf. & Inst. Code, § 800) does not contain a right to appeal a transfer order. (*People v. Chi Ko Wong, supra*, 18 Cal.3d at p. 709.) The court further reasoned that nothing in the legislative history of the statute

governing appeal from criminal convictions in adult court (Pen. Code, § 1259) indicated that the scope of appellate review from a criminal conviction extends to matters beyond the criminal proceedings – i.e., nothing indicated it extends to a transfer order made in prior juvenile court proceedings. (*People v. Chi Ko Wong*, *supra*, 18 Cal.3d at pp. 709-711.) The Court also explained that under the relevant statute and Rules of Court, a juvenile transfer order is not properly included in the record on appeal and will not be considered by an appellate court. (*Id.*, at p. 711; see also Pen. Code, § 1246; Cal. Rules of Court, rules 8.320 [normal record], 8.155 & 8.340(c) [augmenting the record].) Moreover, as a practical matter, appeal of a transfer order would afford a defendant the opportunity to secure a reversal of a judgment of conviction even where they were found guilty in an errorless trial. (*People v. Chi Ko Wong*, *supra*, 18 Cal.3d at p. 712.)

In recognizing the extraordinary writ as the proper avenue for review of a transfer order, the Court noted that timely review via "immediate application for extraordinary writ in a proper case may spare a minor the burden of an unnecessary trial and thus promote justice and judicial economy. It also assures that, if warranted, reconsideration by the juvenile court will be made on timely information without the need for updated reports and affidavits. (*People v. Chi Ko Wong, supra*, 18 Cal.3d at p. 713.)

Unlike appeals, writs are discretionary. Appellate courts will entertain them and render a decision on the merits in only extraordinary circumstances. (*Babb v. Superior Court* (1971) 3 Cal. 3d 841, 851.) Courts will generally only grant writ relief when there is no plain, speedy, or adequate remedy in the ordinary course of the law. (Code of Civ. Proc. §§ 1068(a), 1086, 1103(a).)

California contrasts other states, including Georgia, Oklahoma, and Utah which have enacted legislation providing for minors to appeal transfer decisions on an expedited time frame. (See Ga. Code Ann., § 15-11-564; Okla. Stat. Ann., tit. 10A, § 2-5-205(F); Utah Code Ann., § 78A-6-704.) In 2020, the Supreme Court of Missouri concluded minors have a statutory right to appeal transfer decisions. (*D.E.G. v. Juvenile Officer of Jackson City* (Mo. 2020) 601 S.W.3d 212, 214, 217.)

Proponents of this bill note that despite the enormous consequences of a transfer order and the disparate impact these orders have on youth of color, California law provides no right to appeal a judge's decision transferring a minor's case from juvenile court to adult court for prosecution. California law provides only discretionary review on the merits via an extraordinary writ. AB 624 would authorize immediate appellate review of the transfer order if a notice of appeal is filed within 30 days of the order.

5) **Argument in Support**: According to the *California Public Defender's Association*: "The decision to transfer a youth from juvenile court to adult court has far-reaching implications for the adolescent involved and significant symbolic meaning for the justice system. For the adolescent, transfer to the adult system holds the likelihood of far harsher punishment—including life in prison-- and enduring developmental costs. For the system, transferring an adolescent to adult court is an unambiguous statement that the criminal justice system will no

longer shelter the adolescent, by virtue of his or her acts, from harsh justice."[1] Despite these significant consequences, current law provides no right to appeal a judge's decision to transfer a youth to adult court for prosecution; these decisions are only reviewed by writ.

"Because writs are discretionary, the Court of Appeal does not need to consider these writs on their merits. Most petitions seeking review of transfer decisions are denied summarily. This means the critical decision made by the juvenile court judge is not given full review, with briefing by both parties, oral argument, and a written decision. The lack of a robust review mechanism is out-of-step with practice in other states, many of which provide for a right to appeal a decision to transfer a youth to adult court…."

6) **Related Legislation**:

   a) SB 641 (Skinner), of the 2021-2022 Legislative Session, would make technical, nonsubstantive changes to the provisions governing juvenile court jurisdiction and transfer to a court of criminal court jurisdiction. SB 641 is pending in the Senate Committee on Rules.

7) **Prior Legislation**:

   a) SB 823 (Committee on Budget and Fiscal Review), Chapter 337, Statutes of 2020, contained changes to implement the 2020 Budget Act and operationalized the realignment of the California Department of Corrections and Rehabilitation, Division of Juvenile Justice, to the counties.

   b) AB 1868 (Budget Committee), of the 2019-2020 Legislative Session, also contained changes to implement the 2020 Budget Act and operationalized the realignment of the California Department of Corrections and Rehabilitation, Division of Juvenile Justice, to the counties. AB 1868 died on the Senate inactive file.

   c) AB 2865 (Wicks), of the 2019-2020 Legislative Session, would have amended Proposition 57 by requiring the court to find that the minor is not amenable to rehabilitation while under the jurisdiction of the juvenile court in order to find that the minor should be transferred to a court of criminal jurisdiction. AB 2865 was not heard in this committee.

   d) AB 1423 (Wicks), Chapter 583, Statutes of 2019, created a mechanism for the return of a case back to the juvenile court from the criminal court under certain circumstances.

   e) SB 1391 (Lara), Chapter 1012, Statutes of 2018, repealed the authority of a prosecutor to make a motion to transfer a minor from juvenile court to adult criminal court in a case in which a minor is alleged to have committed a specified serious offense when he or she was 14 or 15 years of age, unless the individual was not apprehended prior to the end of juvenile court jurisdiction.

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[1] "Mulvey and Shubert, Transfer of Juveniles to Adult Court: Effects of a Broad Policy in One Court, OJJDP Juvenile Justice Bulletin (Dec. 2012) avail. at https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/pubs/232932.pdf."

f) SB 439 (Mitchell), Chapter 1006, Statutes of 2018, prohibits the prosecution of a minor under the age of 12, unless the minor is alleged to have committed specified violent crimes.

g) SB 382 (Lara), Chapter 234, Statutes of 2015, enumerated the five criteria taken into consideration during a hearing to transfer a youth from juvenile to adult criminal court.

h) SB 1151 (Kuehl), of the 2003-2004 Legislative Session, would have clarified the definition of the "circumstances and gravity of the offense" for purposes of evaluating the fitness of a minor for juvenile court jurisdiction. SB 1151 was vetoed.

i) AB 560 (Peace), Chapter 453, Statutes of 1994, lowered the age from 16 to 14 at which a juvenile could be transferred to adult criminal court and be tried as an adult for committing certain crimes.

REGISTERED SUPPORT / OPPOSITION:

Support

Pacific Juvenile Defender Center (Sponsor)
American Civil Liberties Union/northern California/southern California/san Diego and Imperial Counties
Anti-recidivism Coalition
Bend the Arc: Jewish Action
California Alliance for Youth and Community Justice
California Attorneys for Criminal Justice
California Public Defenders Association (CPDA)
Californians United for A Responsible Budget
Children's Defense Fund-california
Commonweal
Communities United for Restorative Youth Justice (CURYJ)
East Bay Community Law Center
Ella Baker Center for Human Rights
Fresh Lifelines for Youth
Fresno Barrios Unidos
Human Rights Watch
Legal Services for Children
Legal Services for Prisoners With Children
Los Angeles County Bar Association -- Appellate Courts Section
Milpa (motivating Individual Leadership for Public Advancement)
National Association of Social Workers, California Chapter
National Center for Youth Law
Prosecutors Alliance California
San Francisco Public Defender
San Mateo County Bar Association, Private Defender Program
Santa Cruz Barrios Unidos
Silicon Valley De-bug
Smart Justice California

The W. Haywood Burns Institute
Young Women's Freedom Center
Youth Law Center

Oppositon

None

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

Date of Hearing: April 27, 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**: Evidence offered in a criminal case is generally admissible if it is relevant to any issue in the case. For evidence of the victim's clothing to be admissible in a sexual assault case, as evidence of either consent or lack thereof, the party seeking to introduce 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 unlikely to bear any relevance to the issue of whether the victim consented to sexual contact or not. 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 the unpublished case of *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 a 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 laws that exclude relevant evidence in criminal cases except upon a two thirds vote by the Legislature. Because this bill would exclude all evidence of a victim's clothing in a sexual assault case when offered on the issue of consent, even when a judge determines that it is relevant and that the interests of justice favor its admission, it has been marked as requiring 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 27, 2021
Counsel: Cheryl Anderson

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

AB 28 (Chau) – As Amended April 21, 2021

As Proposed To Be Amended In Committee

SUMMARY: Increases the fines for specified hate crimes from up to $5,000 to up to $7,500, or from up to $10,000 to up to $12,500 and directs that up to $2,500 of any amount received be placed in the Trial Court Trust Fund which may be used to fund classes or programs or ethnic sensitivity, or other similar training in the area of civil rights, as specified. Specifically, **this bill**:

1) Increases the fines for hate crimes, as follows:

   a) For interference with the exercise of civil rights because of actual or perceived characteristics of the victim, a fine up to $7,500, instead of up to $5,000; and,

   b) For any other hate crime not made punishable in state prison, a fine up to $12,500, instead of up to $10,000.

2) Requires up to $2,500 of any fines received pursuant to this provision be placed in the Trial Court Trust Fund and may be used, upon appropriation of the Legislature, to fund classes or programs on racial or ethnic sensitivity, or other similar training in the area of civil rights, as specified.

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).)

2) Defines "association with a person or group with these actual or perceived characteristics" as including advocacy for, identification with, or being on the ground owned or rented by, or adjacent to, any of the following: a community center, educational facility, family, individual, office, meeting hall, place of worship, private institution, public agency, library, orother entity, group, or person that has, or is identified with people who have, one or more of those characteristics listed in the definition of "hate crime." (Pen. Code, § 422.56, subd. (a).)

3) Defines "in whole or in part because of" to mean that the bias motivation must be a cause in fact of the offense, whether or not other causes also exist. When multiple concurrent motives exist, the prohibited bias must be a substantial factor in bringing about the particular result. There is no requirement that the bias be a main factor, or that the crime would not have been committed but for the actual or perceived characteristic. This subdivision does not constitute a change in, but is declaratory of, existing law under *In re M.S.* (1995) 10 Cal.4th 698 and *People v. Superior Court (Aishman)* (1995) 10 Cal.4th 735. (Pen. Code, § 422.56, subd. (d).)

4) 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).)

5) 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).)

6) 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.)

7) Authorizes each state law enforcement agency to adopt a hate crime policy. (Pen. Code, § 422.87, subd. (a).)

8) Requires a state or local law enforcement agency, if it adopts or revises a hate crime policy, to include, but not be limited to, all of the following:

   a) Specified definitions related to hate crimes;

   b) The content of the model policy framework that the Commission on Peace Officer Standards and Training developed, as specified;

   c) Information regarding bias motivation;

   d) Information regarding the general underreporting of disability bias, gender bias, nationality and ethnic bias, and religion bias hate crimes and a plan for the agency to remedy underreporting;

   e) The protocol for reporting suspected hate crimes to the Department of Justice;

   f) A checklist for first responder responsibilities, including, but not limited to, giving the possible victims and any interested persons the agency's hate crimes brochure;

   g) A specific procedure for transmitting and periodically retransmitting the policy and any related orders to all officers, including a simple and immediate way for officers to access the policy in the field when needed;

   h) The designation of an officer to assure the department has the hate crime brochure and ensure that all officers are trained to distribute the brochure to suspected hate crime victims and other interested persons; and

   i) A requirement that all officers be familiar with the policy and carry out the policy at all times unless directed otherwise by a specified authority. (Pen. Code, § 422.87, subd. (a)(1)-(9).)

9) Defines "bias motivation" as a preexisting negative attitude toward actual or perceived characteristics, as defined. Depending on the circumstances of each case, bias motivation may include, but is not limited to, hatred, animosity, resentment, revulsion, contempt, unreasonable fear, paranoia, callousness, thrill-seeking, desire for social dominance, desire for social bonding with those of one's 'own kind,' or a perception of the vulnerability of the victim due to the victim being perceived as being weak, worthless, or fair game because of a protected characteristic, including gender and disability. (Pen. Code, § 422.87, subd. (a)(3)(B).)

10) Provides that any state or local law enforcement agency that updates an existing hate crime policy or adopts a new hate crime policy may include a model hate crime policy and other relevant documents developed by the International Association of Chiefs of Police, as specified. (Pen. Code, § 422.87, subd. (b).)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "Since the onset of the COVID-19 pandemic, hate crimes against the Asian American and Pacific Islander (AAPI) community have risen significantly across the country. In fact, the sixteen largest cities nationwide saw an increase in hate crimes of 150% between 2019 and 2020. According to the Stop AAPI Hate coalition, nearly 3,800 hate incidents occurred across the United States against the AAPI community between March 2020 and February 2021, including nearly 1,700 incidents in California. Many such acts include assaults against the elderly, which have resulted in severe injury and death. For example, an 84 year old Thai man died after being shoved to the ground in San Francisco, while taking his morning walk. Another incident involved the killing of eight people in Atlanta, Georgia, among them six women of Asian descent. AB 28 would address the rise in hate crimes by increasing the maximum criminal fine for committing a hate crime, and using that increase to fund programs on racial or ethnic sensitivity, or other similar training in the area of civil rights."

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.)

   With the onset of the Covid-19 pandemic, there has been a rise in hate crimes against Asian Americans, in particular. (https://www.latimes.com/california/story/2021-03-16/anti-asian-hate-pandemic [as of April 22, 2021].)

3) **Argument in Support**: According to the *Joint Chinese University Alumni Association of Southern California*, "This legislation is timely given the recent and alarming rise in hate crimes against the Asian American and Pacific Islander (AAPI) community. According to the Stop AAPI Hate coalition, nearly 3,800 hate incidents occurred across the United States against the AAPI community between March 2020 and February 2021, including nearly 1,700 incidents in California."

4) **Argument in Opposition**: According to the *American Civil Liberties Union California Action* "AB 28 would also increase the maximum fines for hate crimes, both misdemeanors and felonies, by $2,500 to $7,500 and $12,500, respectively, with no provision for consideration of the defendant's ability to pay. There is no reason to believe that increased penalties will prevent hate-motivated violence. Moreover, the likely outcome in many cases

will be more defendants will be unable to pay these excessive fines, resulting in financial burdens on the individual and their family, difficulty reintegrating into the community, and often a return to jail or prison."

5) **Related Legislation**:

a) AB 886 (Bonta) would among other things, create a program, subject to an appropriation of funds by the Legislature, within the Department of Justice (DOJ) to provide grants to community-based organizations, as defined, for the implementation and operation of restorative justice programs, as defined, that are focused on hate crime offenses. AB 886 is set to be heard in this committee on April 27, 2021.

b) 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.

c) AB 1440 (Bauer-Kahan), would increase the penalty for a misdemeanor civil rights offense ("hate crime'), making it alternatively punishable as a felony by 16 months, or two, or three years in the county jail. AB 1440 is pending before this committee.

d) AB 266 (Cooper), would add hate crimes to the violent felonies list. AB 266 is pending reconsideration in the Assembly Committee on Public Safety.

e) AB 557 (Muratsucchi), would require the Attorney General to establish a toll free hotline for the reporting of hate crimes and the dissemination of information regarding hate crimes. AB 557 is pending in the Assembly Committee on Appropriations.

6) **Prior Legislation**:

a) SB 630 (Skinner, 2017) would have expanded the definition of "association" with a protected person or group for purposes of the hate crime statutes to include active representation, defense of, or support of, a protected person or group. AB 630 was held in the Assembly Committee on Appropriations.

b) SB 1234 (Kuehl), Chapter 700, Statutes of 2004, established a standard definition of a hate crime, applied that definition, reorganizes the laws relating to hate crimes, and made other consistent changes to hate crime and bias-motivated laws. Revised Commission on Peace Officer Standards (POST) training requirements, and made other related changes.

c) AB 1312 (Nakano), Chapter 566, Statutes of 2001, created an Asian Pacific Islander (API) Anti-Hate Crimes Program to create brochures and workbooks to provide to Asian Pacific Islander communities with information concerning hate crimes and to conduct training seminars for community organizations on hate crimes.

d) SB 1569 (Hayden, 2000) would have expanded the definition of a hate crime to those persons who are victimized based upon their association with other people who have one or more of the specified characteristics. SB 1569 failed passage in Senate Committee on Appropriations.

