Date of Hearing: August 5, 2020
Counsel: David Billingsley

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

SB 723 (Jones) – As Amended January 7, 2020

SUMMARY: Clarifies that a person with an active arrest warrant for a prohibited offense must have knowledge of the warrant in order to be criminally liable as a person prohibited from possessing a firearm.

EXISTING LAW:

1) Provides that persons convicted of specified serious or violent misdemeanors are prohibited from possession of firearms for a period of 10 years after a conviction for specified misdemeanors and that a violation is punishable as a misdemeanor with imprisonment up to one year or as a state prison felony. (Pen. Code, § 29805, subd. (a).)

2) Provides that persons with the knowledge that they have an outstanding warrant for any of the specified serious or violent misdemeanors that result in a 10 year prohibition are guilty of a crime if they possess a firearm while the warrant is outstanding. A violation is punishable as a misdemeanor, with imprisonment up to one year, or as a state prison felony. (Pen. Code, §§ 29805, subd. (a), 29851)

3) Includes within the list of misdemeanors triggering a 10 year firearm prohibition the crimes of stalking, sexual battery, assault with a deadly weapon, battery with serious bodily injury, brandishing a firearm of deadly weapon, assault with force likely to produce great bodily injury, battery on a peace officer, and threats of bodily injury or death. The list includes a number of other misdemeanor crimes as well. (Penal Code, § 29805, subd. (a).)

4) States that any person who has an outstanding warrant for a felony under the laws of the United States, the State of California, or any other state, government, or country, with knowledge or the warrant, and who possesses any firearm is guilty of a felony with a maximum of three years in the state prison. (Pen. Code, § 29800, subd. (a)(1).)

5) Provides that persons convicted of a felony are prohibited for their lifetimes from owning or possessing a firearm. (Pen. Code, § 29800, subd. (a)(1).)

6) Specifies that a felon in possession of a firearm is guilty of a felony with a maximum of three years in the state prison. (Pen. Code, § 29800, subd. (a)(1).)

7) Prohibits a person from possessing or owning a firearm that is subject to specified restraining orders related to domestic violence and punishes a violation of the prohibition as a misdemeanor with a maximum sentence of one year in the county jail. (Pen. Code, § 29825.)

8) Specifies that any person who is convicted, on or after January 1, 2019, of a misdemeanor violation of domestic violence, and who subsequently owns or has possession of a firearm is guilty of a misdemeanor punishable by imprisonment in a county jail not exceeding one year or guilty of a felony punishable by up to three years in the state prison. (Penal Code, § 29805, subd. (b).)

9) Provides for an automated system for tracking firearms and assault weapon owners who might fall into a prohibited status. The online database, which is currently known as the Armed Prohibited Persons Systems (APPS), cross-references all handgun and assault weapon owners across the state against criminal history records to determine persons who have been, or will become, prohibited from possessing a firearm subsequent to the legal acquisition or registration of a firearm or assault weapon. (Pen. Code, § 30000, et seq.)

10) Prohibits persons who know or have reasonable cause to believe that the recipient is prohibited from having firearms and ammunition to supply or provide the same with firearms or ammunition. (Pen. Code, §§ 27500 and 30306; and Welf. & Inst. Code, § 8101.)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "Penal Code sections 29800 and 29805 prohibit certain persons from owning or possessing a firearm, including anyone convicted of a felony or who has an outstanding warrant for a felony or a listed misdemeanor.

   "The provision relating to outstanding warrants was added by a Budget Trailer Bill in June 2017. Because the amended code section is well known and often used, the change was noted by criminal law practitioners. This led to concerns because under the law, a person against whom a warrant was issued, including those who had not been convicted of any crime and who had no knowledge of the warrant, would be subject to felony prosecution for possession of an otherwise lawful firearm.

   "In response to these concerns, a new section was added to the Penal Code though another late-session Budget Trailer Bill, specifying that the prohibition against a person with an outstanding warrant does not apply if the person lacked knowledge of the outstanding warrant. However, few practitioners are aware of the existence of this exception because it was originally mis-numbered and placed in its own section of the Penal Code, then re-numbered through the annual Maintenance of the Codes Bill but still separated from the section that prohibits possession.

   "Without changing current firearm restriction law in any way, SB 723 will clarify this situation by placing the existing knowledge requirement directly into the two criminal statutes at issue rather than in a separate, little known statute."

2) **Individuals Prohibited from Possessing Firearms in California:** California has several laws that prohibit certain persons from purchasing firearms. All felony convictions lead to a lifetime prohibition, while a conviction of specified misdemeanors result in a 10-year prohibition. A person may be prohibited from possessing a firearm due to a protective order or as a condition of probation. If a person communicates to his or her psychotherapist a

serious threat of physical violence against a reasonably-identifiable victim or victims, the person is prohibited from owning or purchasing a firearm for five years, starting from the date the psychotherapist reports to local law enforcement the identity of the person making the threat. (Welf. & Inst. Code, § 8100, subd. (b)(1).) If a person is admitted into a facility because that person is a danger to himself, herself, or to others, the person is prohibited from owning or purchasing a firearm for five years. (Welf. & Inst. Code, § 8103, subd. (f).) For the provisions prohibiting a person from owning or possessing a firearm based on a serious threat of violence or based on admittance into a facility as a threat to self or others, the person has the right to request a hearing whereby the person could restore his or her right to own or possess a firearm if a court determines that the person is likely to use firearms or other deadly weapons in a safe and lawful manner. (Welf. & Inst. Code, §§ 8100, subd. (b)(1) and 8103, subd. (f).)

3) **California Law Bans Possession of a Firearm by Persons with Specified Active Warrants for Their Arrest:** Under current law, if a person has an outstanding arrest warrant for any felony, or for specified misdemeanors, the person is prohibited from owning or possessing a firearm. Current law requires that the person be aware of the arrest warrant in order to be found criminally liable for possession of a firearm. A person violating the prohibition on the possession of a firearm because of an outstanding arrest warrant for a felony crime is guilty of a felony. A person violating the prohibition on the possession of a firearm because of an outstanding arrest warrant for a specified misdemeanor is guilty of an alternate felony/misdemeanor.

   The provisions of law requiring persons with active warrants for felonies and specified misdemeanors be prohibited from firearm possession were implemented in a budget trailer bill, AB 103 (Committee on Budget), Chapter 17, Statutes of 2017. Initially, there was no requirement that the person who was the subject of the active warrant have any knowledge that they had an arrest warrant. Later in the year, SB 112 (Committee Budget and Fiscal Review), Chapter 363, Statutes of 2017, was signed into law. SB 112 specified that a violation for possession of a firearm when prohibited because of an outstanding warrant, requires a person to have knowledge of the outstanding warrant before the person could be found guilty of a crime.

   This bill seeks to clarify the requirement that a person has "knowledge" of the outstanding warrant .

4) **This Bill Will Maintain State Prison Felonies for Possession of a Firearm when an Active Warrant for a Prohibited Offense has been Issued and the Person for Whom the Warrant has been Issued has Knowledge of the Warrant:** Under the existing law if a person has a warrant for their arrest for a felony, or if they have a specified misdemeanor arrest warrant, they face up to 3-years of incarceration in state prison. Last year, the California State Legislature passed legislation to reduce the penalties for these provisions to misdemeanors servable in county jail with the passage of SB 701 (Jones). The Governor vetoed the legislation with the following veto message:

   "I am returning Senate Bill 701 without my signature.

   This bill would reorganize statutes governing the prohibition of firearm possession due to an outstanding warrant when the person has knowledge of the warrant. Additionally, this

bill would reduce the penalty for violating this prohibition.

Current law requires knowledge that a warrant has been issued before a prohibition on possessing a firearm applies. Further, I believe existing penalties provide the necessary tools to protect public safety and allow for needed discretion to impose appropriate penalties when justified."

This bill (which does not reduce penalties) addresses the governor's veto message of SB 701 (Jones).

5) **Argument in Support**: According to the *California Public Defenders Association*, "Under current law, a person who lawfully purchases a firearm can be charged with a felony violation of Penal Code section 29800 (unlawful possession of a firearm) if a warrant is subsequently issued for their arrest. Current law *already* requires that the firearm owner know that a warrant has been issued for their arrest before they can be charged under this section. However, due to a disjointed amendment process, this 'knowledge' requirement is listed in an entirely separate section, specifically Penal Code section 29851.

"SB 723 would simply consolidate these two sections, thereby clarifying (not changing) the knowledge requirement."

6) **Related Legislation**: AB 2617 (Gabriel), would require California to honor Gun Violence Restraining Orders (GVRO), as specified, that are issued by states other than California. **AB 2617 is awaiting hearing in the Senate Public Safety Committee.**

7) **Prior Legislation**:

   a) SB 701 (Jones), of the 2019-2020 Legislative Session, would have lowered the penalty to make it a misdemeanor for a person with an outstanding arrest warrant, as specified, to own or possess a firearm. SB 701 was vetoed by the Governor.

   b) AB 3129 (Rubio), Chapter 883, Statutes of 2018, prohibits a person who is convicted on or after January 1, 2019, of a misdemeanor domestic violence offense that currently results in a 10-year prohibition against possessing a firearm, from possessing a firearm for life.

   c) SB 112 (Committee Budget and Fiscal Review), Chapter 363, Statutes of 2017, specified that a violation for possession of a firearm when prohibited because of an outstanding warrant, requires a person to have knowledge of the outstanding warrant.

   d) AB 103 (Committee on Budget), Chapter 17, Statutes of 2017 specified that a person with an outstanding warrant for a felony, or specified misdemeanors, is prohibited from owning or possessing a firearm.

   e) AB 785 (Jones-Sawyer), Chapter 784, Statutes of 2017, added two hate crimes to the list of misdemeanors that result in a ban on the right to possess a firearm for 10 years.

   f) SB 347 (Jackson), of the 2015-2016 legislative session, would have added specified firearms and ammunition misdemeanor offenses to the list of misdemeanors that result in

the defendant being prohibited from possessing a firearm for ten years. SB 347 was vetoed by the governor.

REGISTERED SUPPORT / OPPOSITION:

Support

California Public Defenders Association

Opposition

None

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

Date of Hearing: August 5, 2020
Counsel: David Billingsley

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

SB 1126 (Jones) – As Amended March 23, 2020

SUMMARY: Allows sealed juvenile records to be accessed, inspected, or used by the probation department, the district attorney, counsel for the minor, and the court for the purpose of assessing the minor's mental competency in a subsequent juvenile proceeding if the issue of competency has been raised.

EXISTING LAW:

1) Establishes specified procedures when a juvenile's mental competence to stand trial in a criminal proceeding is at issue. (Welf. & Inst. Code, § 709.)

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

3) Allows a minor to petition the juvenile court to seal his or her record relating to an offense that is considered serious or violent and was committed after the minor attained 14 years of age only in the following circumstances:

   a) The person was committed to the Department of Corrections and Rehabilitation, has attained 21 years of age, and has completed his or her probation after being released from the Department of Corrections and Rehabilitation; or

   b) The person was not committed to the Department of Corrections and Rehabilitation, has attained 18 years of age and has completed any period of probation imposed by the court. (Welf. & Inst. Code, § 781, subd. (a)(1)(D)(i)(I) – (II).)

4) Allows a prosecutor to access the juvenile record relating to an offense that is serious or violent and was committed after the minor attained 14 years of age if the prosecutor believes that the records are necessary to fulfill a disclosure obligation to a defendant in a criminal case. (Welf. & Inst. Code, § 781, subd. (a)(1)(D)(iii).)

5) Provides that, if a minor satisfactorily completes an informal program of supervision, probation as specified, or a term of probation, then the court shall order the petition dismissed and shall order sealed all records pertaining to the dismissed petition in the custody of the juvenile court, and in the custody of law enforcement agencies, the probation

department, or the Department of Justice. (Welf. & Inst. Code, § 786, subd. (a).)

6) States that upon the order of dismissal under the court-initiated sealing process, the arrest and other proceedings in the case must be deemed not to have occurred and the person who was the subject of the petition may reply accordingly to an inquiry by employers, educational institutions, or other persons or entities regarding the arrest and proceedings in the case. (Welf. & Inst. Code, § 786, subd. (b).)

7) Prohibits automatic sealing upon probation completion if the petition was sustained on the basis of a specified serious or violent offense committed when the individual was 14 years of age or older, unless the finding on the offense was dismissed or reduced to a lesser non-serious and non-violent offense. (Welf. & Inst. Code, § 786, subd. (d).)

8) Allows the court, the prosecuting attorney, the probation department, the person whose record has been sealed, and a child welfare agency to access a record that was sealed by the court-initiated process for limited purposes, as specified. (Welf. & Inst. Code, § 786, subd. (f) – (g).)

9) Allows a prosecutor to access, inspect, or utilize a juvenile records because the juvenile completed an informal supervision program or a term of probation if the prosecutor believes that the records are necessary to fulfill a disclosure obligation to a defendant in a criminal case. (Welf. & Inst. Code, § 786, subd. (g)(1)(K).)

10) Specifies that "access" shall not be deemed an unsealing of the record and shall not require notice to any other agency. (Welf. & Inst. Code, § 786, subd. (g)(3); Welf. & Inst. Code, § 781, subd. (a)(1)(D)(iv).)

11) Allows any person who has been arrested for a misdemeanor, with or without a warrant, while a minor, may, during or after minority, petition the court in which the proceedings occurred or, if there were no court proceedings, the court in whose jurisdiction the arrest occurred, for an order sealing the records in the case, including any records of arrest and detention, if any of the following occurred:

    a) The person was released because charges were not feasible or desirable, as specified;

    b) The charges were dismissed without a conviction; or,

    c) The person was acquitted. (Pen. Code, § 851.7, subd. (a).)

12) States that a minor who has performed satisfactorily during the period in which deferred entry of judgment was granted, at the end of that period the charge or charges in the wardship petition shall be dismissed and the arrest upon which the judgment was deferred shall be deemed never to have occurred and any records in the possession of the juvenile court shall be sealed. (Welf. & Inst. Code, § 793, subd. (c).)

13) States that the prosecuting attorney and the probation department of any county shall have access to records sealed following the successful completion of a deferred entry of judgment after they are sealed for the limited purpose of determining whether a minor is eligible for another deferred entry of judgment. (Welf. & Inst. Code, § 793, subd. (c).)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "Pursuant to Welfare & Institutions Code (WIC) section 709, when a youth is found to be not competent to stand trial, proceedings are suspended, and the petition must be dismissed if the youth is not remediated within a maximum of one year. In this event, the juvenile record must be sealed.

   "WIC §786 provides certain exceptions to access sealed records under limited circumstances; however, if the same youth mentioned above, has a new petition filed against them and a doubt as to their competency is raised, there is no allowance for the court to access the sealed record.

   "Not only is access to the old competency records necessary and relevant to the new competency determination, but in most cases where competency is an issue, the youth is high-risk and has special needs. Serious mental health issues or developmental disabilities are prevalent in this population. This population of youth in juvenile court are at greater risk of homelessness, underemployment/unemployment, and dropping out of school.

   "SB 1126 would allow the probation department, the prosecuting attorney, counsel for the minor, and the Court to access prior competency evaluations submitted to the Court in a previous proceeding. Information obtained through this new allowance still may not be disseminated to any other person or agency, except as necessary to evaluate the minor's competency. This will result in a better-informed evaluation of the person's present incompetence that will lead to better decision making.

   "Access to the prior sealed record will provide the Court with a fuller understanding of the youth's social history and service history, identification of service gaps, and guidance for appropriate interventions. For example, access to the sealed record may show that the youth has historically struggled with engagement with therapy and school attendance, but that they respond well to another particular intervention. The Court could then convene mental health providers and school personnel to work with probation to develop a plan."

2) **Juvenile Mental Competency in Criminal Proceedings:** The Due Process Clause of the U.S. Constitution prohibits the criminal prosecution of a defendant who is not mentally competent to stand trial. Adult mental incompetency is currently defined as lacking sufficient present ability to consult with counsel and assist in preparing a defense with a reasonable degree of rational understanding or lacking a rational as well as factual understanding of the nature of the charges or proceedings. While those same factors would be considered in evaluating the competency of a minor, the court would also consider the minors developmental maturity. Unlike an adult, a minor may be determined to be incompetent based on developmental immaturity alone (*Timothy J. v. Superior Court*, 150 Cal.App.4th 847 (2007)).

   California's juvenile competency statute, which lays out the procedure and standards for handling incompetent minors before the juvenile court, was enacted in 2018 via

AB 1214 (Stone, Ch. 991). AB 1214 revised the then-existing statute to close procedural gaps regarding how a juvenile should be treated if they are found to be incompetent.

This bill would allow defense counsel, prosecution, judge, and probation to access sealed juvenile records for the purpose of assessing the minor's competency in a subsequent proceedings if the issue of competency has been raised.

3) **Juvenile Record Sealing:** The statutes for sealing juvenile records in California are fairly complicated. In general, most juvenile records of arrests and adjudications are eligible to be sealed and treated as though they never occurred. For less serious offenses, the juvenile court will often seal the record automatically. This is especially true for arrests that did not result in determination of guilt, or if the juvenile satisfactorily completed a probation term or a deferred entry of judgment program. For more serious cases, or when a juvenile does not satisfactorily complete probation or a deferred entry of judgment, he or she can still petition the court in order to have his or her records sealed.

When a juvenile court hears a petition to seal a serious juvenile offense, it looks to a number of factors in order to determine whether or not sealing is appropriate. Among them is whether the juvenile has subsequently been convicted of a felony or of any misdemeanor involving moral turpitude, and whether rehabilitation has been attained to the satisfaction of the court.

4) **Juvenile Records Can be Sealed Based on the Provisions of Different Statutory Code Sections**: Current law provides at least two different ways to seal a juvenile record. In certain circumstances, a person may petition the court to have his or her record sealed. In other situations the sealing is automatic when the juvenile completes certain requirements.

Juvenile court records generally must be destroyed when the person of record reaches the age of 38 unless good cause is shown for maintaining those records. (Welf. & Inst. Code, § 826.) The person of record may also petition to destroy records retained by agencies other than the court. (Welf. & Inst. Code, § 826, subd. (b).) The request must be granted unless good cause is shown for retention of the records. (Welf. & Inst. Code, § 826.) When records are destroyed pursuant to the above provision, the proceedings "shall be deemed never to have occurred, and the person may reply accordingly to an inquiry." (Welf. & Inst. Code, § 826, subd. (a).) Courts have held that the phrase "never to have occurred" means that the juvenile proceeding is deemed not to have existed. (*Parmett v. Superior Court (Christal B.)* (1989) 212 Cal.App.3d 1261, at 1267.)

Minors adjudicated delinquent in juvenile court proceedings may petition the court to have their records sealed. (Welf. & Inst. Code, § 781.) To seal a juvenile court record, a petition must be filed by either the person who is the subject of the record or the probation department. (Welf. & Inst. Code, § 781.) Juvenile court jurisdiction must have lapsed five years previously or the person must be at least 18 years old. (Welf. & Inst. Code, § 781, subd. (a).) The records are not sealed if the person of record has been convicted of a felony or a misdemeanor involving moral turpitude. (Welf. & Inst. Code, § 781, subd. (a).)

In addition, there is a special sealing procedure for cases in which the person has been found by the juvenile court to have committed one of the serious or violent offenses enumerated

Welfare and Institutions Code Section 707(b) list, when he or she had attained 14 years of age. (Welf. & Inst. Code, § 781, subd. (a)(1)(D).)

Importantly, records sealed pursuant to Welfare and Institutions Code Section 781 are able to be accessed by a prosecutor if he or she believes that information is subject to a discovery obligation. (*See* Welf. & Inst. Code, § 781 (a)(1)(D)(iii).)

In a related section of the Welfare and Institutions Code, the sealing procedure is done automatically by the juvenile court. (Welf. & Inst. Code, § 786, subd. (a).) In order to qualify for automatic sealing, the person does not have to file any petition with the court. Instead, the person must simply complete the informal program of supervision, or term of probation imposed by the court. (*Id.*)

There are two statutes which primarily control sealed juvenile records, Welf. and Inst. §§781, and 786. This bill would amend Section 786, but not amend Section 781. Some confusion already exists about the applicability of each section to juvenile records. Only allowing access to juvenile records for purposes of determining mental competence in a juvenile proceeding in one of the two statutes governing sealing of juvenile records does create some potential for confusion. Because Section 781 was amended and reenacted by Proposition 21 (2000), an amendments to that section require a 2/3 vote by the Legislature because of the terms of the proposition.