REGISTERED SUPPORT / OPPOSITION:

Support

California Hydrogen Coalition
Chinese American Citizens Alliance Los Angeles
Chinese American Museum
Compassion in Sgv
Jewish Federation of The Greater San Gabriel and Pomona Valleys
Joint Chinese University Alumni Association of Southern California

Oppose

ACLU California Action

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

Amended Mock-up for 2021-2022 AB-28 (Chau (A))

Mock-up based on Version Number 97 - Amended Assembly 4/21/21
Submitted by: Cheryl Anderson, Assembly Committee on Public Safety

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

SECTION 1. ~~Section 422.56 of the Penal Code is amended to read:~~

~~**422.56.** For purposes of this title, the following definitions shall apply:~~

~~(a) "Association with a person or group with these actual or perceived characteristics" includes, but is not limited to, advocacy for, identification with, participating in an event concerning, or being on the ground owned or rented by, or adjacent to, any of the following: a community center, educational facility, family, individual, office, meeting hall, place of worship, private institution, public agency, library, or other entity, group, or person that has, or is identified with people who have, one or more of those characteristics listed in the definition of "hate crime" under paragraphs (1) to (6), inclusive, of subdivision (a) of Section 422.55.~~

~~(b) "Bias motivation" means a preexisting negative attitude toward actual or perceived characteristics referenced in Section 422.55 and includes discriminatory selection. Depending on the circumstances of each case, bias motivation may include, but is not limited to, hatred, animosity, resentment, revulsion, contempt, unreasonable fear, paranoia, callousness, thrill-seeking, desire for social dominance, desire for social bonding with those of one's "own kind," perception that the person is responsible for a social ill because of the protected characteristic, or a perception of the vulnerability of the victim due to the victim being perceived as being weak, worthless, or fair game because of a protected characteristic, including, but not limited to, disability or gender. Bias motivation may be demonstrated by any of the following acts:~~

~~(1) The use of a slur based on the actual or perceived characteristic of the victim, that occurred at the time of, or shortly before or after, the crime, and that was directed at the victim or at a person who shares the actual or perceived characteristic with the victim.~~

~~(2) Vandalism of property that occurred at the time of, or shortly before or after, the crime, that used words or symbols that show bias against people who share the victim's actual or perceived characteristic, including, but not limited to, words, phrases, or symbols commonly associated with a hate group.~~

~~(3) Posts on social media or other media, shortly before or after the crime, that blame the group that shares the victims actual or perceived characteristic for a societal problem, including, but not limited to, causing illness, crime, or economic harm.~~

~~(c) "Disability" includes mental disability and physical disability as defined in Section 12926 of the Government Code, regardless of whether those disabilities are temporary, permanent, congenital, or acquired by heredity, accident, injury, advanced age, or illness. This definition is declaratory of existing law.~~

~~(d) "Discriminatory selection" means to specifically choose to target a victim, or series of victims, based on the actual or perceived characteristic of the victim when committing a crime, when there were other targets available and the only apparently discernable difference in choosing the victim was the actual or perceived characteristic.~~

~~(e) "Gender" means sex, and includes a person's gender identity and gender expression. "Gender expression" means a person's gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth.~~

~~(f) "In whole or in part because of" means that the bias motivation must be a cause in fact of the offense, whether or not other causes also exist. When multiple concurrent motives exist, the bias motivation must be a substantial factor in bringing about the particular result. There is no requirement that the bias motivation be a main factor, or that the crime would not have been committed but for the actual or perceived characteristic. This subdivision does not constitute a change in, but is declaratory of, existing law under In re M.S. (1995) 10 Cal.4th 698 and People v. Superior Court (Aishman) (1995) 10 Cal.4th 735.~~

~~(g) "Nationality" includes citizenship, country of origin, and national origin.~~

~~(h) "Race or ethnicity" includes ancestry, color, and ethnic background.~~

~~(i) "Religion" includes all aspects of religious belief, observance, and practice and includes agnosticism and atheism.~~

~~(j) "Sexual orientation" means heterosexuality, homosexuality, or bisexuality.~~

~~(k) "Victim" includes, but is not limited to, a community center, educational facility, entity, family, group, individual, office, meeting hall, person, place of worship, private institution, public agency, library, or other victim or intended victim of the offense.~~

~~**SEC. 2.**~~ Section 422.6 of the Penal Code is amended to read:

422.6. (a) A person, whether or not acting under color of law, shall not, by force or threat of force, willfully injure, intimidate, interfere with, oppress, or threaten any other person in the free exercise or enjoyment of any right or privilege secured by the Constitution or laws of this state or by the

Constitution or laws of the United States in whole or in part because of one or more of the actual or perceived characteristics of the victim listed in subdivision (a) of Section 422.55.

(b) A person, whether or not acting under color of law, shall not knowingly deface, damage, or destroy the real or personal property of any other person for the purpose of intimidating or interfering with the free exercise or enjoyment of any right or privilege secured to the other person 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 actual or perceived characteristics of the victim listed in subdivision (a) of Section 422.55.

(c) (1) A person convicted of violating subdivision (a) or (b) shall be punished by imprisonment in a county jail not to exceed one year, or by a fine not to exceed seven thousand five hundred dollars ($7,500), 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 the person's hours of employment or school attendance. However, a person shall not be convicted of violating subdivision (a) based upon speech alone, except upon a showing that the speech itself threatened violence against a specific person or group of persons and that the defendant had the apparent ability to carry out the threat.

(2) Up to two thousand five hundred dollars ($2,500) of any fine received pursuant to paragraph (1) shall be placed in the Trial Court Trust Fund and may be used, upon appropriation of the Legislature, to fund classes or programs on racial or ethnic sensitivity, or other similar training in the area of civil rights, as provided in paragraph (1) of subdivision (a) of Section 422.85.

(d) Conduct that violates this and any other law, including, but not limited to, an offense described in Article 4.5 (commencing with Section 11410) of Chapter 3 of Title 1 of Part 4, may be charged under all applicable provisions. However, an act or omission punishable in different ways by this section and other provisions of law shall not be punished under more than one provision, and the penalty to be imposed shall be determined as set forth in Section 654.

SEC. ~~3.~~ 2. Section 422.7 of the Penal Code is amended to read:

422.7. (a) Except in the case of a person punished under Section 422.6, a hate crime that is not made punishable by imprisonment in the state prison shall be punishable by imprisonment in a county jail not to exceed one year, or by imprisonment pursuant to subdivision (h) of Section 1170, or by a fine not to exceed twelve thousand five hundred dollars ($12,500), or by both that imprisonment and fine, 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 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:

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

(2) The crime against property causes damage in excess of nine hundred fifty dollars ($950).

(3) The person charged with a crime under this section has been convicted previously of a violation of subdivision (a) or (b) of Section 422.6, or has been convicted previously of a conspiracy to commit a crime described in subdivision (a) or (b) of Section 422.6.

(b) Up to two thousand five hundred dollars ($2,500) of any fine received pursuant to subdivision (a) shall be placed in the Trial Court Trust Fund and may be used, upon appropriation of the Legislature, to fund classes or programs on racial or ethnic sensitivity, or other similar training in the area of civil rights, as provided in paragraph (1) of subdivision (a) of Section 422.85.

~~**SEC. 4.** Section 422.87 of the Penal Code is amended to read:~~

~~**422.87.** (a) Each local law enforcement agency may adopt a hate crimes policy. A local law enforcement agency that updates an existing hate crimes policy or adopts a new hate crimes policy shall include, but not be limited to, all of the following:~~

~~(1) The definitions in Sections 422.55 and 422.56.~~

~~(2) The content of the model policy framework that the Commission on Peace Officer Standards and Training developed pursuant to Section 13519.6, and any content that the commission may revise or add in the future, including any policy, definitions, response and reporting responsibilities, training resources, and planning and prevention methods.~~

~~(3) (A) Information regarding bias motivation.~~

~~(B) (i) In recognizing suspected disability bias hate crimes, the policy shall advise officers to consider whether there is any indication that the perpetrator was motivated by hostility or other bias, occasioned by factors such as, but not limited to, dislike of persons who arouse fear or guilt, a perception that persons with disabilities are inferior and therefore "deserving victims," a fear of persons whose visible traits are perceived as being disturbing to others, or resentment of those who need, demand, or receive alternative educational, physical, or social accommodations.~~

~~(ii) In recognizing suspected disability bias hate crimes, the policy also shall advise officers to consider whether there is any indication that the perpetrator perceived the victim to be vulnerable and, if so, if this perception is grounded, in whole or in part, in antidisability bias. This includes, but is not limited to, if a perpetrator targets a person with a particular perceived disability while avoiding other vulnerable-appearing persons such as inebriated persons or persons with perceived disabilities different than those of the victim, those circumstances could be evidence that the perpetrator's motivations included bias against persons with the perceived disability of the victim and that the crime must be reported as a suspected hate crime and not a mere crime of opportunity.~~

~~(4) Information regarding the general underreporting of hate crimes, the more extreme underreporting of antidisability and antigender hate crimes, and a plan for the agency to remedy this underreporting.~~

~~(5) A protocol for reporting suspected hate crimes to the Department of Justice pursuant to Section 13023.~~

~~(6) A checklist of first responder responsibilities, including, but not limited to, being sensitive to effects of the crime on the victim, determining whether additional resources are needed on the scene to assist the victim or whether to refer the victim to appropriate community and legal services, and giving the victims and any interested persons the agency's hate crimes brochure, as required by Section 422.92.~~

~~(7) A specific procedure for transmitting and periodically retransmitting the policy and any related orders to all officers, including a simple and immediate way for officers to access the policy in the field when needed.~~

~~(8) The title or titles of the officer or officers responsible for ensuring that the department has a hate crime brochure, as required by Section 422.92, and ensuring that all officers are trained to distribute the brochure to all suspected hate crime victims and all other interested persons.~~

~~(9) A requirement that all officers be familiar with the policy and carry out the policy at all times unless directed by the chief, sheriff, director, or other chief executive of the law enforcement agency or other command-level officer to whom the chief executive officer formally delegates this responsibility.~~

~~(b) A local law enforcement agency that updates an existing hate crimes policy or adopts a new hate crimes policy may include any of the provisions of a model hate crime policy and other relevant documents developed by the International Association of Chiefs of Police that are relevant to California and consistent with this chapter.~~

Date of Hearing: April 27, 2021
Counsel: Matthew Fleming

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

AB 481 (Chiu) – As Introduced February 8, 2021

SUMMARY: Requires local law enforcement agencies to follow specific procedures to obtain approval from local government prior to the acquisition or use of federal surplus military equipment. Specifically, **this bill**:

1) Defines the following terms:

   a) "Governing body" means the elected body that oversees a law enforcement agency or, if there is no elected body that directly oversees the law enforcement agency, the appointed body that oversees a law enforcement agency;

   b) "Law enforcement agency" means any of the following:

      i) Police departments, including transit agency, school district, university and community college police;

      ii) Sheriffs departments;

      iii) District Attorneys' Offices;

      iv) County Probation Departments;

      v) The California Highway Patrol;

      vi) The Department of Justice; and,

      vii) Any other agency authorized to conduct criminal investigations or prosecutions.

   c) "Military equipment" includes the following:

      i) Airplanes;

      ii) Helicopters;

      iii) Drones (aerial or ground);

      iv) Armored personnel carriers (wheeled armored vehicles);

v) Wheeled tactical vehicles such as a Humvee, a two and one-half-ton truck, a five-ton truck;

vi) Tanks (tracked armored vehicles);

vii) Command and control vehicles that are either built or modified to facilitate the operational control and direction of public safety units;

viii) Any kind of weaponized aircraft, vessel, or vehicle;

ix) Breaching apparatus such as battering rams and explosives;

x) Firearms .50 caliber and above;

xi) Ammunition .50 caliber and above;

xii) Specialized firearms and ammunition less than .50 caliber that is not a service weapon;

xiii) Any firearm or accessory that is designed to launch small, explosive projectiles;

xiv) Any large knife designed to be attached to a firearm;

xv) Grenades and flashbang grenades;

xvi) Riot gear;

xvii) Long range acoustic devices; and,

xviii) Camouflage uniforms not including woodland or desert patterns;

d) "Military Impact Statement" is a publicly released, legally enforceable document that contains:

i) A description of each piece of military equipment, the quantity sought, its capabilities, expected lifespan, intended uses and effects, and how it works, including product descriptions from the manufacturer of the military equipment;

ii) The purpose and reasons for which the law enforcement agency proposes to use the equipment;

iii) Fiscal impact of the acquisition, use, storage, training, etc. of the equipment;

iv) An assessment specifically identifying any potential impacts that the use of military equipment might have on the welfare, safety, civil rights, and civil liberties of the public, including on marginalized communities that experience disproportionate rates of police killings and higher rates of military equipment deployment, and what specific affirmative measures will be implemented to safeguard the public from

potential adverse impacts; and,

v) Alternative methods by which law enforcement can accomplish the purposes proposed and the associated costs.

e) "Military Equipment Use Policy" is a publicly released, legally enforceable document that contains:

i) The specific purpose or purposes that the military equipment intends to achieve; and

ii) The specific capabilities and authorized uses of the military equipment as well as rules for how and when it can be used;

iii) The training required before an individual can use the equipment;

iv) The way in which compliance with use policies will be enforced; and,

v) The procedure by which the public can file complaints, concerns, or questions about the use and how the law enforcement agency will respond in a timely manner.

f) "Disparate impact" means a discriminatory outcome that adversely impacts a marginalized group, including, but not limited to, those protected under the First, Fourth, and Fourteenth Amendments to the United States Constitution or Title VII of the Civil Rights Act of 1964.

2) Requires a law enforcement agency to obtain the approval of the governing body and adopt a military equipment impact statement and a military equipment use policy at a regular meeting held pursuant to the Bagley-Keene Open Meeting Act or the Ralph M. Brown Act, prior to doing any of the following:

a) Requesting military equipment made available to law enforcement under Federal law;

b) Seeking funds for military equipment, as specified;

c) Acquiring military equipment either permanently or temporarily, including by borrowing or leasing;

d) Collaborating with another law enforcement agency to deploy military equipment in the governing body's jurisdiction;

e) Using any new or existing military equipment without approval under these provisions;

f) Soliciting or responding to a proposal, agreeing with any other person or entity to seek funds for, apply to receive, acquire, use, or collaborate in the use of, military equipment.

g) Acquiring military equipment through any other means.

3) Requires, no later than May 1, 2022, that a law enforcement agency that acquired military equipment prior to January 1, 2022 seek approval from the governing body in accordance

with these provisions. Requires the law enforcement agency to cease use of the military equipment if the governing body does not approve of the use within 180 days.

4) Requires a law enforcement agency to make its proposed military equipment impact statement and use policy available to the public at least 30 days prior to any hearing concerning the equipment at issue.

5) Requires the governing body to consider the proposed military impact statement as an agenda item at a regular meeting held pursuant to the Bagley-Keene Open Meeting Act or the Ralph M. Brown Act.

6) Requires the governing body to approve the request for military equipment only if all of the following conditions are met:

   a) It is needed because there are no available alternatives;

   b) The impact statement and use policy will safeguard the public's welfare, safety, civil rights, and civil liberties;

   c) The use of the equipment will not be create, or reinforce an existing, disparate impact or disproportionately impact any community or group;

   d) The use is the most cost-effective option among all available alternatives; and,

   e) Prior military equipment use complied with the accompanying military equipment use policy.

7) Requires the military impact statement to be available to the public on the law enforcement agency website.

8) Specifies that the adoption of a military impact statement that contains risks to the public interest will be an acknowledgement of the risks and a need to attempt to proactively avoid them.

9) Requires the express approval of the governing body to adopt a military impact statement and use policy.

10) Requires an annual review by the governing body of the adoption of any military impact statement and use policy pursuant to these provisions at a regular meeting held pursuant to the Bagley-Keene Open Meeting Act or the Ralph M. Brown Act, and a vote on whether to renew them.

11) Requires the governing body to determine whether the law enforcement agency is complying with its military impact statement and use policy as to each piece of equipment it has acquired or used.

12) Requires the governing body to either deny the renewal of the military impact statement and use policy or demand modifications to resolve any lack of compliance.

13) Requires a law enforcement agency that receives approval for the funding, acquisition, or use of military equipment to submit an annual military equipment report for each piece of military equipment and make it available to the public.

14) Requires that the military equipment report include a summary of how each piece of equipment was used, geographic location of the use, a summary of complaints or concerns, results of internal audits or violations of the use policy, analysis of any discriminatory practices, the racial demographics of people impacted by military equipment deployment, if available, and the cost of the use of the equipment.