5) **Argument in Support**: According to the *California Judges Association*, "Pursuant to Welfare & Institutions Code (WIC) section 709, when a youth is found to be not competent to stand trial, proceedings are suspended, and the petition must be dismissed if the youth is not remediated within a maximum of one year. In this event, the juvenile record must be sealed. WIC §786 provides certain exceptions to access sealed records under limited circumstances; however, if the same youth mentioned above, has a new petition filed against them and a doubt as to their competency is raised, there is no allowance for the court to access the sealed record.

"SB 1126 would allow the probation department, the prosecuting attorney, counsel for the minor, and the Court to access prior competency evaluations submitted to the Court in a previous proceeding. Information obtained through this new allowance may not be disseminated to any other person or agency, except as necessary to evaluate the minor's competency.

"Not only is access to the old competency records necessary and relevant to the new competency determination, but in most cases where competency is an issue, the youth is high-risk and has special needs. Serious mental health issues or developmental disabilities are prevalent in this population. This population of youth in juvenile court are at greater risk of homelessness, underemployment/unemployment, and dropping out of school. SB 1126 will provide the Court with the information they need to make a well-informed decision as to the best path forward for the youth."

6) **Related Legislation**: AB 2321 (Jones-Sawyer), would permit a prosecutor or a court to access sealed juvenile records for the limited purpose of certifying victim helpfulness in an application for a U-Visa or a T-Visa. AB 2321 is pending hearing in the Senate Public Safety

Committee on July 31, 2020.

7) **Prior Legislation**:

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

b) AB 1214 (Stone), Chapter 991, Statutes of 2018, revised the then-existing statute to close procedural gaps regarding how a juvenile should be treated if they are found to be incompetent.

c) AB 2952 (Stone) Chapter 1002, Statutes of 2018, provided that a prosecutor may access, inspect, or use certain juvenile records that have been sealed by the court if the prosecutor believes that it is necessary to meet a legal obligation to provide evidence to a defendant in a criminal case.

d) SB 312 (Skinner), Chapter 679, Statutes of 2017, authorized a sealing procedure for juveniles convicted of a serious or violent felony and allowed for access by the prosecutor in order to determine whether he or she has a disclosure obligation similar to the provisions proposed by this bill.

REGISTERED SUPPORT / OPPOSITION:

Support

California District Attorneys Association
California Judges Association
California Public Defenders Association
Los Angeles County District Attorney's Office
Peace Officers Research Association of California (PORAC)

Opposition

None

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

Date of Hearing: August 5, 2020
Counsel: Matthew Fleming

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

SB 629 (McGuire) – As Amended July 28, 2020

SUMMARY: Allows duly authorized members of the press to enter areas that have been closed by law enforcement due to a demonstration, march, protest, or rally and prohibits officers from citing members of the press for failure to disperse, a violation of a curfew, or a violation of resisting, delaying, or obstructing, as specified. Specifically, this bill:

1) Allows a duly authorized representative of any news service, online news service, newspaper, or radio or television station or network to enter areas that are closed as command post, police line, or rolling closure at a demonstration, march, protest, or rally where individuals are engaged in activity that is protected pursuant to the First Amendment to the United States Constitution or Article I of the California Constitution.

2) States that a peace officer or other law enforcement officer shall not intentionally assault, interfere with, or obstruct the duly authorized representative of any news service, online news service, newspaper, or radio or television station or network who is gathering, receiving, or processing information for communication to the public.

3) Prohibits a duly authorized representative of any news service, online news service, newspaper, or radio or television station or network that is authorized or permitted to be in a closed area from being cited for the failure to disperse, a violation of a curfew, or a violation of resisting, delaying, or obstructing, as specified.

4) Authorizes a duly authorized representative that is detained by a peace officer or other law enforcement officer, to contact a supervisory officer immediately for the purpose of challenging the detention, unless circumstances make it impossible to do so.

5) States that for the purposes of these provisions, a person who appears to be engaged in gathering, receiving, or processing information, who produces a business card, press badge, other similar credential, or who is carrying professional broadcasting or recording equipment, is a duly authorized representative of a news service, online news service, newspaper, or radio or television station or network.

6) Specifies that these provisions do not prevent a law enforcement officer from enforcing other applicable laws if the person is engaged in activity that is unlawful.

EXISTING LAW:

1) Makes it a misdemeanor for any person to remain present at the place of any riot, rout, or unlawful assembly, after being lawfully warned to disperse. (Pen. Code, § 409.)

2) Authorizes officers of the Department of the California Highway Patrol, police departments, marshal's office or sheriff's office, and other persons designated as peace officers, as specified, to close the area where a menace to the public health or safety is created by a calamity including a flood, storm, fire, earthquake, explosion, accident, or other disaster. (Pen. Code, § 409.5, subd. (a).)

3) Authorizes officers of the Department of the California Highway Patrol, police departments, marshal's office or sheriff's office, and other persons designated as peace officers, as specified, to close the immediate area surrounding any emergency field command post or any other command post activated for the purpose of abating any calamity or any riot or other civil disturbance to any and all unauthorized persons whether or not the field command post or other command post is located near to the actual calamity or riot or other civil disturbance. (Pen. Code, § 409.5, subd. (b).)

4) Makes it a misdemeanor for any person to willfully and knowingly enter an area closed as the result of such a disaster and willfully remain within the area after receiving notice to evacuate. (Pen. Code, § 409.5, subd. (c).)

5) Allows a duly authorized representative of any news service, newspaper, or radio or television station or network to enter areas closed as the result of a disaster. (Pen. Code, § 409.5, subd. (d).)

6) Authorizes officers of the Department of the California Highway Patrol, police departments, marshal's office or sheriff's office, and other persons designated as peace officers, as specified, to close the area where a menace to the public health or safety is created by an avalanche. (Pen. Code, § 409.6, subd. (a).)

7) Authorizes officers of the Department of the California Highway Patrol, police departments, marshal's office or sheriff's office, and other persons designated as peace officers, as specified, to close the immediate area surrounding any emergency field command post or any other command post activated for the purpose of abating hazardous conditions created by an avalanche. (Pen. Code, § 409.6, subd. (b).)

8) Makes it a misdemeanor for any person to willfully and knowingly enter an area closed due to an avalanche and willfully remain within the area after receiving notice to evacuate; and further authorizes the use of reasonable force to remove any unauthorized person from such an area. (Pen. Code, § 409.5, subd. (c).)

9) Allows a duly authorized representative of any news service, newspaper, or radio or television station or network to enter areas closed as the result of an avalanche. (Pen. Code, § 409.5, subd. (d).)

10) Requires the Commission on Peace Officer Standards and Training (POST) to implement a course or courses of instruction for the training of law enforcement officers in the handling of acts of civil disobedience and adopt guidelines that may be followed by police agencies in

responding to acts of civil disobedience. (Pen. Code, § 13514.5, subd. (a).)

11) Requires the POST training course to include adequate consideration of all of the following subjects:

   a) Reasonable use of force;

   b) Dispute resolution;

   c) Nature and extent of civil disobedience, whether it be passive or active resistance;

   d) Media relations;

   e) Public and officer safety;

   f) Documentation, report writing, and evidence collection; and

   g) Crowd control. (Pen. Code, § 13514.5, subd. (b).)

12) Provides that any peace officer who has reasonable cause to believe that the person to be arrested has committed a public offense may use reasonable force to effect the arrest, to prevent escape or to overcome resistance. (Pen. Code, § 835a.)

13) Specifies that a peace officer who makes or attempts to make an arrest need not retreat or desist from his efforts by reason of the resistance or threatened resistance of the person being arrested; nor shall such officer be deemed an aggressor or lose his right to self-defense by the use of reasonable force to effect the arrest or to prevent escape or to overcome resistance. (Pen. Code, § 835a.)

FISCAL EFFECT: Unknown.

COMMENTS:

1) **Author's Statement**: According to the author, "Members of the press risk their personal health and safety each time they attend protests or rallies to get the public the information they need and deserve. Rubber bullets, tear gas, and even detainment cannot be the new norm for an essential pillar of our nation's democracy. California must lead the way to ensure the right of the press and the First Amendment are protected and held to the highest standard. SB 629 - The Press Freedom Act - will help ensure journalists can perform these critical roles while being protected under the law from any law enforcement officer intentionally assaulting, obstructing or interfering with their duties while they are gathering the news."

2) **Use of Force in Crowd Control Situations**: The basic course of training for law enforcement officers includes training in handling disputes and crowd control (POST website, https://post.ca.gov/regular-basic-course-training-specifications, [as of Jul. 27, 2020].) The training topic is broken down into crowd management, crowd control, and riot control. In addition, under Penal Code Section 13514.5, POST is required to provide a supplemental course of training for officers in civil disobedience situations. This training includes instruction on the use of force as well as media relations in organized protest

situations. (See *POST Guidelines Crowd Management, Intervention, and Control*, California Commission on Peace Officer Standards and Training, Mar. 2012, available at: https://post.ca.gov/Portals/0/post_docs/publications/Crowd_Management.pdf, [as of Jul. 27, 2020].) By their own terms, the POST guidelines "are not meant to constitute policy, nor are they intended to establish a statewide standard" instead they are "a resource for law enforcement leaders to provide foundational guidance for the facilitation of First Amendment rights while allowing discretion and flexibility in the development of individual agency policies." (*Id.* at vii.)

The rules for when and what type of force law enforcement can use in crowd control situations is defined by case law and local policy. In general, when courts are evaluating whether or not a specific use of force was lawful or not, they will attempt to balance the "nature and quality of the intrusion on the individual" against the "countervailing governmental interests at stake" and make a determination about whether the use of force was reasonable under the circumstances. (*Graham v. Connor* (1989) 490 U.S. 386, 396.) The decision about whether or not the use of force is "reasonable," and therefore lawful, must take into account "the fact that police officers are often forced to make split-second judgments -- in circumstances that are tense, uncertain, and rapidly evolving." (Id. at 396-97.)

For example, in *Deorle v. Rutherford* (9th Cir. 2000) 272 F.3d 1272, 1286 the court found that an officer shooting a beanbag round into the face of a mentally disturbed person without warning was unreasonable. The officer arrived on the scene and was able to observe the individual form a distance prior to firing the less-lethal beanbag round, which weighed against the notion that the officer had to make a split second decision to use less-lethal force. (Ibid.) By contrast, in *Forrester v. City of San Diego* (9th Cir. 1994) 25 F.3d 804, the court held the use of "pain compliance" techniques to be reasonable to disperse a group of protestors. Prior to applying the pain compliance techniques, the officers warned the demonstrators that they would be subject to pain compliance measures if they did not move, that such measures would hurt, and that they could reduce the pain by standing up, eliminating the tension on their wrists and arms. (*Id.* at 806.)

3) **Police Confrontations with the Media**: The genesis of this bill is the use of force when it is applied to journalists who are attempting to provide news coverage of protests, marches, demonstrations, etc. According to the author:

> "In California and across the country police have arrested, detained, and have physically assaulted journalists with rubber bullets, pepper spray, tear gas, batons, and fists. In many cases there are strong indications that the officers injuring journalists knew their targets were members of the press. Members of the press risk their personal safety and wellbeing each time they attend protest events to get the public the information they need, but rubber bullets, teargas, and even arrest cannot be the norm for an essential pillar of our democracy. We must take steps to ensure that the right of the press and the First Amendment are protected here in the Golden State."

In the wake of the shooting of George Floyd, Black Lives Matter protests have ignited around the country. The United States Press Freedom tracker indicates that so far in 2020 alone there have been more than 585 "aggressions" against journalists during those protests.

(U.S. Press Freedom Tracker website, available at: https://pressfreedomtracker.us/, [as of Jul. 27, 2020].) The website contains links to various incidents in the state of California, including one protest in Los Angeles where police allegedly used force against at least four journalists in separate instances. (*Multiple journalists covering protests in Los Angeles assaulted*, U.S. Press Freedom Tracker, available at: https://pressfreedomtracker.us/all-incidents/multiple-journalists-covering-protests-los-angeles-assaulted/, [as of Jul. 27, 2020].) Proponents of this bill have identified a number of situations in which journalists have been attacked while attempting to cover the news relating to protests in California:

- Barbara Davidson, a Pulitzer Prize-winning photojournalist, was covering a protest in Los Angeles when a police officer told her to move. She showed him her credentials, he responded he did not care, she again identified herself as press, and, as she began to walk away, the officer shoved her causing her to trip and hit her head on a fire hydrant;

- Cerise Castle, a reporter for National Public Radio's Santa Monica affiliate, KCRW, was shot with a rubber bullet while holding her press badge above her head. She said she was shot by an LAPD officer with whom she had just locked eyes;

- Katie Nielsen, a reporter with KPIX 5 News, was detained by officers in Oakland, while repeatedly identifying herself as press and with visible credentials. The detention was brief but interrupted her reporting on a peaceful protest organized by Oakland Tech High School students;

- Leonardo Castañeda, a reporter with the San Jose Mercury News, was zip-tied and detained by police in San Francisco;

- Jintak Han, a photographer and reporter with the University of California at Los Angeles's student newspaper, the Daily Bruin, was shot at with rubber bullets as he tried to return to his car after covering protests. He was wearing his press pass, a white helmet, a vest emblazoned with "PRESS," and was carrying three cameras;

- Adolfo Guzman-Lopez, a clearly identifiable radio journalist with KPCC in Los Angeles, was shot in the throat with a rubber bullet while covering protests in Long Beach, leaving a bloody red welt. "I felt it was a direct hit to my throat," the radio reporter said; and,

- In Santa Monica, BuzzFeed News reporter Brianna Sacks was detained by Santa Monica police while documenting protests on May 31, 2020.

This bill would add several protections for journalists into State Law. First, it would clarify that "duly authorized members of the press" have access to areas that have been closed by the police due to a protest, march or other type of demonstration. It further instructs that journalists are not to be assaulted, interfered with, or obstructed during their coverage of such demonstrations. In addition, this bill provides journalists with immunity from specified violations such as remaining after an order to disperse, curfew violations, and resisting arrest

offenses. Lastly, this bill allows a member of the press who has been detained to immediately contact a law enforcement supervisor for purposes of challenging the detention.

Proponents of this bill contend that these protections are necessary in order to ensure that journalists can cover marches and protests consistent with the right provided by the First Amendment to the United States Constitution. Without such protections they believe that members of the media will be attacked by police either because they are not perceived as press or perhaps even because they are intentionally targeted. Opponents fear that the definition of who is a member of the press is too broadly drawn. They are concerned that some individuals may attempt to use the provisions of this bill to their advantage by pretending to be members of the press when they are not. They fear that giving access to closed areas could be a safety risk if individuals are not, in fact, engaged in journalism.

4) **Arguments in Support**:

a) According to the *California Newspapers Association*: "In order to protect members of the media who are often responsible for the first draft of history, SB 629 would: ensure an authorized member of the media may enter areas closed off by first responders during a demonstration, march, protest or rally; prohibit an officer from assaulting a journalist or obstructing their ability to gather or process news; create an accelerated process for a journalist to challenge being detained by an officer; and create a rebuttable presumption that an individual who appears to be gathering or processing information is a duly authorized journalist as defined.

"Recent actions taken against journalists by law enforcement officers demonstrate that additional statutory protections are necessary to allow reporters and photographers to gather and process information and report on the significant events that are transforming and reshaping our world.

"In California and across the country police have arrested, detained, and have physically assaulted journalists with rubber bullets, pepper spray, tear gas, batons, and fists. In many cases there are strong indications that the officers injuring journalists knew their targets were members of the press.

...

"The right of the press to document police activity is foundational to our democracy and has long been recognized and protected by the courts. News reporting on police conduct serves the crucial First Amendment interest in promoting the "free discussion of governmental affairs." Mills v. Alabama, 384 U.S. 214, 218 (1966). Further, the ability journalists to cover people exercising their First Amendment to petition the government and assemble is crucial to continuing a dialog on the difficult issues our society faces.

"In a turbulent and troubled time and with an abundance of misinformation flooding information channels, journalists need to be able to gather and report facts without having to fear that they will be shot at or arrested by law enforcement officers simply because they are trying to provide context and help us all understand the significance of these events.

"Police attacks on journalists are what we expect from third world countries. SB 629 would make clear that it is the policy of this state that assaults and obstructions designed to prevent the constitutionally protected free flow of information to Californians will not be tolerated."

b) According to the *Reporters Committee*: "Journalists need to be able to gather facts and report the news without being attacked, shot at with less-lethal munitions, or arrested by law enforcement officers for doing their job. SB 629 would allow journalists to enter closed areas during protests to gather and report the news and states that law enforcement officers 'shall not' intentionally 'assault, interfere with, or obstruct' newsgathering functions.

"SB 629 would also prohibit journalists from being cited for a curfew or a failure to disperse violation while in that closed area. As urged in the July 8 letter, all city officials across the state must be informed that they should exempt the news media from any future curfew order, to the extent they issue one. A curfew order that fails to provide an exemption for members of the press would violate the First Amendment and gives law enforcement a potent tool to silence reporting through assaults or arrests of journalists. Furthermore, an arrest or detention of a reporter during a curfew would itself violate the First Amendment. Accordingly, the statutory exemption in SB 629 would track the First Amendment and would confirm its protections in state law.

"The numerous arrests and attacks of journalists reporting on protests across the country are both constitutionally impermissible and beyond the pale in a free society. These attacks endanger the press and threaten the essential role that journalists play in safeguarding constitutional rights by informing the public and the electorate. SB 629 would make it clear that any future arrests or assaults of journalists reporting on public protests will not be tolerated in the state of California."

5) **Arguments in Opposition**:

a) According to *California Association of Highway Patrolmen*: "Your bill says, "a person who appears to be engaged in gathering, receiving, or processing information, who produces a business card, press badge, other similar credential, or who is carrying professional broadcasting or recording equipment, is a duly authorized representative of a news service, online news service, newspaper, or radio or television station or network.'"

"We remain concerned that a person can use a business card, which can easily be made on a home computer or otherwise falsified. In addition, an online news service could simply be a blogger. In regards to the carrying of professional broadcasting or recording equipment, today's professional recording equipment is high-definition, digital and much smaller than in the past. They are so small in fact that they look like cameras many people use for personal use. There is a reporter for the Bee who rides around on a bicycle using his cell phone as a recording device. We don't see how that can be a criteria for allowing people in a closed area.

"We support the media having access and try to provide an area that is safe for them and for the officers; however, allowing them behind the lines is not safe. While your bill talks about protests protected under the first amendment, many of those start out that way and

can quickly turn violent. We have seen this countless times."

b) According to the *California Peace Officers Association*: "The vague wording of PC 409.7 (a) in SB 629, however, creates loopholes to impact anything law enforcement will be engaged in. According to this amended bill, the authority for media to enter a command post is triggered when, 'individuals are engaged in activity that is protected pursuant to the First Amendment to the United States Constitution or Article I of California Constitution.' It does not distinguish that this is ONLY during protests or riot situations, but instead, any command post where there happens to be a demonstration.

"Additionally, peace officers have grave concerns with the definition of 'duly authorized representatives' of news services in the bill. CPOA appreciates Senator McGuire's attempts to provide more a of a definition than what is currently in other codes, but chief among our concerns, is that it still appears reporters —as defined in lines 11-17 of page 4 of the bill, anyone with a business card or 'professional broadcasting or recording equipment' — can have essentially have near free range of secured areas. That jeopardizes the safety of law enforcement personnel and any other admitted representatives, especially in cases where violent rioters or protesters can easily disguise themselves as 'duly authorized representatives' and demand access to a command post or surrounding area.

"An incident command post is drastically different than a disaster or emergency post, and therefore our members have extreme fears of placing people in harms way by allowing access for a torrent of people claiming to be journalists or 'information gatherers' by simply flashing a business card. As noted earlier, the monumental task of ensuring the safety of large numbers of demonstrators of incumbent upon law enforcement, and SB 629 would put at risk those safety precautions."