15) Requires the law enforcement agency to hold a public community meeting and allow the general public to discuss and ask questions about the equipment report within 30 days of its submission.

16) Specifies that these provisions apply to all cities in the State of California, including charter cities, and that these provisions supersede any conflicting provisions in the charter of any city, county, or city and county.

17) Makes legislative findings and declarations.

EXISTING LAW:

1) Allows a local agency to acquire surplus property from the federal government without regard to any law which requires posting of notices or advertising for bids, inviting or receiving of bids, or delivery of purchases before payment, or which prevents the local agency from entering a bid in its behalf at any sale of federal surplus property. (Gov. Code, § 54142.)

2) Authorizes the United States Department of Defense (DOD) to transfer surplus personal property, including arms and ammunition, to federal or state agencies for use in law enforcement activities, subject to specified conditions, at no cost to the acquiring agency. (10 U.S.C. § 2576a.)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, ""California's local law enforcement agencies have acquired more military equipment than any other state over the last 30 years. Yet often, the public have little to no information about such acquisitions, which can cost local governments tens of millions of dollars. With troubling examples of this military equipment being used without clear protocol in recent years against peaceful demonstrators from Orange to Walnut Creek, it is time to reevaluate how law enforcement receives and implements war weapons in our communities.

   "This bill is about rebuilding community trust. Our streets in California are not war zones, and our citizens are not enemy combatants. Law enforcement in California are our partners in public safety, and the weapons and equipment they carry should reflect that reality."

2) **The 1033 Program**: The National Defense Authorization Act authorizes the Secretary of Defense to transfer excess property that it determines suitable for use in law enforcement activities to federal, state, and local law enforcement jurisdictions. This is referred to as the 1033 Program. The Defense Logistics Agency (DLA) Law Enforcement Support Office is assigned to determine whether property is suitable for use by these agencies. The DLA defines law enforcement activities as those performed by government agencies whose primary function is the enforcement of applicable federal, state, and local laws and whose compensated law enforcement officers have powers of arrest and apprehension. The law enforcement agencies must be authorized and certified annually to participate.

   The Governor's Office of Emergency Services implements the 1033 Program in California and conducts management and oversight of the program through the California Public Safety Procurement Program. The Office of Emergency Services also provides support and technical assistance to law enforcement agencies participating (or interested in participating) in the program.

3) **Military Equipment Provided to Local Law Enforcement Agencies from 2006 to 2015**: Openthebooks.com conducted research about the distribution of military hardware to local law enforcement agencies around the country between 2006-2015. The results of the research is reflected in a report entitled "The Militarization of Local Police Departments." (https://www.openthebooks.com/assets/1/7/OTB_SnapshotReport_MilitarizationPoliceDepts.pdf.) The report was published in May, 2016. (*Id.*)

   The report stated that $2.2 billion worth of military gear including helicopters and airplanes, armored trucks and cars, tens of thousands of M16/M14 rifles, thousands of bayonets, mine detectors, and many other types of weaponry was distributed to local law enforcement agencies across the country, between 2006-2015.

   In California, Openbooks.com found that 18,794 Department of Defense transactions transferring weaponry including nearly 7,500 trades involving M16/M14 rifles. The police for the University of California at Berkeley accepted the delivery of 14 M16/M14 rifles. 1,105 M16/M14 rifles (5.56mm and 7.62mm) and two Mine-Resistant Vehicles acquired by the Los Angeles County Sheriff. (*Id.*)

   According to the Openbooks.com report, California ranked 3rd, after Florida and Texas, in the total value of DOD surplus gear that it received. (*Id.*) The total value of military equipment received by California in the 2006 - 2015 time period was estimated to be in excess of $160 million. (*Id.*).

4) **Executive Order 13688**: On January 16, 2015, President Obama issued Executive Order (EO) 13688. (https://www.gpo.gov/fdsys/pkg/DCPD-201500033/pdf/DCPD-201500033.pdf.) EO 13688 established the federal interagency Law Enforcement Equipment Working Group (LEEWG) to develop recommendations to improve federal support for the appropriate use, acquisition and transfer of controlled equipment by state, local and tribal LEAs. The LEEWG consulted with stakeholders from law enforcement, civil liberties, social justice, local government and other fields to review and provide recommendations about the

following topics:

- How to harmonize program requirements for "consistent and transparent policies."
- Relevant training needed to operate certain types of equipment or vehicles.
- Policies to ensure LEAs "address appropriate use and employment of controlled equipment" and adopt policies protecting civil rights and civil liberties.

Operating under EO 13688, the LEEWG identified items that had significant impact on community trust. Two separate lists were established: the Prohibited Equipment List and the Controlled Equipment List. Each list was reviewed periodically. Items on the prohibited equipment list could not be purchased using federal funding streams or acquired via property transfer from federal agencies. Those items included tracked armored vehicles, weaponized aircraft, and grenade launchers.

The purpose of the Controlled Items List was not to preclude law enforcement agencies from purchasing items, but rather to encourage them to carefully consider the appropriateness of acquiring such equipment. Items on the Controlled Equipment List could be purchased with, or acquired from federal sources if the agency meets certain reporting and training requirements and other policies. Items on the Controlled Equipment List included wheeled armored vehicles, breaching apparatus, and riot gear.

In sum, prohibited equipment was unable to be acquired by local law enforcement agencies under EO 13688, and procedures were established for the acquisition and use of items on the Controlled Equipment List. After review of the EO, the LEEWG issued recommendations to law enforcements groups that acquired equipment on the Controlled Equipment List. (https://www.bja.gov/publications/LEEWG_Report_Final.pdf.) Those recommendations included the following requirements:

- Law Enforcement Agencies (LEA) were to adopt:
    - General Policing Standards – includes policies on (a) Community Policing, (b) Constitutional Policing, and (c) Community Input and Impact Considerations;
    - Specific Controlled Equipment Standards – includes policies specifically related to (a) Appropriate Use of Controlled Equipment; (b) Supervision of Use; (c) Effectiveness Evaluation; (d) Auditing and Accountability; and (e) Transparency and Notice Considerations.
    - Record-Keeping Requirement – Upon request, LEAs must provide a copy of the General Policing Standards and Specific Controlled Equipment Standards, and any related policies and protocols, to the Federal agency that supplied the equipment/funds.
- LEAs were to adopt training procedures:

- Required Annual Training on Protocols – On an annual basis, all LEA personnel who may use or authorize use of controlled equipment must be trained on the LEA's General Policing Standards and Specific Controlled Equipment Standards.

- Required Operational and Technical Training – LEA personnel who use controlled equipment must be properly trained on, and have achieved technical proficiency in, the operation or utilization of the controlled equipment at issue.

- Scenario-Based Training – To the extent possible, LEA trainings related to controlled equipment should include scenario-based training that combines constitutional and community policing principles with equipment-specific training. LEA personnel authorizing or directing the use of controlled equipment should have enhanced scenario- based training to examine, deliberate, and review the circumstances in which controlled equipment should or should not be used.

- Record-Keeping Requirement – LEAs must retain comprehensive training records, either in the personnel file of the officer who was trained or by the LEA's training division or equivalent entity, for a period of at least three (3) years, and must provide a copy of these records, upon request, to the Federal agency that supplied the equipment/funds. (*Id.* at pp. 38-39.)

In addition to policy and training implementation, the LEEWG recommended strict procedures for acquisition, sale/transfer, and oversight of compliance in implementation. (*Id.* at pp. 40-42.)

5) **AB 36 (Campos) Veto Message:** Following the issuance of EO 13688 in 2015, the California Legislature passed AB 36 (Campos). AB 36 would have prohibited local agencies, except local law enforcement agencies that are directly under the control of an elected officer, from applying to receive specified surplus military equipment from the federal government, unless the legislative body of the local agency approves the acquisition at a regular meeting held pursuant to the Ralph M. Brown Act (Brown Act). However the bill was vetoed by the Governor. In his veto message, the Governor stated, "This bill requires a local agency governing body to hold a public meeting prior to the acquisition of certain surplus military equipment.

"Transparency is important between law enforcement and the communities they serve, but it must be tempered by security considerations before revealing law enforcement equipment shortages in a public hearing. This bill fails to strike the proper balance.

"Moreover, the bill is unnecessary, as President Obama's Executive Order 13688 will implement a similar requirement for governing bodies to grant approval of surplus military equipment."

However, as discussed below, EO 13688 was rescinded.

6) **Repeal of Executive Order 13688**: On August 28, 2017, President Trump signed Executive Order 13809. The new executive order rescinded an EO 13688 as well as the recommendations of the LEEWG. Then United States Attorney General Sessions explained that "Those restrictions went too far, we will not put superficial concerns above public safety." Attorney General Sessions further stated that President Trump was doing "all he can to restore law and order and support our police across America." (Goldman, NY Times, August 28, 2017, available at: https://www.nytimes.com/2017/08/28/us/politics/trump-police-military-surplus-equipment.html, [as of April 22, 2021].) President Biden has yet to act on executive orders dealing with the 1033 program, but some members of Congress are pushing President Biden to issue an executive order banning the transfer of military-grade weapons to local police departments. (Kheel, "House Democrats Push Biden to Limit Transfer of Military-Grade Gear to Police," The Hill, April 6, 2021, available at: https://thehill.com/policy/defense/546682-house-democrats-push-biden-to-limit-transfer-of-military-grade-gear-to-police, [as of April 22, 2021].)

   This bill would not reintroduce all of the protocols imposed by EO 13688. Instead it seems to take something of a middle ground between the relatively strict regulation under the Obama administration and the relatively relaxed regulation currently in place. For example, this bill does not contain any prohibited equipment, opting instead to consider all military equipment as subject to transparency and bureaucratic protocols prior to acquisition by a law enforcement agency. The procedures and protocols this bill would establish are aimed at fostering more transparency, awareness, and involvement of local communities – not just law enforcement – in the acquisition and use of surplus military gear.

7) **AB 3131 (Gloria) Veto Message**: AB 3131 (Gloria), of the 2017 – 2018 Legislative Session, was very similar to this bill. AB 3131 included a report that would have been required to be submitted to the DOJ, included a private cause of action for all residents, and had some other minor differences from this bill. AB 3131 was vetoed by Governor Brown. In his veto message, the Governor stated:

   > "This bill establishes requirements that must be met before a law enforcement agency may take a number of specified actions related to the acquisition and use of 'military' equipment.
   >
   > "The list of equipment contemplated by this bill is overbroad-broader than that covered by now-repealed Executive Order 13688 which was the basis for AB 36 (Campos) in 2015, which I also vetoed. The current list not only includes items that are clearly 'militaristic in style,' but many that are commonly used by law enforcement and do not merit additional barriers to their acquisition.
   >
   > "In my view this bill creates an unnecessary bureaucratic hurdle without commensurate public benefit, and I cannot sign it."

8) **Argument in Support**: According to the bill's co-sponsor, the *Alliance for Boys and Men of Color*: "Regulating police acquisition of military equipment is critical because the militarization of police departments leads to increased civilian deaths, and militarized policing teams are more often deployed in communities of color. In addition, police militarization fails to keep officers safe or prevent violence or harm in communities. When police forces are militarized, they are seen as an occupying force rather than a public safety

service. The lack of a public forum to discuss the acquisition of military equipment further strains the relationship police have with the community. This bill would provide crucial local government oversight, and allow the public to have a voice in determining the military grade weapons and equipment that are brought into their communities.

"State and local law enforcement agencies in California may acquire military equipment from two sources: the federal government and private companies. Through the 1033 Program, the U.S. Department of Defense (DoD) allows direct transfer of surplus U.S. military equipment to police departments, free of charge. Over 8,000 federal and state law enforcement agencies from all 50 states and the U.S. territories currently participate in the program. Police agencies may also purchase military equipment from private companies using the federal discount via the 1122 Program, or using federal dollars through grant programs such as the State Homeland Security Program and the Urban Areas Security Initiative.

"In recent decades, as the acquisition of military equipment by law enforcement agencies has become more common, local government officials and the public have little to no information about such acquisitions. For example, in 2014, the Los Angeles Unified School District received sixty one M16 assault rifles, three M79 grenade launchers, and one mine-resistant ambush protected (MRAP) vehicle through the 1033 Program. 7 San Diego local law enforcement agencies have spent over $200 million on tactical equipment in violation of public disclosure laws. San Diego County law enforcement agencies have also purchased at least ten armored vehicles since 2003 using federal grant funding, without public discussion. 8 Over $11 million worth of military equipment is currently in the hands of local police forces across the Bay Area, including Armored Rescue Vehicles (ARVs) acquired by the Petaluma Police Department and MRAPs by the Antioch police, which require regular maintenance fees which cost the city thousands of dollars.

"Recent events have raised questions about when and how police choose to deploy military equipment. In 2020, peaceful protests, which erupted in response to the killing of George Floyd and other forms of police violence, were met with increasingly militarized responses by local law enforcement throughout California and across the country. This past year, law enforcement in Walnut Creek, CA and Orange, CA used military vehicles including Lenco BearCats to disperse peaceful protestors. The decision of how and when to deploy the vehicles was left up to the individual officers at the scene, with no uniform protocol. In Sacramento, CA last summer, police donned riot helmets, and aimed assault rifles from armored vehicles at peaceful demonstrators to clear an assembled crowd.

"This legislation is necessary to begin the process of holding law enforcement agencies accountable through increased oversight and transparency of military equipment acquisition."

9) **Argument in Opposition**: According to the *California State Sheriffs' Association*: "As a practical matter, the acquisition of military surplus property often requires bidders to respond quickly without the opportunity to engage a legislative body regarding each purchase. Even if the bill only applies to the first time an agency seeks to acquire certain equipment, AB 3131 would still severely disadvantage California agencies in their attempted participation. Additionally, the type of property contemplated by this bill is exceedingly vast and includes items commonly used by law enforcement such as helicopters, command and control vehicles, breaching apparatus, and riot helmets and shields.

"However, even if this measure lacked the identified deficiencies in terms of what equipment is included, we would remain opposed. AB 481 interferes with the ability of independently elected constitutional officers to acquire equipment at a cost savings for deployment for law enforcement purposes. Duly elected sheriffs are certainly capable of responding to the concerns of their constituents when it comes to the purchasing and deployment of appropriate equipment should they arise.

"Further, the bill's reporting requirement mandates that law enforcement not only describe how and where such equipment was used, but also an '…analysis of any discriminatory, disparate, any other adverse impacts that the use of military equipment may have had on the public's safety, welfare, civil rights, and civil liberties and on any community or group…' These provisions are unnecessarily burdensome and presuppose inappropriately that law enforcement's use of specified equipment and technology necessarily negatively impacts communities.

"In 2018, Governor Brown vetoed AB 3131, a similar bill that did not go so far as to require governing body approval for the acquisition of military equipment. In his veto message, he stated 'The current list not only includes items that are clearly 'militaristic in style,' but many that are commonly used by law enforcement and do not merit additional barriers to their acquisition. In my view this bill creates an unnecessary bureaucratic hurdle without commensurate public benefit, and I cannot sign it.'"

10) **Prior Legislation**:

a) AB 3131 (Gloria) of the 2017 – 2018 Legislative Session was similar to this bill. AB 3131 was vetoed by Governor Brown.

b) AB 36 (Campos) of the 2015 – 2016 Legislative Session would have prohibited local agencies, except local law enforcement agencies that are directly under the control of an elected officer, from applying to receive specified surplus military equipment from the federal government, unless the legislative body of the local agency approves the acquisition at a regular meeting held pursuant to the Ralph M. Brown Act (Brown Act). AB 36 was vetoed by the Governor.

c) SB 242 (Monning), Chapter 79, Statutes of 2015, required a school district's police department to obtain approval from its governing board prior to receiving federal surplus military equipment.