6) **Related Legislation**:

a) AB 1652 (Wicks) would require each law enforcement agency to expand the agency's use of force policy to prohibit law enforcement officers from using force on members of the press, would further require that an officer who is found to have intentionally violated this policy be suspended, as specified, and would allow a person who is unlawfully arrested or detained, as specified, to recover actual damages not exceeding twenty-five thousand dollars ($25,000) per violation. AB 1652 is pending in the Senate Public Safety Committee.

b) AB 66 (Gonzalez) would prohibit the use of kinetic projectiles and chemical agents except in compliance with specified standards as set by the bill. AB 66 is pending in the Senate Public Safety Committee.

c) AB 1196 (Gipson) would prohibit a law enforcement agency from authorizing the use of a carotid restraint or a choke hold, as defined, and techniques or transport methods that involve a substantial risk of positional asphyxia, as defined. AB 1196 is pending in the Senate Public Safety Committee.

d) AB 1314 (McCarty) would require municipalities to annually post on their internet websites specified information relating to use of force settlements and judgements,

including amounts paid, broken down by individual settlement and judgment, information on bonds used to finance use of force settlement and judgment payments, and premiums paid for insurance against use of force settlements or judgements. AB 1314 is pending in the Senate Public Safety Committee.

7) **Prior Legislation**:

a) AB 392 (Weber) Chapter 170, Statutes of 2019, revised the standards for use of deadly force by peace officers.

b) AB 230 (Caballero) Chapter 285, Statutes of 2019, required law enforcement agencies to maintain a policy that provides guidelines on the use of force, utilizing de-escalation techniques and other alternatives to use of force, specific guidelines for the application of deadly force, and factors for evaluating and reviewing all use of force incidents.

c) SB 1844 (Thompson) Chapter 207, Statutes of 1998, required the Commission on Peace Officer Standards and Training (POST) to implement a course for training peace officers to deal with civil disobedience, including reasonable use of force, active and passive resistance, media relations, officer safety, evidence collection and crowd control.

REGISTERED SUPPORT / OPPOSITION:

Support

American Civil Liberties Union/northern California/southern California/san Diego and Imperial Counties
California Black Media
California Broadcasters Association
California News Publishers Association
First Amendment Coalition
Impremedia
LA Opinion
Reporters Committee for Freedom of the Press

Oppose

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

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

Date of Hearing: August 5, 2020
Chief Counsel: Gregory Pagan

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

SB 914 (Portantino) – As Amended May 11, 2020

SUMMARY: Implements a procedure to confirm that a hunting license is valid when a person under the age of 21 years of age is using the license to purchase a firearm; deletes an outdated code section pertaining to fees associated with firearm purchaser information. **Specifically, this bill**:

1) Requires the Department of Justice (DOJ), for sales of firearms to persons under 21-years of age who are eligible to purchase a firearm based on their possession of a hunting license, confirm the validity of the hunting license as a part of the background check.

2) Defines a valid and unexpired hunting license as a hunting license issued by the Department of Wildlife for which the time period authorized for the taking of birds or mammals has commenced but not expired.

3) Deletes obsolete provisions of law relating to the DOJ's authority to impose fees for the non-electronic transfer of firearms purchaser information to the department.

4) Makes other non-substantive conforming changes.

EXISTING LAW:

1) Prohibits a licensed firearms dealer from selling, supplying, or giving possession or control of a firearm to any person under 21 years of age. (Pen. Code, § 27510, subd. (a).)

2) Provides that the above prohibition does not apply to or affect the sale, supplying, or giving possession or control of a firearm to any person 18 years of age or older who possesses a valid, unexpired hunting license issued by the Department of Fish and Wildlife. (Pen. Code, § 27510, subd. (b)(1).)

3) Exempts the sale of a firearm that is not a handgun, or a semiautomatic centerfire rifle. to the following persons that are 18 years of age or older:

   a) An active peace officer, who is authorized to carry a firearm in the course and scope of his or her employment;

   b) An active federal officer, or law enforcement agent, who is authorized to carry a firearm in the course and scope of his or her employment;

c) A reserve peace officer, who is authorized to carry a firearm in the course and scope of his or her employment; and,

d) An active member of the United States Armed Forces, the National Guard, the Air national Guard, or the active reserve components of the United States, where the individuals in these organizations are properly identified. Proper identification includes the Armed Forces Identification Card or other written documentation certifying that the individual is an active or honorably retired member. (Pen. Code, §27510, subd. (b)(2).)

4) Requires that persons who purchase a firearm in California must wait 10-days from the date of the purchase to undergo a background check and for the Department of Justice (DOJ) to process the purchase of the firearm. (Pen. Code, §§ 26815 & 27540.)

5) Allows DOJ to charge a fee sufficient to reimburse it for costs associated with the sale and transfer of firearms such as the preparation, sale, processing, and filing of forms or reports required for the submission of a Dealers' Record of Sale (DROS). (Pen. Code, § 28230 (a).)

6) Requires firearm purchaser information to be transmitted to the DOJ exclusively through electronic means. (Pen. Code, § 28205.)

7) Permits the DOJ to electronically approve the purchase or transfer of ammunition through a vendor at the time of purchase or transfer and prior to the purchaser taking possession of the ammunition, and permits the department to collect certain fees for these purposes. (Pen. Code, § 30370.)

8) Directs the DOJ, starting July 1, 2025, to electronically approve the purchase or transfer of firearm precursor parts through a vendor at the time of purchase or transfer and before the purchaser taking possession of the firearm precursor part, and permits the department to collect certain fees for these purposes. (Pen. Code, § 30370.)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "Under current law when transferring or purchasing a firearm with a hunting license there is no verification during the 10 day background check to ensure the validity of the license. The bill would require the DOJ and the DFW to confirm a hunting license is valid when anyone under 21 years of age is using the license to purchase a firearm.

"Also, this bill removes code sections related to the DOJ's authority to impose fees for the non-electronic transfer of firearms purchaser information, and removes the relevant cross references.

2) **Background**: SB 1100 (Portantino), Chapter 894, Statutes of 2018, increased the age for which a person could purchase a rifle or shotgun from 18 to 21 years of age. This statute exempted from the increased age requirement a person who possesses a valid unexpired hunting license issued by the Department of Fish and Game.

In 2019 a 19 year old young man illegally purchase a semiautomatic centerfire rifle from a licensed firearms dealer with an invalid hunting license, and opened fire in a synagogue in Poway, California. The firearms dealer failed to adequately inspect the validity of the hunting license, and the DOJ cleared the young man's background check.

This bill would address the circumstance uncovered in Poway by requiring the DOJ to confirm the validity of a hunting license as part of the background check process.

3) **Argument in Opposition**: According to the *Gun Owners of California*, "We do not believe that it is necessary to define when a hunting license is valid. Gun owners of California also believes that this legislation will eliminate most, if not all, youth shooting programs throughout the state by making it virtually impossible for youth to shoot a firearm provided by anyone other than parents. This includes youth camps, and high school shooting teams that have become very popular throughout California.

"And finally, we completely oppose any legislation that will allow the California DOJ to increase the Dealer Record of Sales fees for any reason. Law abiding gun owners are already required to pay too much in fees in return for subpar services from the DOJ Firearms Bureau.

4) **Prior Legislation**: SB 61 (Portantino), Chapter 737, Statutes of 2018, allows a person 18 to 20 years of age to purchase a firearm that is not a handgun or a centerfire semiautomatic rifle if the person possesses a valid, unexpired hunting license issued by the California Department of Fish and Wildlife.

REGISTERED SUPPORT / OPPOSITION:

Support

None

Opposition

California Rifle and Pistol Association
Gun Owners of California
National Rifle Association of America

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

Date of Hearing: August 5, 2020
Counsel: Nikki Moore

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

SB 1276 (Rubio) – As Amended April 2, 2020

SUMMARY: Eliminates the requirement that state funding be matched by 10 percent to qualify a local domestic violence shelter service provider with funding pursuant to this section.

EXISTING LAW:

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

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

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

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

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

6) States that the funding process for distributing grant awards to DVSSPs shall be administered by the Office of Emergency Services, and including by providing matching funds or in-kind

contributions equivalent to not less than 10 percent of the grant they would receive, which may come from other governmental or private sources. (Pen. Code, § 13823.15, subd. (f)(14).)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "Amid COVID-19, we are seeing an increase in domestic violence cases across the state, nation, and even globally. For example, police statistics reveal that in the city of Los Angeles, as of March 21, 2020, aggravated assault crimes, including those of domestic violence, have increased more than 4 percent. In addition, Korean American Family Services in Los Angeles has seen their call volume more than double for their bilingual domestic violence crisis hotline. It is critical that we provide some relief to our domestic violence shelters serving our most vulnerable populations. However, this change in policy is long overdue. Similar programs administered under the California Governor's Office of Emergency Services (Cal OES), such as the Rape Victim Counseling Centers and Human Trafficking Victims Assistance, do not mandate this matching fund service requirement. As we settle in to a 'new normal', we anticipate that the ongoing social distancing requirements and economic downturn will continue to negatively impact the cash and in-kind resources available to domestic violence programs. Eliminating the match requirement can provide some flexibility and relief to programs providing essential services in our communities."

2) **Matching Funds Requirement is Onerous Administrative Task:** The requirement that matching funds of 10 percent must be proven for a DVSSP to receive funds was included in the law at its inception. It appears to be a relic of the past, and according to advocates, provides little meaningful assurances that a program is operating according to the statute. For example, the Rape Victim Counseling Venters and the Human Trafficking Victims Assistance Fund do not require matching funds. Indeed, there are numerous more substantive requirements that the DVSSP must comply with to receive funding, for example, operating a 24-hour hotline. On the other hand, tracking volunteer hours and reporting donations is an administrative burden on the DVSSP.

3) **Need to Eliminate Matching Funds Requirement Due to COVID-19:** As a result of the stay at home orders, and limitations on public gatherings which began in March 2020, DVSSPs have been unable to host traditional fundraising events. Additionally, the current economic recession has negatively impacted giving by donors. Thus, eliminating the 10 percent matching requirement would aid DVSSPs that have lost anticipated donations as a result of COVID-19. Similar action to this bill to waive the matching requirement on a federal level has been implemented under the Coronavirus Aid, Relief, and Economic Security Act. Additionally, the Governor has suspended the matching requirement temporarily due to COVID.

4) **Argument in Support**: According to *Disability Rights California*, "Current state funding requirements for domestic violence shelter providers require 10 percent matching funds, using either cash or in-kind matching funds. The state law requirement is in addition to matching fund requirements from federal funding sources. Domestic violence programs rely on private funding, in-kind donations, or volunteer hours to meet this match requirement. In

this time of crisis, flexibility is needed as programs adapt to the changing needs of survivors, families and communities they serve.

"During the COVID-19 crisis, domestic violence service providers have been forced to cancel large annual fundraisers, and small businesses and individual donors who have been impacted by the crisis are unable to donate to the program, reducing the availability of private funds to meet the match requirement. Additionally, volunteers are forced to stay home due to health and safety concerns. Securing, documenting, and reporting funding matches is significant burden for programs who are shifting operations and service delivery in a crisis. Programs need to focus on keeping survivors and their staff safe and healthy; not on meeting administrative requirements including matching fund documentation.

"As we settle in to a 'new normal', we anticipate that the ongoing social distancing requirements and economic downturn will continue to negatively impact the cash and in kind resources available to domestic violence programs. Eliminating the match requirement can provide some flexibility and relief to programs providing essential services in our communities."

REGISTERED SUPPORT / OPPOSITION:

Support

A Community for Peace
Alliance Against Family Violence and Sexual Assault
Asian Women's Shelter
California Partnership to End Domestic Violence
Catalyst Domestic Violence Services
Cora - Community Overcoming Relationship Abuse
Disability Rights California
Endtab
Haven Women's Center of Stanislaus
House of Ruth
Interface Children & Family Services
Jewish Family Service of Los Angeles
Laura's House
Marjaree Mason Center
Peace Officers Research Association of California (PORAC)
Plumas Rural Services
Rainbow Services, Ltd.
State Controller's Office
Weave
Womenshelter of Long Beach

Opposition

None

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

Date of Hearing: August 5, 2020
Counsel: Cheryl Anderson

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

SB 776 (Skinner) – As Amended July 27, 2020

As Proposed to be Amended in Committee

SUMMARY: Expands the categories of personnel records of peace officers and custodial officers that are subject to disclosure under the California Public Records Act (CPRA), establishes civil penalties for untimely disclosure, and prohibits assertion of the attorney-client privilege to limit disclosure of factual information and billing records. Specifically, **this bill**:

1) Expands the use of force category subject to disclosure to all uses of force.

2) Removes the requirement that a record related to sexual misconduct involving a member of the public or dishonesty be found to be sustained following an investigation in order to be subject to disclosure.

3) Adds a new category of disclosure for records relating to an incident involving prejudice or discrimination on the basis of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status.

4) Requires disclosure of records relating to sustained findings of wrongful arrests and wrongful searches.

5) Expands the category of frivolous and unfounded complaints, or the investigations, findings, or dispositions of those complaints that shall not be released pursuant to this section to include any complaint, not just civilian complaints.

6) Incorporates misconduct allegations into the disclosure delay provisions pertaining to records of an incident that are the subject of an active criminal or administrative investigation.

7) Requires that the foregoing records be released when an officer resigned before the law enforcement agency or oversight agency concluded its investigation into the alleged incident.

8) Specifies that persons who request records subject to disclosure are responsible for the cost of duplication, but not the cost of editing and redacting the records.

9) Imposes a civil fine not to exceed $1,000 per day for each day beyond 30 days that records subject to disclosure are not disclosed.

10) Provides that a member of the public who files suit for records found to have been improperly withheld or improperly redacted is entitled to twice the party's reasonable costs and attorney fees.

11) Provides that for purposes of releasing peace officer and custodial officer records under the CPRA, the attorney-client privilege shall not be asserted to limit the disclosure of factual information provided by the public entity to its attorney, factual information discovered by any investigation done by the public entity's attorney, or billing records related to work done by the attorney.

12) Removes the five-year minimum retention period for complaints against officers and any reports or findings relating to these complaints. Requires retention of all complaints and any reports currently in the possession of the agency.

13) Removes the requirement that a court, in determining the relevance of and whether to disclose records of complaints of officer misconduct, exclude disclosure of information of misconduct that occurred more than five years before the event or transaction that is the subject of the litigation for which discovery or disclosure is sought.

14) Requires each department or agency to request and review a peace officer's personnel file prior to hiring the officer.

15) Requires every person employed as a peace officer to immediately self-report all uses of force by the officer to the officer's department or agency.

EXISTING LAW:

1) Provides pursuant to the CPRA that all records maintained by local and state governmental agencies are open to public inspection unless specifically exempt. (Gov. Code, §§ 6250 *et seq.*)

2) Defines "public records" to include any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics. (Gov. Code, § 6252, subd. (e).)

3) States that except with respect to public records exempt from disclosure by express provisions of law, each state or local agency, upon a request for a copy of records that reasonably describes an identifiable record or records, shall make the records promptly available to any person upon payment of fees covering direct costs of duplication, or a statutory fee if applicable. Upon request, an exact copy shall be provided unless impracticable to do so. (Government Code, § 6253, subd. (b).)

4) States that, except as in other sections of the CPRA, this chapter does not require the disclosure of specified records, which includes among other things: records of complaints to, or investigations conducted by specified agencies, including any state or local police agency, or any investigatory or security files compiled by any other state or local police agency, or any investigatory or security files compiled by any other state or local agency for correctional, law enforcement, or licensing purposes. (Gov. Code, § 6254, subd. (f).)

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

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

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

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

6) Creates an exemption under the CPRA for personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy. (Gov. Code, § 6254, subd. (c).)

7) Creates an exemption under the CPRA for records, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege. (Gov. Code, § 6254, subd. (k).)

8) Requires an agency to justify withholding any record by demonstrating that the record in question is exempt under express provisions of the CPRA or that on the facts of the particular case, the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record. (Gov. Code, § 6255, subd. (a).)

9) Authorizes any person to institute proceedings for injunctive or declarative relief or writ of mandate in any court of competent jurisdiction to enforce his or her right to inspect or to receive a copy of any public record or class of public records under this chapter. (Gov. Code, § 6258.)

10) Provides that if the plaintiff prevails in an action under the CPRA, the judge must award court costs and reasonable attorneys' fees to the plaintiff. (Govt. Code, § 6259, subd. (d).)

11) *Requires a department or agency employing peace officers or custodial officers to establish a procedure to investigate complaints by members of the public against the personnel of these departments or agencies. (Pen. Code, § 832.5, subd. (a).)*

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

13) *Provides that complaints by members of the public that are determined by the peace or custodial officer's employing agency to be frivolous, as defined, or unfounded or exonerated, or any portion of a complaint that is determined to be frivolous, unfounded, or exonerated, shall not be maintained in that officer's general personnel file. However, these complaints shall be retained in other, separate files that shall be deemed personnel records for purposes of the CPRA. (Pen. Code, § 832.5, subd. (c).)*

14) Defines "frivolous" as "totally and completely without merit or for the sole purpose of harassing an opposing party." (Civ. Code, § 128.5, subd. (b)(2).)

15) Defines "unfounded" as "mean[ing] that the investigation clearly established that the allegation is not true." (Pen. Code, § 832.5, subd. (d)(2).)

16) States that except as specified, peace officer or custodial officer personnel records and records maintained by any state or local agency pursuant to citizens' complaints against personnel are confidential and shall not be disclosed in any criminal or civil proceeding except by discovery. This section shall not apply to investigations or proceedings concerning the conduct of peace officers or custodial officers, or any agency or department that employ these officers, conducted by a grand jury, a district attorney's office, or the Attorney General's office. (Pen. Code, § 832.7, subd. (a).)

17) *Provides that the following peace officer or custodial records maintained by their agencies shall not be confidential and shall be made available for public inspection pursuant to the CPRA:*

   a) A record relating to the report, investigation, or findings of any of the following:

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

      ii) An incident in which the use of force by a peace officer or custodial officer against a person resulted in death, or in great bodily injury;

   b) Any record relating to an incident in which a sustained finding was made by any law enforcement agency or oversight agency that a peace officer or custodial officer engaged in sexual assault involving a member of the public; and,

   c) Any record relating to an incident in which a sustained finding was made by any law enforcement agency or oversight agency of dishonesty by a peace officer or custodial officer directly relating to the reporting, investigation, or prosecution of a crime, or directly relating to the reporting of, or investigation of misconduct by, another peace officer or custodial officer, including, but not limited to, any sustained finding of perjury, false statements, filing false reports, destruction, falsifying, or concealing of evidence. (Pen. Code, *§ 832.7, subd. (b).)*

18) States that an agency shall redact a disclosed record for the following purposes only:

   a) To remove personal data or information outside the name and work-related information of the officers;

   b) To preserve the anonymity of complainants and witnesses;

   c) To protect confidential medical, financial, or other information whose disclosure is specifically prohibited by federal law or would cause an unwarranted invasion of personal privacy that outweighs the public's interest in the records; and,

d) Where there is reason to believe that disclosure of the record would pose a significant danger to the physical safety of the officer or another person. (Pen. Code, § 832.7, subd. (b)(5)(A)-(D).)

19) Provides also that an agency may redact a record disclosed "where, on the facts of the particular case, the public interest served by not disclosing the information clearly outweighs the public interest served by disclosure of the information." (Pen. Code, § 832.7, subd. (b)(6).)

20) Allows an agency to temporarily withhold records of incidents involving an officer's discharge of a firearm or use of force resulting in death or great bodily injury by delaying disclosure when the incidents are the subject of an active criminal or administrative investigation. (Pen. Code, § 832.7, subd. (b)(7).)

21) States that a record of a civilian complaint, or the investigations, findings, or dispositions of that complaint, shall not be released if the complaint is frivolous or the complaint is unfounded. (Pen. Code, § 832.7, subd. (b)(8).)

22) States that "personnel records" include "complaints, or investigations of complaints, concerning an event or transaction in which the officer participated, or which he or she perceived, and pertaining to the manner in which he or she performed his or her duties." (Pen. Code, § 832.8.)

23) *Requires that each department or agency in this state that employs peace officers shall make a record of any investigations of misconduct involving a peace officer in their general personnel file or a separate file designated by the department or agency. A peace officer seeking employment with a department or agency in this state that employs peace officers shall give written permission for the hiring department or agency to view their general personnel file and any separate file designated by the department or agency. (Pen. Code, § 832.12.)*

24) Sets forth the procedure for obtaining peace officer personnel records or records of citizen complaints or information from these records. Specifically, in any case in which discovery or disclosure is sought of peace officer or custodial officer personnel records or records of citizen complaints against peace officers or custodial officers or information from those records, the party seeking the discovery or disclosure shall file a written motion with the appropriate court or administrative body upon written notice to the governmental agency which has custody and control of the records, as specified. (Evid. Code, § 1043.)