REGISTERED SUPPORT / OPPOSITION:

Support

Alliance for Boys and Men of Color (Co-Sponsor)
ACLU California Action
Alliance San Diego
American Friends Service Committee
Asian Solidarity Collective
Bay Rising
Bend the Arc: Jewish Action

Buen Vecino
California Faculty Association
California Federation of Teachers Afl-cio
California for Safety and Justice
California Latinas for Reproductive Justice
California League of United Latin American Citizens
California Public Defenders Association (CPDA)
Center for Empowering Refugees and Immigrants
Change Begins With Me Indivisible Group
Communities United for Restorative Youth Justice (CURYJ)
Community Legal Services in East Palo Alto
Courage California
Del Cerro for Black Lives Matter
Disability Rights California
Drug Policy Alliance
Ella Baker Center for Human Rights
Empowering Pacific Islander Communities (EPIC)
Essie Justice Group
Fresno Barrios Unidos
Friends Committee on Legislation of California
Immigrant Legal Resource Center
Initiate Justice
John Burton Advocates for Youth
Legal Services for Prisoners With Children
March for Our Lives California
Mid-city Community Advocacy Network
Oakland Privacy
Pillars of The Community
Public Health Advocates
Re:store Justice
Root & Rebound
San Francisco Public Defender
Secure Justice
Showing Up for Racial Justice (SURJ) San Diego
Showing Up for Racial Justice North County
Social Workers for Equity & Leadership
Southeast Asia Resource Action Center
Stop Coalition
Team Justice
The W. Haywood Burns Institute
The Women's Foundation of California
Think Dignity
Translatin@ Coalition
We the People - San Diego
Young Women's Freedom Center
Youth Alive!

5 private individuals

Oppose

California Narcotic Officers' Association
California State Sheriffs' Association
California Statewide Law Enforcement Association
Los Angeles County Sheriff's Department
Los Angeles Professional Peace Officers Association
Peace Officers Research Association of California (PORAC)

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

Date of Hearing: April 27, 2021
Counsel: Nikki Moore

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

AB 886 (Chiu) – As Amended April 12, 2021

As Proposed to be Amended in Committee

SUMMARY: Establishes grants, contingent upon appropriation by the Legislature, to fund programs for Restorative Justice and victims of hate crimes. Specifically, **this bill**:

1) Establishes the Community-Based Restorative Justice Grant Program, a program to provide grant assistance to community-based organizations to create or maintain restorative justice programs in collaboration with the prosecutor in a local jurisdiction, which is administered by the Department of Justice ("DOJ").

2) Defines "restorative justice" to mean "a preconviction alternative to criminal prosecution, entered into with the voluntary consent of the victim, the offender, and the prosecutor, in which a community-based organization facilitates mediation between the parties that aims to compensate the victim for the harm suffered, rehabilitate the offender through understanding the impacts of their offense, break down barriers of fear and mistrust that exist between communities because of cultural differences and language barriers, and build bridges based on common interests and goals."

3) Provides that grants made pursuant to this bill shall be made to community-based organizations and used to fund the implementation and operation of restorative justice programs that focus on offenders who have committed hate crime offenses and their victims.

4) States that grants shall be made on a competitive basis to those applicants who, as determined by the DOJ, based upon application materials, have demonstrated a need for restorative justice programs in the communities they serve, have the knowledge and ability to effectively implement and operate a restorative justice program, and have secured a commitment from the local district attorney or prosecutor to work with the applicant if they are selected for a grant.

5) Requires each grantee to report to the DOJ a summary of activities supported by the grant and related data, as required by DOJ.

6) Establishes the Community-Based Mental Health Services for Victims of Hate Crimes Grant Program, a program to provide grant assistance to community-based organizations to provide mental health services for victims of hate crimes is hereby created to be administered by the California Health and Human Services Agency (HHS).

7) Defines "mental health services" to mean "counseling and treatment for trauma, post-traumatic stress, and other related services for victims of, or other persons affected by, hate

crimes and related hostilities."

8) Provides that grants made pursuant to this title shall be made to community-based organizations and used to fund the implementation and operation of programs providing mental health services geared towards and located within underserved communities.

9) Provides that the implementation of this bill is contingent upon an appropriation by the Legislature in the annual Budget Act or another statute for purposes of this title.

EXISTING LAW:

1) States that the Legislature finds and declares that it is in the public interest to assist residents of the State of California in obtaining compensation for the pecuniary losses they suffer as a direct result of criminal acts. (Gov. Code, § 13950, subd. (a).)

2) Authorizes the board to reimburse for pecuniary loss for the following types of losses:

   a) Medical or medical-related expenses incurred by the victim for services provided by a licensed medical provider;

   b) Out-patient psychiatric, psychological or other mental health counseling-related expenses incurred by the victim or derivative victim, including peer counseling services provided by a rape crisis center;

   c) Compensation equal to the loss of income or loss of support, or both, that a victim or derivative victim incurs as a direct result of the victim's injury or the victim's death;

   d) Cash payment to, or on behalf of, the victim for job retraining or similar employment-oriented services;

   e) The expense of installing or increasing residential security, not to exceed $1,000;

   f) The expense of renovating or retrofitting a victim's residence or a vehicle to make them accessible or operational, if it is medically necessary;

   g) Relocation expenses up to $2,000 if the expenses are determined by law enforcement to be necessary for the victim's personal safety, or by a mental health treatment provider to be necessary for the emotional well-being of the victim; and,

   h) Funeral or burial expenses. (Gov. Code, § 13957, subd. (a).)

3) Defines "crime" for purposes of victim compensation to mean "a crime or public offense, wherever it may take place, that would constitute a misdemeanor or a felony if the crime had been committed in California by a competent adult. (Gov. Code, § 13951, subd. (b)(1).)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "The recent rise in racist and xenophobic attacks on members on the API community and the larger increase in hate crimes must be addressed with decisive action. The embers of hate have always been present, but they have recently been fanned into a fire of violence by no less than the previous occupant of the White House.

   "All communities deserve to be seen, valued, and protected. AB 886 would assure that consultation with the victim becomes a primary focus along with community healing. AB 886 would address prevention by providing additional restorative justice tools to proactively increase the likelihood that an individual who caused the harm would not do additional harm."

2) **Purpose of this bill**: According to the author, "Due to the underfunding of services for vulnerable communities and of training for mental health providers to serve diverse communities, it is difficult for many survivors of hate violence to access culturally competent and language accessible mental health services.

   "At present, the California Victim Compensation and Government Claims Board administers the California Victim Compensation Program (CalVCP) and is authorized to compensate victims and derivative victims of specified types of crimes through a continuously appropriated fund, the Restitution Fund. Existing law sets that victims of hate violence are required to file a police report when applying to the victim compensation funds. This creates a barrier for victims of hate violence to receive funds and start their recovery."

3) **Increase in Hate Crimes**: According to an FBI report, hate crimes rose to their highest level in 2019 in the last decade. Hate-motivated murders also rose to a record high in 2019, with 51 deaths - more than double the 2018 total. (*US hate crime highest in more than a decade – FBI*, BBC, Nov. 17, 2020, available at https://www.bbc.com/news/world-us-canada-54968498.) "The FBI's annual Hate Crime Statistics Act (HCSA) report says there were 7,314 hate crimes last year, up from 7,120 the year before - and the highest number since 7,783 were recorded in 2008." (Id.)

   This trend appears in California data too. According to the Los Angeles Police Department, it documented 15 hate crimes against Asian Americans in 2020, which is more than double the number in 2019. (Leila Miller, *Hate crimes against Asian Americans in L.A. more than doubled last year, LAPD reports*, LA Times, April 17, 2021, available at https://www.latimes.com/california/story/2021-04-17/in-2020-hate-crimes-against-asian-americans-in-l-a-more-than-doubled.) "Of the hate crimes reported, nine were classified as battery, five as criminal threats or aggravated assault and one as a bomb threat made in an email to the Japanese American National Museum, according to the LAPD report."

4) **Restorative Justice**: "The justice system in the United States has traditionally been a system that administers punishment for crime. Offenders are taken to court, receive a sentence for their crimes, and pay society back by way of fines, probation, or jail time. In this retributive system, crime is an act by an offender against the state. The system is built on the concepts that criminals should be punished for their crimes and that deterrence is the way to achieve community safety. This retributive system is not focused on addressing the needs of victims, the community, or the offenders. Restorative justice, in contrast, seeks to repair the harm

done to all parties affected by crime—the victim, the community, and the offender; to hold offenders accountable; and to improve community safety, while increasing the ability of the youth who comes into contact with the juvenile justice system to contribute to his or her family and society. A crime is seen as an act against an individual victim or victims and the community. Restorative justice emphasizes the impact of crime or wrongdoing on relationships. Restorative justice is focused on addressing the needs of the most affected parties rather than simply ensuring that offenders get what they deserve. Both the retributive system and the restorative philosophy are based on a belief that when a crime happens, the offender's obligation should be in proportion to the offense. Restorative justice advocates for the obligation to focus on redressing the harm caused by the offense." (*Balanced and Restorative Justice*, Judicial Council of California (2006) available at https://www.courts.ca.gov/documents/BARJManual3.pdf.)

5) **Argument in Support**: According to the *San Francisco District Attorney's Office* "I join Assemblymember Chiu and Attorney General Bonta in condemning attacks on the AAPI community and to make clear that my office does not and will not tolerate any violence against the AAPI community. To that end, my office is collaborating with AAPI community leaders to protect against any acts of hate or violence; to educate members of the AAPI community about hate crimes; and to make sure anyone in the AAPI community who may have witnessed or been impacted by hate or violence knows what steps to take to report it. AB 886 provides for a restorative path to accountability and healing, culturally competent mental health services and equal access to victim compensation.

"The history of hate violence against the AAPI community in the U.S. is not new. Unfortunately, violence against the AAPI community continues unabated due to a climate of fear, xenophobia, and racism during the COVID-19 pandemic, perpetuated by the highest echelons of federal government. AB 886 is a community-centered solution to address hate violence, allocate resources to victims, and restore our community's safety. All communities deserved to be seen, to be valued, and to be protected. The pain, hurt, and anger is heard.

"AB 886 takes urgent and necessary steps to address the recent rise of hate violence by funding community-based organizations that provide culturally competent mental health services for victims of hate violence and restorative justice programs."

6) **Related Legislation**:

   a) AB 57 (Gabriel), would require the Department of Justice (DOJ) to carry out various duties related to documenting and responding to hate crimes, including conducting reviews of all law enforcement agencies every three years to evaluate the accuracy of hate crime data reported, and requires the basic peace officer course curriculum to include on the topic of hate crimes a specified hate crimes video developed by the Commission on Peace Officer Standards and Training (POST). AB 57 is currently pending before the Assembly Appropriations Committee.

   b) AB 557, (Muratsuchi) would establish a hotline telephone number for the reporting of hate crimes, and for the dissemination of information about the characteristics of hate crimes, protected classes, civil remedies, and reporting options. AB 557 is currently pending before the Appropriations Committee.

c) AB 485 (Nguyen) would require local law enforcement agencies to post the information sent to the DOJ related to hate crimes on their internet website on a monthly basis. AB 485 is currently pending before this committee.

7) **Prior Legislation**: AB 1140 (Bonta), Chapter 569, Statutes of 2015, revised various rules governing the California Victim Compensation Program (CalVCP).

REGISTERED SUPPORT / OPPOSITION:

Support

San Francisco District Attorney's Office (Sponsor)
Aapi Women Lead
ACLU California Action
Anti-defamation League
Api Equality-la
Arab Resource and Organizing Center (AROC)
Asian Law Alliance
California Healthy Nail Salon Collaborative
California Public Defenders Association (CPDA)
Center for Empowering Refugees and Immigrants
Chinese Culture Foundation of San Francisco
East Bay Asian Local Development Corporation
Ella Baker Center for Human Rights
Florin Japanese American Citizens League - Sacramento Valley
Having Our Say Coalition
Hip Hop for Change, INC.
Japanese American Citizens League, Berkeley Chapter
Korean American Community Foundation of San Francisco
Korean American Family Services, INC.
Korean Community Center of The East Bay
San Francisco Bay Area Rapid Transit District (BART)
San Francisco Public Defender
Silicon Valley Community Foundation
Sonoma County Japanese American Citizens League
South Bay Youth Changemakers
Southeast Asian Development Center

Opposition

None

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

Amended Mock-up for 2021-2022 AB-886 (Chiu (A))

Mock-up based on Version Number 97 - Amended Assembly 4/12/21
Submitted by: Nikki Moore, Public Safety

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

~~**SECTION 1.** Section 13954 of the Government Code is amended to read:~~

~~**13954.** (a) The board shall verify with hospitals, physicians, law enforcement officials, or other interested parties involved, the treatment of the victim or derivative victim, circumstances of the crime, amounts paid or received by or for the victim or derivative victim, and any other pertinent information deemed necessary by the board. Verification information shall be returned to the board within 10 business days after a request for verification has been made by the board. Verification information shall be provided at no cost to the applicant, the board, or victim centers. When requesting verification information, the board shall certify that a signed authorization by the applicant is retained in the applicant's file and that this certification constitutes actual authorization for the release of information, notwithstanding any other provision of law. If requested by a physician or mental health provider, the board shall provide a copy of the signed authorization for the release of information.~~

~~(b) (1) The applicant shall cooperate with the staff of the board or the victim center in the verification of the information contained in the application. Failure to cooperate shall be reported to the board, which, in its discretion, may reject the application solely on this ground.~~

~~(2) An applicant may be found to have failed to cooperate with the board if any of the following occur:~~

~~(A) The applicant has information, or there is information that the applicant may reasonably obtain, that is needed to process the application or supplemental claim, and the applicant failed to provide the information after being requested to do so by the board. The board shall take the applicant's economic, psychosocial, and posterime traumatic circumstances into consideration, and shall not unreasonably reject an application solely for failure to provide information.~~

~~(B) The applicant provided, or caused another to provide, false information regarding the application or supplemental claim.~~

(C) The applicant refused to apply for other benefits potentially available from other sources besides the board including, but not limited to, worker's compensation, state disability insurance, social security benefits, and unemployment insurance.

(D) The applicant threatened violence or bodily harm to a member of the board or staff.

(c) The board may contract with victim centers to provide verification of applications processed by the centers pursuant to conditions stated in subdivision (a). The board and its staff shall cooperate with the Office of Criminal Justice Planning and victim centers in conducting training sessions for center personnel and shall cooperate in the development of standardized verification procedures to be used by the victim centers in the state. The board and its staff shall cooperate with victim centers in disseminating standardized board policies and findings as they relate to the centers.

(d) (1) Notwithstanding Section 827 of the Welfare and Institutions Code or any other provision of law, every law enforcement and social service agency in the state shall provide to the board or to victim centers that have contracts with the board pursuant to subdivision (c), upon request, a complete copy of the law enforcement report and any supplemental reports involving the crime or incident giving rise to a claim, a copy of a petition filed in a juvenile court proceeding, reports of the probation officer, and any other document made available to the probation officer or to the judge, referee, or other hearing officer, for the specific purpose of determining the eligibility of a claim filed pursuant to this chapter.

(2) The board and victim centers receiving records pursuant to this subdivision may not disclose a document that personally identifies a minor to anyone other than the minor who is so identified, the minor's custodial parent or guardian, the attorneys for those parties, and any other persons that may be designated by court order. Any information received pursuant to this section shall be received in confidence for the limited purpose for which it was provided and may not be further disseminated. A violation of this subdivision is a misdemeanor punishable by a fine not to exceed five hundred dollars ($500).

(3) The law enforcement agency supplying information pursuant to this section may withhold the names of witnesses or informants from the board, if the release of those names would be detrimental to the parties or to an investigation in progress.

(e) Notwithstanding any other provision of law, every state agency, upon receipt of a copy of a release signed in accordance with the Information Practices Act of 1977 (Chapter 1 (commencing with Section 1798) of Title 1.8 of Part 4 of Division 3 of the Civil Code) by the applicant or other authorized representative, shall provide to the board or victim center the information necessary to complete the verification of an application filed pursuant to this chapter.

(f) The Department of Justice shall furnish, upon application of the board, all information necessary to verify the eligibility of any applicant for benefits pursuant to subdivision (b) of Section 13956, to recover any restitution fine or order obligations that are owed to the Restitution Fund or to any victim of crime, or to evaluate the status of any criminal disposition.

(g) A privilege is not waived under Section 912 of the Evidence Code by an applicant consenting to disclosure of an otherwise privileged communication if that disclosure is deemed necessary by the board for verification of the application.

(h) Any verification conducted pursuant to this section shall be subject to the time limits specified in Section 13958.

(i) Any county social worker acting as the applicant for a child victim or elder abuse victim shall not be required to provide personal identification, including, but not limited to, the applicant's date of birth or social security number. County social workers acting in this capacity shall not be required to sign a promise of repayment to the board.

SEC. 2. Section 13956 of the Government Code is amended to read:

13956. Notwithstanding Section 13955, a person shall not be eligible for compensation under the following conditions:

(a) An application may be denied, in whole or in part, if the board finds that denial is appropriate because of the nature of the victim's or other applicant's involvement in the events leading to the crime, or the involvement of the person whose injury or death gives rise to the application.

(1) Factors that may be considered in determining whether the victim or derivative victim was involved in the events leading to the qualifying crime include, but are not limited to:

(A) The victim or derivative victim initiated the qualifying crime, or provoked or aggravated the suspect into initiating the qualifying crime.

(B) The qualifying crime was a reasonably foreseeable consequence of the conduct of the victim or derivative victim.

(C) The victim or derivative victim was committing a crime that could be charged as a felony and reasonably lead to their being victimized. However, committing a crime shall not be considered involvement if the victim's injury or death occurred as a direct result of a crime committed in violation of Section 261, 262, or 273.5 of, or for a crime of unlawful sexual intercourse with a minor in violation of subdivision (d) of Section 261.5 of, the Penal Code.

(2) If the victim is determined to have been involved in the events leading to the qualifying crime, factors that may be considered to mitigate or overcome involvement include, but are not limited to:

(A) The victim's injuries were significantly more serious than reasonably could have been expected based on the victim's level of involvement.

~~(B) A third party interfered in a manner not reasonably foreseeable by the victim or derivative victim.~~

~~(C) The board shall consider the victim's age, physical condition, and psychological state, as well as any compelling health and safety concerns, in determining whether the application should be denied pursuant to this section. The application of a derivative victim of domestic violence under 18 years of age or derivative victim of trafficking under 18 years of age shall not be denied on the basis of the denial of the victim's application under this subdivision.~~

~~(c) (1) Notwithstanding Section 13955, no person who is convicted of a violent felony listed in subdivision (c) of Section 667.5 of the Penal Code may be granted compensation until that person has been discharged from probation or has been released from a correctional institution and has been discharged from parole, or has been discharged from postrelease community supervision or mandatory supervision, if any, for that violent crime. In no case shall compensation be granted to an applicant pursuant to this chapter during any period of time the applicant is held in a correctional institution, or while an applicant is required to register as a sex offender pursuant to Section 290 of the Penal Code.~~

~~(2) A person who has been convicted of a violent felony listed in subdivision (c) of Section 667.5 of the Penal Code may apply for compensation pursuant to this chapter at any time, but the award of that compensation may not be considered until the applicant meets the requirements for compensation set forth in paragraph (1).~~

SEC. 3. Title 12.1 (commencing with Section 14220) is added to Part 4 of the Penal Code, to read:

TITLE 12.1. Community-Based Restorative Justice Grant Program

14220. A program to provide grant assistance to community-based organizations to create or maintain restorative justice programs is hereby created, to be administered by the Department of Justice.

14220.1. As used in this title, terms are defined as follows:

(a) "Community-based organization" means a nonprofit nongovernmental organization with a physical presence in the jurisdiction in which it is applying for a grant under this title.

(b) "Department" means the Department of Justice.

(c) "Hate violence" means violence, verbal harassment, threats, intimidation, vandalism, bullying, and civil rights violations committed against the person or property of another on account of any characteristic listed or defined in subdivision (b) or (e) of Section 51 of the Civil Code.

(d) "Restorative justice" means a facilitated mediation process between the parties that aims to repair the harm caused to the victim, rehabilitate the individual who caused the harm through

understanding the impacts of their actions, break down barriers of fear and mistrust that exist between communities because of cultural differences and language barriers, and build bridges based on common interests and goals.

14220.2. Grants made pursuant to this title shall be made to community-based organizations and used to fund the implementation and operation of restorative justice programs that focus on individuals who have committed hate violence and the victims.

14220.3. An applicant for a grant shall submit a proposal, in a form prescribed by the department.

14220.4. Grants shall be made on a competitive basis to those applicants who, as determined by the department, based upon application materials, have demonstrated a need for restorative justice programs in the communities they serve, have the knowledge and ability to effectively implement and operate a restorative justice program as described in Section 14220.2.

14220.5. Each grantee shall report to the department, in a form and at intervals prescribed by the department, a summary of activities supported by the grant and related data.

14220.6. The implementation of this title is contingent upon an appropriation by the Legislature in the annual Budget Act or another statute for purposes of this title.

SEC. 4. Part 7 (commencing with Section 5955) is added to Division 5 of the Welfare and Institutions Code, to read:

PART 7. Community-Based Mental Health Services for Victims of Hate Crimes Grant Program

5955. A program to provide grant assistance to community-based organizations to provide mental health services for victims of hate violence is hereby created to be administered by the California Health and Human Services Agency.

5956. As used in this title, terms are defined as follows:

(a) "Agency" means the California Health and Human Services Agency.

(b) "Community-based organization" means a nonprofit nongovernmental organization with a physical presence in the jurisdiction in which it is applying for a grant under this title.

(c) "Hate violence" means violence, verbal harassment, threats, intimidation, vandalism, bullying, and civil rights violations committed against the person or property of another on account of any characteristic listed or defined in subdivision (b) or (e) of Section 51 of the Civil Code.

(d) "Mental health services" means counseling and treatment for trauma, post-traumatic stress, and other related services for victims of, or other persons affected by, hate violence and related hostilities.

5957. Grants made pursuant to this title shall be made to community-based organizations and used to fund the implementation and operation of programs providing mental health services geared towards and located within underserved communities.

5958. An applicant for a grant shall submit a proposal, in a form prescribed by the agency.

5959. Grants shall be made on a competitive basis to those applicants who, as determined by the agency, based upon application materials, have demonstrated a need for mental health service for victims of hate violence and others affected by hate violence in the communities they serve, have the knowledge and ability to effectively provide those services, including relevant language skills and cultural competencies, and are appropriately licensed.

5960. Each grantee shall report to the agency, in a form and at intervals prescribed by the agency, a summary of activities supported by the grant and related data.

5961. The implementation of this part is contingent upon an appropriation by the Legislature in the annual Budget Act or another statute for purposes of this part.

Date of Hearing: April 27, 2021
Counsel: Nikki Moore

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

AB 1259 (Chiu) – As Introduced February 19, 2021

SUMMARY: Provides that a person who is no longer in criminal custody may file a motion to vacate a conviction or sentence if the conviction or sentence is legally invalid due to prejudicial error damaging the moving party's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a conviction or sentence. Specifically, **this bill**:

EXISTING LAW:

1) Authorizes a person no longer imprisoned or restrained to prosecute a motion to vacate a conviction or sentence for either of the following reasons:

   a) The conviction or sentence is legally invalid due to prejudicial error damaging the moving party's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a plea of guilty or nolo contendere; or

   b) Newly discovered evidence of actual innocence exists that requires vacation of the conviction or sentence as a matter of law or in the interests of justice. (Pen. Code, § 1473.7.)

2) Requires a court before accepting a plea to advise a criminal defendant as follows: "If you are not a citizen, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States." (Pen. Code, § 1016.5, subd. (a).)

3) Permits a defendant to make a motion to withdraw their plea if the court fails to admonish him or her about the possible immigration consequences of entering the plea. (Pen. Code, § 1016.5, subd. (a).)

4) Permits a defendant to move to withdraw a plea at any time before judgment, or within six months after an order granting probation when the entry of judgment is suspended, or if the defendant appeared without counsel at the time of the plea. (Pen. Code, § 1018.)

5) Allows every person unlawfully imprisoned or restrained of their liberty to prosecute a writ of habeas corpus to inquire into the cause of their restraint. (Pen. Code, § 1473, subd. (a).)

6) Authorizes a person no longer unlawfully imprisoned or restrained to prosecute a motion to vacate the judgment based on newly discovered evidence, as specified, if the motion is brought within one year of the discovery. (Pen. Code, § 1473.6.)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "AB 1259 is a small, straightforward bill that will have a profound impact for immigrants currently locked out of our courts who face deportation and barriers to naturalization, often for decades-old crimes. Current law says that if someone is unaware of the possible adverse immigration consequences of a charge -- either because their lawyer failed to inform them, or because of some other barrier -- then that conviction is legally invalid. Many immigrants have suffered convictions without having any idea that their criminal record would, at some point in the future, result in mandatory immigration imprisonment and deportation, permanently separating families or blocking their pathway to citizenship. The Legislature finally created a process to erase those faulty convictions in 2016, but only for those defendants who took a plea deal. The remedy is not currently available for those convicted by jury trials. That dichotomy is not fair. We should not punish people for pursuing their constitutional right to a jury trial and trying to prove their innocence. AB 1259 closes this loophole and ensures this legal remedy is available to all suffering invalid convictions. This bill is about keeping California families whole by preventing detentions and deportations based on faulty grounds."

2) **Padilla v. Kentucky**: In Padilla v. Kentucky (2010) 559 U.S. 356, the United States Supreme court held that the Sixth Amendment requires defense counsel to provide affirmative and competent advice to noncitizen defendants regarding the potential immigration consequences of their criminal cases. (Id. At 360.) Specifically, the United States Supreme Court held that defense counsel is constitutionally deficient if there is a failure to advise a noncitizen client entering a plea to a criminal offense of the risk of deportation. "Deportation as a consequence of a criminal conviction has become an integral part of the penalty for a criminal conviction for noncitizens, sometimes the most important part." (Id. at 364.) The court's holding is not limited to only affirmative mis-advice of the consequence because that would encourage defense counsel to remain silent on a matter of great importance to a noncitizen client, and that would be inconsistent with counsel's duty to provide advice to a client considering the advantages and disadvantages of a plea agreement. (Id. at 370-71.)

3) **Writs of Habeas Corpus**: Habeas corpus is the main vehicle for review of orders where an appeal is precluded or would be an inadequate remedy. Habeas corpus is also used to bring to the court's attention to matters outside the record which are crucial to the petitioner's claims for relief, and which have resulted in a constitutional violation, thereby rendering the petitioner's restraint unlawful. (In re Bower (1985) 38 Cal.3d 865, 872.) One common example of the use of habeas corpus is ineffective assistance of counsel claims. An individual could allege that their attorney was ineffective by failing to advise him or her of the adverse immigration consequences of accepting a plea, or by providing erroneous advice. (See e.g. People v. Soriano (1987) 194 Cal.App.3d 1470.) However, to be eligible for habeas corpus the individually must be considered "unlawful imprisoned or restrained." (Pen. Code, § 1473.) Actual incarceration in prison or jail is not required for a petition for writ of habeas

corpus; persons on bail, probation, parole, or committed to a state hospital are considered to be in constructive custody for purposes of habeas corpus writ review. (In re Bandmann (1959) 51 Cal.2d 388, 396-97; In re Petersen (1958) 51 Cal.2d 177, 181.) However, federal immigration custody alone, does not qualify as "custody" for purposes of habeas corpus writ review. (People v. Villa (2009) 45 Cal.4th 1063.) Therefore, a non-citizen who did not learn of an immigration consequence until many years later, such as at a naturalization interview, would be precluded from using the writ of habeas corpus to challenge the conviction based on ineffective assistance of counsel.

4) **This bill in Context with Prior Legislation**: In response to the limitations on when a writ of habeas corpus can be filed, the author introduced AB 813 Chapter 739, Statutes of 2016. AB 813 created Penal Code Section 1473.7 to provide a procedure in which individuals detained in federal immigration custody could seek relief from a conviction that they did not understand would have adverse immigration consequences. A follow-up bill, AB 2867 Chapter 825, Statutes of 2018, clarified timing and procedural requirements to aid courts in correctly and uniformly implementing AB 813.

   This bill would expand the category of persons able to seek to vacate a conviction or sentence as legally invalid, whatever way that person was convicted or sentence, including a person who was found guilty after a trial. This is a modest expansion of the existing law which permits a motion to vacate for ineffective assistance of counsel if a person plead guilty or no contest. Broadly speaking, less than two percent of criminal cases go to trial. The facts establishing ineffective assistance of counsel only arise in a fraction of those cases, making the actual number of cases this bill would impact numerically minimal.

5) **Argument in Support**: According to the *Prosecutors Alliance of California*, "The Prosecutors Alliance of California is a nonprofit organization of prosecutors committed to reforming California's criminal justice system through smart, safe, and modern solutions that advance not just public safety, but also human dignity and community well-being. Founded by the elected district attorneys of Los Angeles, San Francisco, Contra Costa, and San Joaquin counties, PAC's prosecutors represent one-third of all Californians.

   "Penal Code § 1473.7 provides access to the courts for people who have completed their sentence to challenge the legal validity of old convictions, including when the person convicted failed to meaningfully understand or knowingly accept the immigration consequences of pleading to a specific crime that could later become grounds for detention or deportation. If a court grants a motion to vacate based on this defect, the person is eligible to enter a new plea, or, on the prosecutor's petition, have the charges dropped altogether. This process has been a lifesaving tool for thousands of people with California convictions.

   "AB 1259 extends Penal Code § 1473.7 to immigrant community members who failed to meaningfully understand the immigration consequences of taking their criminal case to trial and suffered a conviction. While trial convictions only account for two percent of all convictions, AB 1259 ensures that all immigrants have the opportunity to present evidence of legal invalidity to a court and keep more California families whole by preventing deportations based on faulty legal grounds."

6) **Prior Legislation**:

a) AB 2867 (Gonzalez Fletcher), Chapter 825, Statutes of 2018, clarified the timing and procedural requirements of motions for post-conviction relief that are based on either a prejudicial error regarding a defendant's comprehension of immigration consequences stemming from their conviction, or newly discovered evidence of actual innocence.

b) AB 813 (Gonzalez Fletcher), Chapter 739, Statutes of 2016 created a mechanism of post-conviction relief for a person to vacate a conviction or sentence based on error damaging their ability to meaningfully understand, defend against, or knowingly accept the immigration consequences of the conviction.

REGISTERED SUPPORT / OPPOSITION:

Support

American Civil Liberties Union/northern California/Southern California/San Diego and Imperial Counties (Co-Sponsor)
California Attorneys for Criminal Justice (Co-Sponsor)
Alliance for Boys and Men of Color
Asian Americans Advancing Justice - California
California Coalition for Women Prisoners
California for Safety and Justice
California Immigrant Policy Center
California Public Defenders Association (CPDA)
California Rural Legal Assistance Foundation, INC.
Communities United for Restorative Youth Justice (CURYJ)
Community Legal Services in East Palo Alto
Courage California
Drug Policy Alliance
Ella Baker Center for Human Rights
Immigrant Defense Advocates
Initiate Justice
Long Beach Immigrant Rights Coalition
Los Angeles Center for Law and Justice
National Association of Social Workers, California Chapter
Norcal Resist
Open Immigration Legal Services
Prosecutor Alliance California
Re:store Justice
Rubicon Programs
San Francisco District Attorney's Office
San Francisco Public Defender's Officer
Santa Clara County District Attorney's Office
Secure Justice
Showing Up for Racial Justice (SURJ) San Diego
Silicon Valley De-bug
Southeast Asia Resource Action Center
We the People - San Diego

Yolo County District Attorney

Opposition

None

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

Date of Hearing: April 27, 2021
Counsel: David Billingsley

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

AB 1245 (Cooley) – As Amended March 11, 2021

SUMMARY: Allows a defendant to petition a court to resentence them to a lower sentence after the defendant has served at least 15 years of their sentence. Creates a presumption that the court will grant a petition to recall and resentence a defendant made by Board of Parole Hearings (BPH), California Department of Corrections and Rehabilitation (CDCR), the sheriff, or the district attorney. Specifically, **this bill**:

1) Establishes additional rules and procedures for the existing court process when CDCR, BPH, Sheriff, or District Attorney, recommend that a sentence of convicted defendant be recalled and that the defendant be resentenced.

2) Allows a petition for recall and resentencing to be filed by the defendant, after the defendant has served at least 15 years of their sentence and prior to the final 24 months of their sentence.

3) Requires a petition for recall and resentencing made by the defendant, CDCR, sheriff, or the district attorney, to be filed with the presiding judge of the superior court in which the defendant was originally sentenced.

4) Requires the presiding judge, or another judge designated by the presiding judge, to act on the petition within 90 days of the petition having been filed.

5) Specifies that for each petition for recall and resentencing made pursuant to this bill, the court shall give notice to all parties of each action taken, shall provide sufficient time for the parties to respond, shall permit the presentation of evidence, and shall specify the reason for its judgment on the petition.

6) States that if a petition for recall and resentencing is made by made by BPH, CDCR, the sheriff, or the district attorney, based on a defendant's exceptional rehabilitation while imprisoned, the court shall appoint counsel to represent the defendant and shall hold a hearing on the petition.

7) Specifies that the court shall not deny the petition to recall and resentence a defendant made by BPH, CDCR, the sheriff, or the district attorney, unless there is evidence beyond a reasonable doubt that the defendant is likely to commit a future violent crime.