25) Provides that a motion for discovery or disclosure of personnel records shall include all of the following:

a) Identification of the proceeding in which discovery or disclosure is sought, the party seeking discovery or disclosure, the peace or custodial officer whose records are sought, the governmental agency which has custody and control of the records, and the time and place at which the motion for discovery or disclosure shall be heard;

b) A description of the type of records or information sought; and,

c) Affidavits showing good cause for the discovery or disclosure sought, setting forth the materiality thereof to the subject matter involved in the pending litigation and stating upon reasonable belief that the governmental agency identified has the records or information from the records. (Evid. Code *§ 1043, subd. (b).)*

26) *Limits the right of access to records of complaints, or investigations of complaints, or discipline imposed as a result of those investigations, concerning an event or transaction in which the peace officer or custodial officer participated, or which the officer perceived, and pertaining to the manner in which the officer performed, to information that is relevant to the subject matter involved in the pending litigation.* (Evid. Code, *§ 1045, subd. (a).)*

27) *Provides that in determining relevance, the court shall examine the information in chambers and exclude from disclosure: information consisting of complaints concerning conduct occurring more than five years before the event or transaction that is the subject of the litigation in aid of which discovery or disclosure is sought.* (Evid. Code, *§ 1045, subd. (b)(1).)*

28) *S*tates that courts shall, in any case or proceeding permitting the disclosure or discovery of any peace or custodial officer records requested, order that the records disclosed or discovered may not be used for any purpose other than a court proceeding pursuant to applicable law. (Evid. Code, *§ 1045, subd. (e).)*

29) Confers a privilege, generally and with specified exceptions, on the client to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer. (Evid. Code, § 950 *et seq.*)

30) Defines the term "confidential communication" to include information transmitted between a client and their lawyer in the course of that relationship and in confidence. (Evid. Code, § 952.)

31) Provides that if a confidential communication between client and lawyer exists, the client has a privilege protecting disclosure, and the attorney has an obligation to refuse disclosure unless otherwise instructed by the client (Evid. Code, §§ 954, 955).

32) States that attorney-client communications are presumed to be confidential and the opponent of the claim of privilege has the burden of proof to establish that the communication was not confidential. (Evid. Code, § 917.)

33) Provides that it is the duty of an attorney to maintain inviolate the confidence, and at every peril to the attorney to preserve the secrets, of their client. However, an attorney may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the attorney reasonably believes the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death of, or substantial bodily harm to, an individual. (Bus. & Prof. Code, § 6068, subd. (e)(1) & (2); see also Cal. Rules of Court, Rule 3-100(A) & (B).)[i]

34) Recognizes that litigants may not recover attorney fees from each other absent authorization by statute or contract. (Code Civ. Proc., § 1021.)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "After forty years of prohibiting public access to any and all police records, SB 1421, passed in 2018, finally gave Californians the right to obtain a very limited set of records on police misconduct. While SB 1421 was a hard fought breakthrough, California remains an outlier when it comes to the public's right to know about those who patrol our streets and enforce our laws. At least twenty other states have far more open access, with states like New York, Ohio and others having essentially no limitations on what records are publicly available. This bill, SB 776, opens California's door further and would make public law enforcement records on all uses of force, wrongful arrests or wrongful searches, and for the first time, records related to an officer's biased or discriminatory actions. Additionally, SB 776 ensures that officers with a history of misconduct can't just quit their jobs, keep their records secret, and move on to continue bad behavior in another jurisdiction. SB 776 also establishes civil penalties for agencies that fail to release records in a timely manner and mandates that agencies can only charge for the cost of duplication."

2) **Background: The CPRA**: Under the CPRA, the public is granted access to public records held by state and local agencies. (Gov. Code, § 6250 et seq.) "Modeled after the federal Freedom of Information Act (5 U.S.C. § 552 et seq.), the [CPRA] was enacted for the purpose of increasing freedom of information by giving members of the public access to records in the possession of state and local agencies. [Citation.] Such 'access to information concerning the conduct of the people's business,' the Legislature declared, 'is a fundamental and necessary right of every person in this state.'" (*Los Angeles County Bd. of Supervisors v. Superior Court* (2016) 2 Cal.5th 282, 290.) The purpose of the CPRA is to prevent secrecy in government and to contribute significantly to the public understanding of government activities. (*City of San Jose v. Superior Court* (1999) 74 Cal.App.4th 1008, 1016-1017.) That being said, this right of access is not absolute. In enacting the CPRA, the Legislature also declared it was "mindful of the right of individuals to privacy." (Gov. Code, § 6250.)

   In light of these dual concerns of privacy and disclosure, the CPRA includes a number of disclosure exemptions. (Govt. Code, § 6254-6255.) Agencies may refuse to disclose records that are exempted or prohibited from public disclosure pursuant to federal or state law. This includes Evidence Code provisions relating to privilege. (Gov. Code, § 6254, subd. (k).) But, even if a specific exception does not exist, an agency may refuse to disclose records if on balance, the interest of nondisclosure outweighs disclosure. (Govt. Code, § 6255.) "The specific exceptions of section 6254 should be viewed with the general philosophy of section 6255 in mind; that is, that records should be withheld from disclosure only where the public interest served by not making a record public outweighs the public interest served by the general policy of disclosure." (53 Ops.Cal.Atty.Gen. 136 (1970).)

3) **Discovery of Police Records in Criminal and Civil Proceedings**: Notwithstanding the CPRA, until recently, both police investigatory records and police personnel records were generally protected from disclosure. (Gov. Code, § 6254, subd. (f); former Pen. Code, §§ 832.5 832.7, 832.8.) Before its amendment in 2018, Penal Code section 832.7 made specified peace officer records and information confidential and nondisclosable in any criminal or civil proceeding except pursuant to discovery under Evidence Code sections 1043 and 1046. (See Pen. Code, § 832.7, subd. (a), as amended by Stats. 2003, ch. 102, § 1, p. 809.) "The first category of confidential records pertained to '[p]eace officer or custodial officer personnel

records,' which included among other things certain records that relate to employee discipline or certain complaints and to investigations of complaints pertaining to how the officer performed his or her duties. (*Ibid.*; see § 832.8) The second category consisted of 'records maintained by any state or local agency pursuant to section 832.5' (former § 832.7, subd. (a)), which required '[e]ach department or agency in [California] that employs peace officers [to] establish a procedure to investigate complaints by members of the public against the personnel of these departments or agencies' and further required such '[c]omplaints and any reports or findings relating' to them be retained for "at least five years" and "maintained either in the peace or custodial officer's general personnel file or in a separate file' (§ 832.5, subds. (a)(1), (b); see also § 832.5, subds. (c), (d)(1)). The third category extended confidentiality to 'information obtained from' the prior two types of records. (Former § 832.7, subd. (a).)" (*Becerra v. The Superior Court of the City of San Francisco* (2020) 44 Cal.App.5th 897, 914-915.)

These statutes, along with Evidence Code sections 1043-1047, codified *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*). In *Pitchess*, the California Supreme Court held that under certain circumstances, and upon an adequate showing, a criminal defendant may discover information from an officer's otherwise-confidential personnel file that is relevant to his or her defense.

The *Pitchess* statutes require a criminal defendant to file a written motion that identifies and demonstrates good cause for the discovery sought. If such a showing is made, the trial court then reviews the law enforcement personnel records in camera with the custodian, and discloses to the defendant any relevant information from the personnel file. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1226.) Any records disclosed are subject to a mandatory order that they be used only for the purpose of the court proceeding for which they were sought. (*Id.* at p. 1042.)

The *Pitchess* statutes reflect the Legislature's attempt to balance the competing policy considerations of an officer's confidentiality interest and a litigant's interest in knowing about police misconduct. (*Assn. for Los Angeles Deputy Sheriffs v. Superior Court* (2019) 8 Cal.5th 41 (*ALADS*).) The California Supreme Court has stressed that weighing these competing policy interests is for the Legislature, not the courts, to make. (*Copley-Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272, 1299.)

4) **Senate Bill No. 1421 and General Public Access to Peace Officer Records**: In 2018, again weighing these policy considerations, the Legislature passed SB 1421. This legislation amended Penal Code section 832.7 to loosen the protections afforded to specified peace officer records relating to certain use of force, sustained findings of sexual assault on a member of the public and pertaining to sustained findings of dishonesty in reporting, investigating, or prosecuting a crime. (Pen. Code, § 832.7, as amended by Stats. 2018, ch. 988, § 2, eff. Jan. 1, 2019.) Unlike the *Pitchess* statutes which addressed a litigant's discovery interest, the purpose of SB 1421 was to give the general public "access to otherwise confidential police personnel records relating to serious police misconduct in an effort to increase transparency." (Assem. Comm. on Pub. Safety, Analysis on Sen. Bill No. 1421 (2017-2018 Reg. Sess.) as amended June 19, 2018.)

As reflected in the committee analysis, SB 1421 was a step in furtherance of the California Supreme Court's interpretation of the CPRA: "The California Supreme Court has found a

policy favoring disclosure especially salient when the subject is law enforcement: In order to maintain trust in its police department, the public must be kept fully informed of the activities of its peace officers. (See *Long Beach Officers Association* (2015) 59 Cal.4th 59, 74, see also *Commission on Peace Officer Standards & Training v. Superior Court* (2007) 42 Cal.4th 278, 297.) In *Commission on Peace Officer Standards*, *supra*, the Supreme Court noted:

> "Given the extraordinary authority with which they are entrusted, the need for transparency, accountability and public access to information is particularly acute when the information sought involves the conduct of police officers. In Commission on Police Officer Standards, the Supreme Court observed, "The public's legitimate interest in the identity and activities of peace officers is even greater than its interest in those of the average public servant. 'Law enforcement officers carry upon their shoulders the cloak of authority to enforce the laws of the state. In order to maintain trust in its police department, the public must be kept fully informed of the activities of its peace officers.' [Citation.] 'It is indisputable that law enforcement is a primary function of local government and that the public has a far greater interest in the qualifications and conduct of law enforcement officers, even at, and perhaps especially at, an "on the street" level than in the qualifications and conduct of other comparably low-ranking government employees performing more proprietary functions. The abuse of a patrolman's office can have great potentiality for social harm ....'" (*Commission on Police Officer Standards*, at pp. 297–298, fn. omitted.)