8) Specifies that for all petitions for recall and resentencing not made by CDCR, BPH, the sheriff, or district attorney, based on a defendant's exceptional rehabilitation while imprisoned, the court may recall and resentence a defendant in the interest of justice.

9) Provides that in determining whether to recall and resentence a defendant, the court may consider postconviction factors, including, but not limited to, the inmate's disciplinary record and record of rehabilitation while incarcerated, evidence that reflects whether age, time served, and diminished physical condition, if any, have reduced the inmate's risk for future violence, and evidence that reflects that circumstances have changed since the inmate's original sentencing so that the inmate's continued incarceration is no longer in the interest of justice.

10) Requires a court resentencing a defendant under the provisions of this bill to apply the sentencing rules of the Judicial Council in order to eliminate disparity of sentences and to promote uniformity of sentencing.

11) States that a court resentencing a defendant under the provisions of this bill may reduce a defendant's term of imprisonment, and reconsider any other matter relating to the original sentence, and modify the judgment, including a judgment entered after a plea agreement, accordingly.

12) States that if the original sentence was the result of a plea agreement, resentencing pursuant to this bill shall not constitute grounds for a prosecutor or the court to withdraw their agreement to the original plea agreement.

13) Provides that credit shall be given for time served.

14) Requires the Department of Finance (DOF) to calculate the savings accrued from resentencing a defendant pursuant to this section who was sentenced to imprisonment in the state prison.

15) States that upon appropriation by the Legislature, 25 percent of the savings shall be allocated to the district attorney of the county in which the resentencing occurred, 12.5 percent of the savings shall be allocated to the superior court in the county in which the resentencing occurred, and, for a defendant represented in resentencing proceedings by the public defender, 12.5 percent of the savings shall be allocated to the public defender of the county in which the resentencing occurred.

EXISTING LAW:

1) Provides that the purpose of imprisonment for crime is punishment; that this purpose is best served by terms proportionate to the seriousness of the offense with provision for uniformity in the sentences of offenders committing the same offense under similar circumstances; and that the elimination of disparity, and the provision of uniformity, of sentences can best be achieved by determinate sentences fixed by statute in proportion to the seriousness of the offense, as determined by the Legislature, to be imposed by the court with specified discretion. (Pen. Code, § 1170, subd. (a)(1).)

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

3) Provides that the court can recall the defendant's sentence within 120 days of the defendant's commitment, or at any time upon a recommendation of the Secretary of the Department of Corrections and Rehabilitation or the Board of Parole Hearings (for prison sentences) or the county correctional administrator (for jail sentences) and impose a new sentence. (Pen. Code, § 1170, subd. (d)(1).) Provides that when a sentencing enhancement specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court. (Pen. Code, § 1170.1(d).)

4) Allows a defendant who was a minor at the time he or she received a sentence of life without the possibility of parole to petition the court for a new sentence after completing 15 years imprisonment. (Pen. Code, § 1170, subd. (d)(2)(A)(i).)

5) Allows the Secretary of the Department of Corrections and Rehabilitation or the Board of Parole Hearings to make a recommendation to the sentencing court that a defendant's sentenced be recalled and that he or she be given a new sentence for medical reasons. (Pen. Code, § 1170, subd. (e)(1).)

6) Provides that sentencing choices requiring a statement of a reason include "[s]electing one of the three authorized prison terms referred to in section 1170(b) for either an offense or an enhancement." (Cal. Rules of Court, Rule 4.406(b)(4).)

7) Provides that, in exercising discretion to select one of the three authorized prison terms referred to in statute, "the sentencing judge may consider circumstances in aggravation or mitigation, and any other factor reasonably related to the sentencing decision. The relevant circumstances may be obtained from the case record, the probation officer's report, other reports and statements properly received, statements in aggravation or mitigation, and any evidence introduced at the sentencing hearing." (Cal. Rules of Court, Rule 4.420(b).)

8) Requires the sentencing judge to consider relevant criteria enumerated in the Rules of Court. (Cal. Rules of Court, Rule 4.409.)

9) Prohibits the sentencing court from using a fact charged and found as an enhancement as a reason for imposing the upper term unless the court exercises its discretion to strike the punishment for the enhancement. (Cal. Rules of Court, Rule 4.420(c).)

10) Prohibits the sentencing court from using a fact that is an element of the crime to impose a greater term. (Cal. Rules of Court, Rule 4.420(d).)

11) Enumerates circumstances in aggravation, relating both to the crime and to the defendant, as specified. (California Rules of Court, Rule 4.421.)

12) Enumerates circumstances in mitigation, relating both to the crime and to the defendant, as specified. (California Rules of Court, Rule 4.423.)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "Under current law, CDCR, local prosecutors, law enforcement, and the Board of Parole Hearings may request that an incarcerated person be resentenced. However, because there is no formal procedure spelled out in the law for how a court should proceed when receiving such a request, many are simply denied or ignored.

   "AB 1245 seeks to make the process clearer and fairer by creating a new resentencing statute with three types of resentencing, each with specific procedures.

   a) Law enforcement or CDCR is in favor of resentencing. In this situation, there is a presumption in favor of resentencing. This would help codify the current practice of CDCR and prosecutors seeking resentencings for people who have shown exceptional rehabilitation.

   b) Law enforcement or CDCR takes no position on whether the resentencing is appropriate. In this situation, there would be no presumption in favor or against resentencing, and the matter would be left up to the judge's discretion. This would also codify CDCR's current practice of requesting that a sentence be adjusted in cases where there was an error in the original sentence or where it may be appropriate to apply recent changes in the law to an incarcerated person.

   c) An incarcerated person or court brings a request for resentencing after fifteen years of incarceration. There would be no presumption in favor or against resentencing.

   "For all resentencing, a court would be required to give notice of any actions it takes and provide a defendant an opportunity to respond. Courts would also be required to give specific reasons for its actions, including when denying a request for resentencing. Additionally, AB 1245 would direct savings from reduced prison incarceration to local entities, including the local prosecutor's office that made the successful resentencing request as well as the public defender's office that represented the defendant."

2) **Determinate Sentencing**: Most felonies are punished under the Determinate Sentencing Law (DSL). (Pen. Code, § 1170.) The DSL covers felonies for which three specified terms are provided in statute; crimes declared to be felonies but for which there is no specified term; and crimes simply made punishable by imprisonment in the state prison or in the county jail pursuant to realignment. The latter two categories are punishable by 16 months (low term), 2 years (middle term), or 3 years (upper term). (Pen. Code, § 18.)

   Under the DSL, where three terms are specified, the court is free to choose any of the three terms, using valid discretion. The judge must still state reasons for the term selected. (Pen. Code, § 1170, subd. (b); see also Cal. Rules of Court, rules 4.406(b)(4) , 4.420(e).) "[T]he sentencing judge may consider circumstances in aggravation or mitigation, and any other factor reasonably related to the sentencing decision. The relevant circumstances may be obtained from the case record, the probation officer's report, other reports and statements properly received, statements in aggravation or mitigation, and any evidence introduced at the sentencing hearing." (Cal. Rules of Court, rule 4.420(b), see also Pen. Code, § 1170, subd. (b).) The Rules of Court list both aggravating factors and mitigating factors. In each category there are factors relating to the crime and factors relating to the defendant. (See Cal.

Rules of Court, rule 4.421 and rule 4.423.)

Currently, under Penal Code section 1170, subdivision (d), a trial court may recall a defendant's sentence and "impose any otherwise permissible new sentence, which may include consideration of facts that arose after [the defendant] was committed to serve the original sentence." (*Dix v. Superior Court* (1991) 53 Cal.3d 442, 465.) The new sentence cannot be greater than the original sentence. (Pen. Code, § 1170, subd. (d)(1).) The court's recall of a sentence for resentencing on the recommendation of the county correctional administrator, the Secretary of the CDCR, or the Board of Parole Hearings, or the county correctional administrator may occur at any time. However, a trial court's recall for resentencing on its own motion must occur within 120 days after the commitment date. (Pen. Code, § 1170, subd. (d)(1).)

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

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

CDCR's weekly report, as of April 7, 20201, on the prison population notes that the in-state adult institution population is currently 92,028 inmates, which amounts to approximately 103.7% of design capacity. (https://www.cdcr.ca.gov/research/wp-content/uploads/sites/174/2021/04/Tpop1d210407.pdf)

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

California has announced it is closing two prisons and it possible more prisons could be closed in coming years. California has declared that Deuel Vocational Institution in Tracy and California Correctional Center in Susanville will be closed. According to the Legislative Analyst's Office, the state could close a total of five prisons by 2025, which in turn could save an estimated $1.5 billion in annual spending. The corrections department, which has a budget of $16 billion, oversees 34 prisons and more than 50,000 employees. (https://abgt.assembly.ca.gov/sites/abgt.assembly.ca.gov/files/Feb%2022%20Sub%205%20Agenda.pdf). The measures proposed by this bill should help reduce the number of inmates in the prison system and make it more likely that California can close additional prisons.

4) **Committee on the Revision of the Penal Code Recommendation on Resentencing:** On January 1, 2020, the Committee on Revision of the Penal Code (Committee) was formed. The Committee has seven members. Five are appointed by the Governor for four-year terms. One is an assembly member selected by the speaker of the assembly; the last is a senator selected by the Senate Committee on Rules. The Governor selects the Committee's chair.

The principal duties of the Committee include establishing alternatives to incarceration that will aid in the rehabilitation of offenders and improving the system of parole and probation. The Committee made several recommendations to improve the criminal justice system in its 2020 Annual Report and Recommendations. One of the 10 recommendations made by the Committee was to establish a judicial process for "second look" resentencing. The recommendation builds on California's existing law allowing incarcerated individuals to be resentenced in the interest of justice. (http://www.clrc.ca.gov/CRPC/Pub/Reports/CRPC_AR2020.pdf)

California has expanded the statute governing resentencing to allow certain law enforcement officials, including the Secretary of CDCR or the district attorney of the county of conviction, to request that a person be resentenced at any time for any reason. A court that receives such a request is vested with authority to recall the person's sentence and issue a new, reduced punishment, if "circumstances have changed since the inmate's original sentencing so that the inmate's continued incarceration is no longer in the interest of justice."

The Committee noted that despite these expansions to the resentencing statute, current law has failed to protect many important interests at stake. For example, because the Penal Code does not provide any rules, many trial courts provide virtually no process while considering these requests, including denying resentencing requests without providing notice to the parties, appointing counsel, or giving parties an opportunity to be heard. (Id.)

With respect recall and resentencing, the Committee recommended the following:

a) Establish judicial procedures for evaluating resentencing requests;

   i) In all cases, require notice, initial conference within 60 days, and written reasons for court decisions.

   ii) For all cases initiated by law enforcement, require appointment of counsel.

b) Establish that resentencing is presumed if law enforcement officials recommend resentencing because a sentence is unjust or because of a person's exceptional rehabilitative achievement while incarcerated; and

c) Expand "second look" sentencing opportunities by allowing any person who has served more than 15 years to request a reconsideration of sentence by establishing that "continued incarceration is no longer in the interest of justice." (Id.)

This bill incorporates a number of the Committee's recommendations. Consistent with the Committee's recommendation, this bill would presume recall and resentencing when there is a recommendation initiated by BPH, CDCR, the Sheriff, or the District Attorney, based on based on a defendant's exceptional rehabilitation while imprisoned. In those cases, the court

would be required to appoint an attorney for the defendant. In those cases, the court would grant the petition to recall and resentence recall unless there is evidence beyond a reasonable doubt that the defendant is likely to commit a future violent crime.

Many of the elements of this bill are similar to AB 1540 (Ting). One notable difference, is that this bill would allow an inmate that has served 15 years of their sentence to request the court to recall and resentence them. This provision is consistent with one of the Committee's recommendations for expanding resentencing options. Current law requires recall and resentencing to be initiated by the judge or through a recommendation from a source such as the district attorney or CDCR. This bill would enable the defendant to initiate the process themselves, but not until they have served at least 15 years of their sentence. The court would evaluate these petitions by determining if granting the petition was in the interest of justice and allow the court to consider post-conviction factors in making that determination.

There are some procedural questions raised by this process of defendant initiated petitions. Could a defendant apply for recall and resentencing more than once, if their initial petition was denied? This bill does not require that an inmate initiating the petition be provided counsel. Is it expected, that the court would rule based purely on what was contained in the inmates written petition or would the defendant be transported to the sentencing court to present evidence. It is not clear if the requirement that the defendant serve at least 15 years of their sentence means 15 years of actual time, or the 15 years would be calculated including the inmate's custody credits. Allowing inmate referrals could also result in a large number of petitions for recall and resentencing. However, this bill does not impose a presumption of recall and resentencing on the petitions submitted by inmates. There is no explicit requirement that the inmate petitions be given a hearing, but this bill does require that all petitions the court shall permit the presentation of evidence, and shall specify the reason for its judgment on the petition.

5) **Argument in Support:** According to the *California Public Defenders Association*, "Under existing law, the recall of a prisoner's sentence can be initiated by the court, the Department of Corrections and Rehabilitation (CDCR), or the district attorney, in the case of an inadvertent over-sentence, or in the case of a particularly deserving prisoner. Although this limited permitting of sentence recall is decades old, the procedures have never been codified in detail, which has resulted in confusion and inequity, including a high percentage of recall motions never being acted upon at all.

"AB 1245 would correct that problem in a fair and equitable manner while it would also expand the recall rules in a limited common-sense manner. It would strengthen due process protections by providing notice to the inmate, establishing deadlines, and requiring a hearing at which evidence could be presented.

"Recognizing that most individuals age out of crime, AB 1245 would also permit a defendant who has served at least 15 years of their sentence, to file a petition for recall. Under AB 1245, while the court can only recall a sentence in the interest of justice, it would be able to consider postconviction facts such as the individual's disciplinary record, rehabilitation record, age, and physical condition in determining whether to recall and modify a sentence.

"AB 1245 is similar to AB 1540 (Ting), which is also set for hearing on April 27, and which CPDA is supporting as well. CPDA respectfully suggests that the two bills be combined or

otherwise amended in such a way that the provisions of both bills can become law."

6) **Argument in Opposition**: According to the *California District Attorneys Association*, "AB 1245 would allow any inmate to petition the court for resentencing for the most serious and violent crimes up to and including continuous sexual abuse of a child and multiple murder without regard for their disciplinary record, their participation in rehabilitation programs or other such factors that reflect on their suitability to reenter society without risk for future criminal conduct. This change would result in an avalanche of petitions by nearly every single incarcerated individual.

"Additionally, AB 1245 would shift the burden of proof from a standard which allows the court to grant a petition when the evidence shows that the inmate's continued incarceration is no longer in the interest of justice, to an impossible-to-rebut standard that would require the court to grant every petition 'unless there is evidence beyond a reasonable doubt that the defendant is likely to commit a future violent crime.' This would not only impose the highest standard of proof in the inverse but would require the impossible – the ability to not only accurately predict the future, but to do so beyond a reasonable doubt. There will never be proof beyond a reasonable doubt of the future conduct of any human being because no human is possessed of such ability. Moreover, the proposed standard only contemplates the commission of a future 'violent' crime. This, by definition, precludes consideration of the likelihood that the inmate will commit future non-violent crimes such as domestic violence, rape by intoxication or child molestation which are highly likely to be repeated in the absence of successful rehabilitation.

"Finally, AB 1245 would apply not only to convictions at trial but also to convictions resulting from plea bargain and would preclude the prosecution and court from withdrawing their end of the original plea agreement when resentencing was granted. Freeing the inmate of the obligations of a plea agreement while continuing to bind the court and prosecution will have negative consequences. Neither prosecutors nor the court will be willing to enter into plea bargains that entail reduced sentences or dismissal of charges when the defendant will not be bound by his or her end of the agreement."

7) **Related Legislation**:

a) AB 1540 (Ting), would require the court to provide counsel for the defendant when there is recommendation from the CDCR, BPH, or the district attorney, to recall an inmate's sentence and resentence that inmate to a lesser sentence. AB 1540 is set for hearing in the Assembly Public Safety Committee on April 27, 2021.

b) AB 124 (Kamlager), would authorize the court to resentence inmate upon a motion by the inmate and would require the court, when resentencing an inmate, to consider if the inmate experienced intimate partner violence, commercial sex trafficking, commercial sexual exploitation, or human trafficking. AB 124 is awaiting hearing in the Assembly Appropriations Committee.

8) **Prior Legislation**:

a) AB 865 (Levine), Chapter 523, Statutes of 2018, authorized the court, under specified conditions, to resentence any person who was sentenced for a felony conviction prior to January 1, 2016, and who is, or was, a member of the United States military and who may be suffering from specified mental health problems as a result of his or her military service.

b) AB 1076 (Ting), Chapter 578, Statutes of 2019, requires starting on January 1, 2021, and subject to an appropriation in the annual Budget Act, that the DOJ, on a monthly basis, review the records in the statewide criminal justice databases grant relief to persons who identify persons who are eligible for relief by having their arrest records, or their criminal conviction records, withheld from disclosure, as specified.

c) AB 2942 (Ting), Chapter 1001, Statutes of 2018, allowed the district attorney of the county where a defendant was convicted and sentenced to make a recommendation that the court recall and resentence the defendant.

REGISTERED SUPPORT / OPPOSITION:

Support

California Public Defenders Association (CPDA)

Oppose

California District Attorneys Association

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

Date of Hearing: April 27, 2021
Counsel: David Billingsley

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

AB 821 (Cooper) – As Amended March 18, 2021

PULLED BY AUTHOR

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

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

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

AB 700 (Cunningham) – As Introduced February 16, 2021

As Proposed to be Amended in Committee

SUMMARY: Allows a defendant who is in custody to appear by counsel in criminal proceedings, with or without a written waiver, if the court makes specified findings on the record by clear and convincing evidence. Specifically, **this bill**:

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

   a) The defendant is in custody and refusing, without good cause, to appear in court for that particular trial, hearing, or other proceeding;

   b) The defendant has been informed of their right and obligation to be personally present in court;

   c) The defendant has been informed that the trial, hearing, or other proceeding will proceed without their personal presence;

   d) The defendant has been informed that they have the right to remain silent during the trial, hearing, or other proceeding;

   e) The defendant has been informed that their absence without good cause will constitute a voluntary waiver of any constitutional or statutory right to confront any witnesses against them or to testify on their own behalf; and,

   f) The defendant has been informed whether or not defense counsel will be present.

2) Requires the court to state the reasons for its findings on the record and cause those findings and reasons to be entered into the minutes.

3) Provides that if the trial, hearing, or other proceeding lasts more than one day, the court is required to make the findings required by this provision anew for each day that the defendant is absent.

4) States that these provisions do not apply to any trial, hearing, or other proceeding in which the defendant was personally present in court at the commencement of the trial, hearing, or other proceeding.

5) Provides that a trial or preliminary hearing shall be deemed to have "commenced in the presence" of a defendant who is in custody and refuses to appear in court, under the circumstances stated above.

EXISTING LAW:

1) Provides a criminal defendant the right to be personally present with counsel at trial. (Cal. Const., Art. I, sec. 15.)

2) Specifies in all cases in which the accused is charged with a misdemeanor only, the accused may appear by counsel only, with specified exceptions. (Pen. Code, § 977, subd. (a).)

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

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

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

4) Specifies the accused may execute a written waiver of their right to be personally present, approved by their counsel, and the waiver shall be filed with the court. However, the court may specifically direct the defendant to be personally present at any particular proceeding or portion thereof. (Pen. Code, § 977, subd. (b)(2).)

5) Provides the court may permit the initial court appearance and arraignment of defendants held in any state, county, or local facility within the county on felony or misdemeanor charges, except for those defendants who were indicted by a grand jury, to be conducted by two-way electronic audiovideo communication between the defendant and the courtroom in lieu of the physical presence of the defendant in the courtroom. If the defendant is represented by counsel, the attorney shall be present with the defendant at the initial court appearance and arraignment, and may enter a plea during the arraignment. However, if the defendant is represented by counsel at an arraignment on an information in a felony case, and if the defendant does not plead guilty or nolo contendere to any charge, the attorney shall be present with the defendant or if the attorney is not present with the defendant, the attorney shall be present in court during the hearing. The defendant shall have the right to make their plea while physically present in the courtroom if requested. If the defendant decides not to exercise the right to be physically present in the courtroom, they shall execute a written waiver of that right. A judge may order a defendant's personal appearance in court for the initial court appearance and arraignment. In a misdemeanor case, a judge may, pursuant to

this subdivision, accept a plea of guilty or no contest from a defendant who is not physically in the courtroom. In a felony case, a judge may, pursuant to this subdivision, accept a plea of guilty or no contest from a defendant who is not physically in the courtroom if the parties stipulate thereto. (Pen. Code, § 977, subd. (c)(1).)

6) Provides that a defendant who does not wish to be personally present for noncritical portions of the trial when no testimonial evidence is taken may make an oral waiver in open court prior to the proceeding or may submit a written request to the court, which the court may grant in its discretion. The court may, when a defendant has waived the right to be personally present, require a defendant held in any state, county, or local facility within the county on felony or misdemeanor charges to be present for noncritical portions of the trial when no testimonial evidence is taken, including, but not limited to, confirmation of the preliminary hearing, status conferences, trial readiness conferences, discovery motions, receipt of records, the setting of the trial date, a motion to vacate the trial date, and motions in limine, by two-way electronic audiovideo communication between the defendant and the courtroom in lieu of the physical presence of the defendant in the courtroom. If the defendant is represented by counsel, the attorney shall not be required to be personally present with the defendant for noncritical portions of the trial, if the audiovideo conferencing system or other technology allows for private communication between the defendant and the attorney prior to and during the noncritical portion of trial. Any private communication shall be confidential and privileged. (Pen. Code, § 977, subd. (c)(2)(A).)

7) Provides that the defendant in a felony case shall be personally present at the trial. However, the absence of the defendant in a felony case after the trial has commenced in the their presence shall not prevent continuing the trial to, and including, the return of the verdict in any of the following cases:

   a) Any case in which the defendant, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that the trial cannot be carried on with him in the courtroom; or

   b) Any prosecution for an offense which is not punishable by death in which the defendant is voluntarily absent. (Pen. Code, §§ 1043, subds. (a) & (b).)

8) States that any defendant who is absent from a trial because of disruptive behavior may reclaim their right to be present at the trial as soon as they are willing to conduct themselves consistently with the decorum and respect inherent in the concept of courts and judicial proceedings. (Pen. Code, § 1043, subds. (c).)

9) Specifies this provision does not limit defendant's right to waive their presence, as specified. (Pen. Code, § 1043, subd. (d).)

10) Authorizes the court to proceed with a misdemeanor trial if the defendant fails to appear and if the defendant has authorized counsel to proceed in their absence, unless good cause for a continuance exists. (Pen. Code, § 1043, subd. (e).)

11) Provides that if there is no authorization and if the defendant fails to appear, the court, in its discretion, may do one or more of the following, as it deems appropriate:

a) Continue the matter;

b) Order bail forfeited or revoke release on the defendant's own recognizance;

c) Issue a bench warrant; and/or,

d) Proceed with the trial if the court finds the defendant has absented themselves voluntarily with full knowledge that the trial is to be held or is being held. (Pen. Code, § 1043, subd. (e).)

12) States that nothing in this provision shall limit the right of the court to order the defendant to be personally present at the trial for purposes of identification unless counsel stipulate to the issue of identity. (Pen. Code, § 1043, subd. (e).)

13) Provides that the defendant in a preliminary hearing shall be personally present, except as otherwise provided. (Pen. Code, § 1043.5, subd. (a).)

14) States the absence of the defendant in a preliminary hearing after the hearing has commenced in his presence shall not prevent continuing the hearing to, and including, holding to answer, filing an information, or discharging the defendant in any of the following cases:

a) Any case in which the defendant, after he has been warned by the judge that he will be removed if he continued his disruptive behavior, nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that the hearing cannot be carried on with him in the courtroom; or,

b) Any prosecution for an offense which is not punishable by death in which the defendant is voluntarily absent. (Pen. Code, § 1043.5, subd. (b).)

15) Provides that any defendant who is absent from a preliminary hearing because of disruptive behavior may reclaim their right to be present at the hearing as soon as they are willing to conduct themselves consistently with the decorum and respect inherent in the concept of courts and judicial proceedings. (Pen. Code, § 1043.5, subd. (c).)

16) Specifies this provision does not limit defendant's right to waive their presence, as specified. (Pen. Code, § 1043.5, subd. (c).)

FISCAL EFFECT: Unknown.

COMMENTS:

1) **Author's Statement**: According to the author, "This bill is necessary to permit defendants, with their proven voluntary consent, to have a preliminary examination or trial conducted in their absence without their having to be forcibly brought to court over their objection so that the trial or preliminary examination can 'commence' in their presence. It also eliminates judicial concerns that by proceeding to trial in the defendant's absence, they are violating Penal Code sections 1043, 1043.5 or 977 even though a defendant in custody does not want to be present."

2) **Defendant's Right to be Present at Trial**: A criminal defendant has the right to be present at his trial under the Sixth and Fourteenth Amendments to the federal Constitution and under article I, section 15, of the California Constitution. (*People v. Howze* (2001) 85 Cal.App.4th 1380, 1393.) The Penal Code also specifies that right. (*Ibid.*; Pen. Code, §§ 977, 1043.)

However, the right to be present at trial is not absolute. It may be expressly or impliedly waived. (*People v. Espinoza* (2016) 1 Cal.5th 61, 72.) "In determining whether a defendant is absent voluntarily, a court must look at the 'totality of the facts.'" (*Ibid.*, citing *People v. Gutierrez* (2003) 29 Cal.4th 1196, 1205.)

For example, under Penal Code section 1043, subdivision (b)(1), after a trial has commenced, "a disruptive defendant can be removed from the courtroom without violating his right to be present." (*People v. Howze, supra,* 85 Cal.App.4th at p. 1393.) "Under Penal Code section 1043, subdivision (b)(2), a noncapital felony trial that has commenced may continue in a defendant's absence, if the defendant was present when trial began, then later voluntarily absents himself." (*People v. Concepcion* (2008) 45 Cal.4th 77, 79.) But the court may proceed only if "'"it is clearly established that [the defendant's] absence is voluntary. He must be aware of the processes taking place, of his right and of his obligation to be present, and he must have no sound reason for remaining away."' [Citations.]" (*People v. Espinoza, supra*, 1 Cal.5th at pp. 73-74.) If the trial court finds that the defendant voluntarily waived the right to be present at trial, the trial court has discretion to proceed with the trial without the defendant. (*Id.* at p. 78.) Under Penal Code section 1043.5, subdivision (b)(1) and (2), similar rights pertain to a defendant with regard to preliminary hearings.

A trial that has commenced in the defendant's presence may continue in the defendant's absence if the defendant is in custody and refusing to come to court. In these circumstances, the defendant is voluntarily absent after the trial has commenced within the meaning of Penal Code Section 1043(b)(2), which allows the absence regardless of Penal Code Section 977. (*People v. Gutierrez* (2003) 29 Cal.4th 1196.) In determining whether a defendant who is in custody and refuses to come to court is "voluntarily absent" (Pen. Code, § 1043, subd. (b)(2)), a trial court should take reasonable steps to ensure that being absent from trial is the defendant's choice. (*People v. Gutierrez, supra,* 29 Cal.4th at p. 1206.)

The bill would provide that a trial or preliminary hearing would be deemed to have commenced in the defendant's presence where the court makes specified findings by clear and convincing evidence, including that the defendant is refusing to come to court, without good cause, and is voluntarily waiving their statutory and constitutional right to be present. The bill would also allow the court to proceed in an in-custody defendant's absence, with or without a written waiver, under similar circumstances.

3) **Argument in Support**: According to the *California District Attorneys Association*, the sponsor of this bill, "Under current law, defendants in felony cases are generally required to be personally present during trial or preliminary examination. Prosecutors have repeatedly been running into problems with defendants in custody who refuse to come to court for the commencement of trial or preliminary examination. The sheriff's department will not physically remove the defendant from his or her jail cell to bring the defendant to court (i.e., out of fear of injury to themselves, injury to the defendant, or out of concern of enhancing the

risk of contracting an illness). This fear of physical contact has been exacerbated by the COVID pandemic.

"AB 700 would allow a preliminary examination or trial to proceed when there is clear and convincing evidence that an in-custody defendant is voluntarily refusing to appear. This bill will help move these cases along and mitigate the backlog of cases that are piling up from the pandemic's impact on our court system."

4) **Argument in Opposition**: According to the *California Attorneys for Criminal Justice*, "The current language in Penal Code section 977, 1043 and 1043.5 permits defendants under limited circumstances to give a voluntary and informed waiver of their right to be personally present. Assembly Bill 700 turns this on its head and permits the court to exclude the defendant based on the defendant purportedly 'refusing' to show up in court. Under many circumstances, such purported refusal is not voluntary or the result of an informed choice. It is also based on a unilateral interpretation by correctional officers. If defendants truly wish to voluntarily absent themselves, they can use the process set forth in section 977. If the court has compelling reasons to proceed in the defendant's absence, the provisions of sections 1043 and 1043.5 provide some protections for the defendant."

5) **Prior Legislation**:

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

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

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

   d) AB 678 (Gaines), Chapter 747, Statues of 2007, made a series of technical conforming amendments to numerous code sections related to penalty enhancements, victim compensation, license suspension, license revocation, insurance rates, waiver of personal appearance through counsel, chemical test refusal, commercial licensing, prior offense enhancements, and vehicle impoundment. AB 678 made technical corrections to conform 2006 legislative amendments to provisions relating to vehicular manslaughter.

REGISTERED SUPPORT / OPPOSITION:

Support

California District Attorneys Association (Sponsor)
California State Sheriffs' Association

Opposition

California Attorneys for Criminal Justice

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

AMENDMENTS TO ASSEMBLY BILL NO. 700

Amendment 1
On page 5, in line 3, after "(d)" insert:

(1)

Amendment 2
On page 5, in line 3, strike out "if the", strike out line 4 and in line 5, strike out "in custody and refusing to appear in court,"

Amendment 3
On page 5, in line 6, strike out "the" and insert:

a

Amendment 4
On page 5, in line 6, strike out "in all proceedings," and insert:

on that day, at a trial, hearing, or other proceeding,

Amendment 5
On page 5, in line 7, strike out "waiver." and insert:

waiver, if the court finds, by clear and convincing evidence, all of the following to be true:

(A) The defendant is in custody and is refusing, without good cause, to appear in court on that day for that trial, hearing, or other proceeding.

(B) The defendant has been informed of their right and obligation to be personally present in court.

(C) The defendant has been informed that the trial, hearing, or other proceeding will proceed without the defendant being present.

(D) The defendant has been informed that they have the right to remain silent during the trial, hearing, or other proceeding.

(E) The defendant has been informed that their absence without good cause will constitute a voluntary waiver of any constitutional or statutory right to confront any witnesses against them or to testify on their own behalf.

(F) The defendant has been informed whether or not defense counsel will be present.

(2) The court shall state on the record the reasons for the court's findings and shall cause those findings and reasons to be entered into the minutes.

(3) If the trial, hearing, or other proceeding lasts for more than one day, the court is required to make the findings required by this subdivision anew for each day that the defendant is absent.

(4) This subdivision does not apply to any trial, hearing, or other proceeding in which the defendant was personally present in court at the commencement of the trial, hearing, or other proceeding.

Amendment 6

On page 5, in line 12, after "their" insert:

physical

Amendment 7

On page 6, in line 4, strike out "if the court finds the defendant", strike out lines 5 and 6 and insert:

in the defendant's absence as authorized in subdivision (f).

Amendment 8

On page 6, in line 7, strike out "For purposes of subdivision (b), a" and insert:

(1) A

Amendment 9

On page 6, in line 8, after "defendant" insert:

for purposes of subdivision (b), or may proceed pursuant to paragraph (4) of subdivision (e),

Amendment 10

On page 6, in line 9, strike out "that the defendant is in custody,", strike out lines 10 and 11 and insert:

all of the following to be true:

(A) The defendant is in custody and is refusing, without good cause, to appear in court on that day for that trial.

(B) The defendant has been informed of their right and obligation to be personally present in court.

(C) The defendant has been informed that the trial will proceed without the defendant being present.

(D) The defendant has been informed that they have the right to remain silent during the trial.

(E) The defendant has been informed that their absence without good cause will constitute a voluntary waiver of any constitutional or statutory right to confront any witnesses against them or to testify on their own behalf.

(F) The defendant has been informed whether or not defense counsel will be present.

(2) The court shall state on the record the reasons for the court's findings and shall cause those findings and reasons to be entered into the minutes.

(3) If the trial lasts for more than one day, the court is required to make the findings required by this subdivision anew for each day that the defendant is absent.

(4) This subdivision does not apply to any trial in which the defendant was personally present in court at the commencement of trial.

Amendment 11

On page 6, in line 19, after "their" insert:

physical

Amendment 12

On page 6, in line 39, after "(e)" insert:

(1)

Amendment 13

On page 7, in line 1, strike out "that the", strike out lines 2 and 3 and insert:

all of the following to be true:

(A) The defendant is in custody and is refusing, without good cause, to appear in court on that day for that preliminary hearing.

(B) The defendant has been informed of their right and obligation to be personally present in court.

(C) The defendant has been informed that the preliminary hearing will proceed without the defendant being present.

(D) The defendant has been informed that they have the right to remain silent during the preliminary hearing.

(E) The defendant has been informed that their absence without good cause will constitute a voluntary waiver of any constitutional or statutory right to confront any witnesses against them or to testify on their own behalf.

(F) The defendant has been informed whether or not defense counsel will be present.

(2) The court shall state on the record the reasons for the court's findings and shall cause those findings and reasons to be entered into the minutes.

(3) If the preliminary hearing lasts for more than one day, the court is required to make the findings required by this subdivision anew for each day that the defendant is absent.

(4) This subdivision does not apply to any preliminary hearing in which the defendant was personally present in court at the commencement of the preliminary hearing.

LEGISLATIVE COUNSEL'S DIGEST

AB 700, as amended, Cunningham. Criminal procedure: arraignment and trial.

Existing provisions of the California Constitution provide a criminal defendant the right to be personally present with counsel at trial. Existing law requires a defendant to be present at a felony trial or preliminary hearing. Existing law, however, also authorizes a court to proceed, in the defendant's absence, with a trial or preliminary hearing that has commenced in the presence of the defendant, but from which the defendant is voluntarily absent or has been removed from the courtroom for disruptive behavior, as specified.

This bill would specify that a trial or preliminary hearing shall be deemed to have "commenced in the presence" of a defendant ~~who, as determined by clear and convincing evidence,~~ who is in ~~custody, is represented by counsel that is present,~~ custody and refuses to appear in ~~court.~~ court, if the court makes certain specified findings on the record, by clear and convincing evidence.

Existing law authorizes a court, in a misdemeanor case, to proceed in the defendant's absence, as specified, if a defendant has provided a waiver and is represented by counsel.

This bill would allow the court to proceed, with or without a waiver, in any misdemeanor case in which the ~~defendant, as determined by clear and convincing evidence,~~ defendant is in ~~custody, is represented by counsel that is present,~~ custody and refuses to appear in ~~court.~~ court, if the court makes certain specified findings on the record, by clear and convincing evidence.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

[AMENDED IN...]

CALIFORNIA LEGISLATURE—2021–22 REGULAR SESSION

ASSEMBLY BILL **No. 700**

Introduced by Assembly Member Cunningham

[Date introduced]

[Title will go here]

LEGISLATIVE COUNSEL'S DIGEST

AB 700, as introduced, Cunningham. Criminal procedure: arraignment and trial.

[Text of Legislative Counsel's Digest will go here]

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

PROPOSED AMENDMENTS TO ASSEMBLY BILL NO. 700

CALIFORNIA LEGISLATURE—2021–22 REGULAR SESSION

ASSEMBLY BILL **No. 700**

Introduced by Assembly Member Cunningham

February 16, 2021

An act to amend Sections 977, 1043, and 1043.5 of the Penal Code, relating to criminal procedure.

LEGISLATIVE COUNSEL'S DIGEST

AB 700, as introduced, Cunningham. Criminal procedure: arraignment and trial.

Existing provisions of the California Constitution provide a criminal defendant the right to be personally present with counsel at trial. Existing law requires a defendant to be present at a felony trial or preliminary hearing. Existing law, however, also authorizes a court to proceed, in the defendant's absence, with a trial or preliminary hearing that has commenced in the presence of the defendant, but from which the defendant is voluntarily absent or has been removed from the courtroom for disruptive behavior, as specified.

This bill would specify that a trial or preliminary hearing shall be deemed to have "commenced in the presence" of a defendant ~~who, as determined by clear and convincing evidence,~~ *who* is in ~~custody, is represented by counsel that is present,~~ *custody* and refuses to appear in ~~court.~~ *court, if the court makes certain specified findings on the record, by clear and convincing evidence.*

Existing law authorizes a court, in a misdemeanor case, to proceed in the defendant's absence, as specified, if a defendant has provided a waiver and is represented by counsel.

This bill would allow the court to proceed, with or without a waiver, in any misdemeanor case in which the ~~defendant, as determined by clear and convincing evidence,~~ *defendant* is in ~~custody, is represented by counsel that is present,~~ *custody* and refuses to appear in ~~court.~~ *court, if the court makes certain specified findings on the record, by clear and convincing evidence.*

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

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SECTION 1. Section 977 of the Penal Code is amended to read:

977. (a) (1) In all cases in which the accused is charged with a misdemeanor only, they may appear by counsel only, except as provided in paragraphs (2) and (3). If the accused agrees, the initial court appearance, arraignment, and plea may be by video, as provided by subdivision (c).

(2) If the accused is charged with a misdemeanor offense involving domestic violence, as defined in Section 6211 of the Family Code, or a misdemeanor violation of Section 273.6, the accused shall be present for arraignment and sentencing, and at any time during the proceedings when ordered by the court for the purpose of being informed of the conditions of a protective order issued pursuant to Section 136.2.

(3) If the accused is charged with a misdemeanor offense involving driving under the influence, in an appropriate case, the court may order a defendant to be present for arraignment, at the time of plea, or at sentencing. For purposes of this paragraph, a misdemeanor offense involving driving under the influence shall include a misdemeanor violation of any of the following:

(A) Subdivision (b) of Section 191.5.

(B) Section 23103 as specified in Section 23103.5 of the Vehicle Code.

(C) Section 23152 of the Vehicle Code.

(D) Section 23153 of the Vehicle Code.

(b) (1) Except as provided in subdivision (c), in all cases in which a felony is charged, the accused shall be personally present at the arraignment, at the time of plea, during the preliminary hearing, during those portions of the trial when evidence is taken

Page 2 before the trier of fact, and at the time of the imposition of sentence. The accused shall be personally present at all other proceedings unless they shall, with leave of court, execute in open court, a written waiver of their right to be personally present, as provided by paragraph (2). If the accused agrees, the initial court
Page 3 appearance, arraignment, and plea may be by video, as provided by subdivision (c).

(2) The accused may execute a written waiver of their right to be personally present, approved by their counsel, and the waiver shall be filed with the court. However, the court may specifically direct the defendant to be personally present at any particular proceeding or portion thereof. The waiver shall be substantially in the following form:

"Waiver of Defendant's Personal Presence"

"The undersigned defendant, having been advised of their right to be present at all stages of the proceedings, including, but not limited to, presentation of and arguments on questions of fact and law, and to be confronted by and cross-examine all witnesses, hereby waives the right to be present at the hearing of any motion or other proceeding in this cause. The undersigned defendant hereby requests the court to proceed during every absence of the defendant that the court may permit pursuant to this waiver, and hereby agrees that their interest is represented at all times by the presence of their attorney the same as if the defendant were personally present in court, and further agrees that notice to their attorney that their presence in court on a particular day at a particular time is required is notice to the defendant of the requirement of their appearance at that time and place."

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

represented by counsel, the attorney shall be present with the defendant at the initial court appearance and arraignment, and may enter a plea during the arraignment. However, if the defendant is represented by counsel at an arraignment on an information in a felony case, and if the defendant does not plead guilty or nolo contendere to any charge, the attorney shall be present with the defendant or if the attorney is not present with the defendant, the attorney shall be present in court during the hearing. The defendant shall have the right to make their plea while physically present in the courtroom if they request to do so. If the defendant decides not to exercise the right to be physically present in the courtroom they shall execute a written waiver of that right. A judge may order a defendant's personal appearance in court for the initial court appearance and arraignment. In a misdemeanor case, a judge may, pursuant to this subdivision, accept a plea of guilty or no contest from a defendant who is not physically in the courtroom. In a felony case, a judge may, pursuant to this subdivision, accept a plea of guilty or no contest from a defendant who is not physically in the courtroom if the parties stipulate thereto.

(2) (A) A defendant who does not wish to be personally present for noncritical portions of the trial when no testimonial evidence is taken may make an oral waiver in open court prior to the proceeding or may submit a written request to the court, which the court may grant in its discretion. The court may, when a defendant has waived the right to be personally present, require a defendant held in any state, county, or local facility within the county on felony or misdemeanor charges to be present for noncritical portions of the trial when no testimonial evidence is taken, including, but not limited to, confirmation of the preliminary hearing, status conferences, trial readiness conferences, discovery motions, receipt of records, the setting of the trial date, a motion to vacate the trial date, and motions in limine, by two-way electronic audiovideo communication between the defendant and the courtroom in lieu of the physical presence of the defendant in the courtroom. If the defendant is represented by counsel, the attorney shall not be required to be personally present with the defendant for noncritical portions of the trial, if the audiovideo conferencing system or other technology allows for private communication between the defendant and the attorney prior to and during the noncritical portion of trial. Any private

communication shall be confidential and privileged pursuant to Section 952 of the Evidence Code.

(B) This paragraph does not expand or limit the right of a defendant to be personally present with their counsel at a particular proceeding as required by Section 15 of Article 1 of the California Constitution.

(d) *(1)* Notwithstanding any other provision in this section, ~~if the court finds by clear and convincing evidence that a defendant is in custody and refusing to appear in court,~~ the court may allow ~~the~~ *a* defendant to appear by counsel ~~in all proceedings,~~ *on that day, at a trial, hearing, or other proceeding,* with or without a written ~~waiver.~~ *waiver, if the court finds, by clear and convincing evidence, all of the following to be true:*

(A) The defendant is in custody and is refusing, without good cause, to appear in court on that day for that trial, hearing, or other proceeding.

(B) The defendant has been informed of their right and obligation to be personally present in court.

(C) The defendant has been informed that the trial, hearing, or other proceeding will proceed without the defendant being present.

(D) The defendant has been informed that they have the right to remain silent during the trial, hearing, or other proceeding.

(E) The defendant has been informed that their absence without good cause will constitute a voluntary waiver of any constitutional or statutory right to confront any witnesses against them or to testify on their own behalf.

(F) The defendant has been informed whether or not defense counsel will be present.

(2) The court shall state on the record the reasons for the court's findings and shall cause those findings and reasons to be entered into the minutes.

(3) If the trial, hearing, or other proceeding lasts for more than one day, the court is required to make the findings required by this subdivision anew for each day that the defendant is absent.

(4) This subdivision does not apply to any trial, hearing, or other proceeding in which the defendant was personally present in court at the commencement of the trial, hearing, or other proceeding.

SEC. 2. Section 1043 of the Penal Code is amended to read:

Amendments 1 & 2

Amendments 3 & 4
Amendment 5

Page 5

1043. (a) Except as otherwise provided in this section, the defendant in a felony case shall be personally present at the trial.

(b) The absence of the defendant in a felony case after the trial has commenced in their *physical* presence shall not prevent continuing the trial to, and including, the return of the verdict in any of the following cases:

Amendment 6

(1) Any case in which the defendant, after being warned by the judge that they will be removed if they continue their disruptive behavior, nevertheless insists on acting in a manner so disorderly, disruptive, and disrespectful of the court that the trial cannot be carried on with the defendant present in the courtroom.

(2) Any prosecution for an offense which is not punishable by death in which the defendant is voluntarily absent.

(c) Any defendant who is absent from a trial pursuant to paragraph (1) of subdivision (b) may reclaim the right to be present at the trial as soon as they are willing to act consistently with the decorum and respect inherent in the concept of courts and judicial proceedings.

(d) Subdivisions (a) and (b) shall not limit the right of a defendant to waive the right to be present in accordance with Section 977.

(e) If the defendant in a misdemeanor case fails to appear in person at the time set for trial or during the course of trial, the court shall proceed with the trial, unless good cause for a continuance exists, if the defendant has authorized their counsel to proceed in their absence pursuant to subdivision (a) of Section 977.

If there is no authorization pursuant to subdivision (a) of Section 977 and if the defendant fails to appear in person at the time set for trial or during the course of trial, the court, in its discretion, may do one or more of the following, as it deems appropriate:

(1) Continue the matter.

Page 6

(2) Order bail forfeited or revoke release on the defendant's own recognizance.

(3) Issue a bench warrant.

(4) Proceed with the trial ~~if the court finds the defendant is voluntarily absent with full knowledge that the trial is to be held or is being held.~~ *in the defendant's absence as authorized in subdivision (f).*

Amendment 7

(f) ~~For purposes of subdivision (b), a~~ *(1) A* trial shall be deemed to have commenced in the presence of the defendant *for purposes*

Amendment 8
Amendment 9

Page 6

of subdivision (b), or may proceed pursuant to paragraph (4) of subdivision (e), if the court finds, by clear and convincing evidence, ~~that the defendant is in custody, is refusing to appear in court, and is represented by counsel who is present in court.~~ *all of the following to be true:*

(A) The defendant is in custody and is refusing, without good cause, to appear in court on that day for that trial.

(B) The defendant has been informed of their right and obligation to be personally present in court.

(C) The defendant has been informed that the trial will proceed without the defendant being present.

(D) The defendant has been informed that they have the right to remain silent during the trial.

(E) The defendant has been informed that their absence without good cause will constitute a voluntary waiver of any constitutional or statutory right to confront any witnesses against them or to testify on their own behalf.

(F) The defendant has been informed whether or not defense counsel will be present.

(2) The court shall state on the record the reasons for the court's findings and shall cause those findings and reasons to be entered into the minutes.

(3) If the trial lasts for more than one day, the court is required to make the findings required by this subdivision anew for each day that the defendant is absent.

(4) This subdivision does not apply to any trial in which the defendant was personally present in court at the commencement of trial.

(g) Nothing herein shall limit the right of the court to order the defendant to be personally present at the trial for purposes of identification unless counsel stipulate to the issue of identity.

SEC. 3. Section 1043.5 of the Penal Code is amended to read:

1043.5. (a) Except as otherwise provided in this section, the defendant in a preliminary hearing shall be personally present.

(b) The absence of the defendant in a preliminary hearing after the hearing has commenced in their *physical* presence shall not prevent continuing the hearing to, and including, holding to answer, filing an information, or discharging the defendant in any of the following cases:

Amendment 10

Amendment 11

(1) Any case in which the defendant, after being warned by the judge that they will be removed if they continued their disruptive behavior, nevertheless insists on acting in a manner so disorderly, disruptive, and disrespectful of the court that the hearing cannot be carried on with the defendant present in the courtroom.

(2) Any prosecution for an offense which is not punishable by death in which the defendant is voluntarily absent.

(c) Any defendant who is absent from a preliminary hearing pursuant to paragraph (1) of subdivision (b) may reclaim their right to be present at the hearing as soon as they are willing to act consistently with the decorum and respect inherent in the concept of courts and judicial proceedings.

(d) Subdivisions (a) and (b) shall not limit the right of a defendant to waive the right to be present in accordance with Section 977.

(e) *(1)* For purposes of subdivision (b), a preliminary hearing shall be deemed to have commenced in the presence of the defendant if the court finds, by clear and convincing evidence, ~~that the defendant is in custody, is refusing to appear in court, and is represented by counsel who is present in court.~~ *all of the following to be true:*

(A) The defendant is in custody and is refusing, without good cause, to appear in court on that day for that preliminary hearing.

(B) The defendant has been informed of their right and obligation to be personally present in court.

(C) The defendant has been informed that the preliminary hearing will proceed without the defendant being present.

(D) The defendant has been informed that they have the right to remain silent during the preliminary hearing.

(E) The defendant has been informed that their absence without good cause will constitute a voluntary waiver of any constitutional or statutory right to confront any witnesses against them or to testify on their own behalf.

(F) The defendant has been informed whether or not defense counsel will be present.

(2) The court shall state on the record the reasons for the court's findings and shall cause those findings and reasons to be entered into the minutes.

Amendment 12

Amendment 13

+ *(3) If the preliminary hearing lasts for more than one day, the*
+ *court is required to make the findings required by this subdivision*
+ *anew for each day that the defendant is absent.*
+ *(4) This subdivision does not apply to any preliminary hearing*
+ *in which the defendant was personally present in court at the*
+ *commencement of the preliminary hearing.*

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