(Assem. Comm. on Pub. Safety, Analysis on Sen. Bill No. 1421 (2017-2018 Reg. Sess.) as amended on June 19, 2018.) Release of the personnel records specified in SB 1421 was intended to promote public scrutiny of, and accountability for, law enforcement. (*Ibid.*)

In furtherance of the goal of public scrutiny of, and accountability for, law enforcement, SB 776 expands the categories of personnel records of peace officers and custodial officers that are subject to disclosure under the CPRA.

This bill would also increase a defendant's access to discovery of otherwise-confidential peace officer records through the *Pitchess* process by removing the five-year limitation on relevance at trial and disclosure of information of an officer's misconduct, and by requiring an agency to retain all complaints currently in its possession (rather than allowing an agency to destroy them after five years).

Additionally, this bill would require officer's to immediately self-report all uses of force by the officer to the officer's department or agency. And it would require a department or agency, prior to hiring an officer, to obtain and review the officer's personnel or separate file containing records of any investigations of misconduct involving the officer.

5) **Privacy**: For public employees generally, the CPRA exempts from disclosure "[p]ersonnel, medical or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy." Govt. Code, § 6254, sub. (c).) There is an "inherent tension between the public's right to know and [the] society's interest in protecting private citizens (including public servants) from unwarranted invasions of privacy. [Citation.] One way to resolve this tension is to try to determine 'the extent to which disclosure of the requested item of information will shed light on the public agency's performance of its duty.'" (*Los Angeles*

Unified School Dist. v. Superior Court (2014) 228 Cal.App.4th 222, 241 [175 Cal. Rptr. 3d 90].)

"In *Chronicle Pub. Co. v. Superior Court* (1960) 54 Cal.2d 548 [7 Cal.Rptr. 109, 354 P.2d 637] … , our Supreme Court concluded that complaints confidentially made to the State Bar regarding an attorney's professional conduct, and the investigations of those complaints, that do not result in public or private discipline, are confidential and not subject to disclosure. The rule serves two public interests. First, it protects the proper functioning of the bar's disciplinary system by ensuring people may file complaints without risk of creating a publicly accessible record and being subject to a libel action. [Citation.] [¶] Second, the rule of nondisclosure protects individual members of the bar from unwarranted attacks and accusations. [Citation.] '[The attorney] is not exposed to publicity where groundless charges are made. … The fact that a charge has been made against an attorney, no matter how guiltless the attorney might be, if generally known, would do the attorney irreparable harm even though he be cleared by the State Bar.' [Citation.]" (*BRV, Inc. v. Superior Court* (2006) 143 Cal.App.4th 742, 757–758.)

This rule was applied to personnel records maintained by a school district in *Bakersfield City School Dist. v. Superior Court* (2004) 118 Cal.App.4th 1041, 1045-1046.) There, a newspaper sought complaints and disciplinary records of a school district employee. (*Id.* at pp. 1043–1044.) The trial court denied disclosure of records that were not substantial in nature but allowed disclosure as to complaints regarding one incident described as sexual-type conduct, threats of violence, and violence. The court found these complaints to be substantial in nature and reasonably well founded. *(Ibid.)* The Court of Appeal affirmed, finding that the disclosure of the complaints to the public does not turn upon a finding that the complaints were true or discipline was imposed. (*Id.* at p. 1046.) Rather, "[i]n evaluating whether a complaint against an employee is well-founded within the context of section 6250 et seq., both trial and appellate courts, … originally and upon review, are required to examine the documents presented to determine whether they reveal sufficient indicia of reliability to support a reasonable conclusion that the complaint was well founded. The courts must consider such indicia of reliability in performing their ultimate task of balancing the competing concerns of a public employee's right to privacy and the public interest served by disclosure. [Citations.]" (*Id.* at p. 1047; cf. *Kelvin L. v. Superior Court* (1976) 62 Cal.App.3d 823, 830–831 ["the fact that the charges against the officers were not substantiated [is a] factor[] which the court may weigh in deciding whether the public interest favors disclosure"].)

This bill would authorize release of unsustained and exonerated complaints against an officer. Whether or not the privacy exemption of Government Code section 6254, subdivision (c) applies to the peace officer records at issue here, Penal Code section 832.7, subdivision (b)(5)(C) contains its own privacy provision – an agency must redact a record to remove information if the disclosure would cause unwarranted invasion of privacy that clearly outweighs the strong public interest in records of misconduct by peace officers and custodial officers. This language largely mirrors language in Government Code section 6254, subdivision (c). However, redaction under Penal Code section 832.7, subdivision (b)(5)(C) is mandatory where privacy interests prevail. (*Becerra v. The Superior Court of the City of San Francisco*, *supra*, 44 Cal.App.5th at p. 925 ["only those provisions of law that conflict with" section 832.7(b)—"not … every provision of law"—are inapplicable"].)

The CPRA also has a catchall exemption where "on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record." (Govt. Code, § 6255, subd. (a).) As with the privacy exemption, Penal Code section 832.7, subdivision (b)(6), contains its own catchall exemption largely mirroring language of the CPRA – "an agency may redact a record disclosed pursuant to this section, including personal identifying information, where, on the facts of the particular case, the public interest served by not disclosing the information clearly outweighs the public interest served by disclosure of the information." The tests under the catchall provision and the privacy provision are essentially the same. (*BRV, Inc. v. Superior Court, supra,* 143 Cal.App.4th at pp. 757–758.)

Given the reach of this bill, it appears redaction of the records at issue could be required in some circumstances to protect an officer's privacy rights per Penal Code section 832.7, subdivision (b)(5)(C) as well as under the catchall provision of subdivision (b)(6).

6) **First Amendment**: In *Garcetti v. Ceballos* (2006) 547 U.S. 410, the United States Supreme court set the current standard to trigger First Amendment protection for government employee speech. To be protected, the speech must clear three hurdles: [1] it must be about a matter of public concern; [2] it must be made as a private citizen and not as part of the employee's official duties; and [3] the interests of the employee in the speech must outweigh the interests of the employer in the safe, efficient, and effective accomplishment of its mission and purpose. (*City of San Diego v. Roe* (2004) 543 U.S. 77, 80 [there must be a sufficient nexus between the officer's conduct and the impact of that conduct on the agency in order to discipline the officer without violating the officer's First Amendment rights].)

The latter hurdle is the most difficult for police officers to overcome in light of the public safety mission and purpose of a law enforcement agency:

> The effectiveness of a city's police department depends on the perception in the community that it enforces the law fairly, even-handedly, and without bias . . . If the department treats a segment of the population of any race, religion, gender, national origin, sexual preference, etc., with contempt, so that the particular minority comes to regard the police as oppressor rather than protector, respect for law enforcement is eroded and the ability of the police to do its work in the community is impaired.

(*Papps v. Giuliani* (2nd Cir. 2002) 290 F.3d 143.)

The reach of this bill includes disclosure of unsustained and exonerated complaints of officer misconduct relating to an incident involving group prejudice or discrimination, including, but not limited to, verbal statements, writings, online posts, recordings, and gestures. Though this bill does not require disciplinary action, could the public release of unsustained and exonerated complaints for which the officer was not disciplined nonetheless inadvertently implicate the First Amendment by chilling the officer's free speech? (See *Doe v. Reed* (2010) 561 U.S. 186.)

To the extent that disclosure of records under this bill would be in tension with the First Amendment, the records may be subject to redaction under Penal Code section 832.7, subdivision (c)(5)(C), which exempts records from disclosure where such disclosure is

"specifically prohibited by federal law." (See also Govt. Code, § 6254, subd. (k) [under the CPRA, records are exempt from disclosure if "exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege"]; see also U.S. Const., art. VI, cl. 2 [the Supremacy Clause of the United States Constitution].)

7) **Costs to Redact and Edit Police Records Subject to Disclosure under the CPRA**: Government Code section 6253, subdivision (b) provides that the person requesting the public records pay fees "covering direct costs of duplication, or a statutory fee if applicable." "As a general rule, a person who requests a copy of a government record under the act must pay only the costs of duplicating the record, and not other ancillary costs, such as the costs of redacting material that is statutorily exempt from public disclosure. ([Govt. Code,] § 6253, subd. (b); [], § 6253.9, subd. (a)(2); see *County of Santa Clara v. Superior Court* (2009) 170 Cal.App.4th 1301, 1336 [89 Cal. Rptr. 3d 374] (*County of Santa Clara*).)" (See *National Lawyers Guild v. City of Hayword* (2020) 9 Cal.5th 488, 491.)

   This bill would clarify that the person requesting a copy of records under the CPRA must pay only the costs of duplicating the record – "direct costs of duplication" – not costs of editing or redaction.

8) **Mandatory Civil Fine as Penalty for Untimely Disclosure of Police Records under the CPRA**: The state may impose reasonable penalties as a means of securing obedience to statutes validly enacted. Civil penalties have become a means by which the legislature implements statutory policy. (*Hale v. Morgan* (1978) 22 Cal.3d 388, 398 (*Hale*).) The "Legislature does not violate due process so long as an enactment is procedurally fair and reasonably related to a proper legislative goal." (*Ibid.*) "Courts have consistently assumed that 'oppressive' or 'unreasonable' statutory penalties may be invalidated as violative of due process." (*Id.* at p. 399 [citation omitted].)

   In *Hale v. Morgan, supra,* 22 Cal.3d 388, a statute, which at the time imposed a $100-per-day fine on landlords who interfered with their tenants' occupancy, was held unconstitutional because the penalty was mandatory in amount and unlimited in duration. (See also Witkin, Summary of Cal. Law (2020) Torts, § 1740.) The Court distinguished another statute, which imposed a daily penalty for a continuing failure to pay wages due, because it limited the penalty to 30 days. (*Hale v. Morgan, supra*, 22 Cal.3d at p. 400.) The Court stated, "Uniformly, we have looked with disfavor on ever-mounting penalties...." (*Id.* at p. 401.) After *Hale* was decided, the California legislature amended the statute at issue to provide courts with discretion over the size of the award by directing the trial court to impose an amount 'not to exceed' $100 per day and directing the court to consider 'proof of such matters as justice may require' for purposes of determining the amount of the award. (See *Kinney v. Vaccari* (1980) 27 Cal.3d 348, 356 n.6 [explaining 1979 amendments to statute].)

   The proposed Committee amendments amend this provision to provide that the court impose an amount not to exceed $1,000 per day.

9) **Awarding Double Court Costs and Attorney's Fees to Prevailing Party in Litigation filed Pursuant to the CPRA to Obtain Police Records**: Generally, attorney fees are not allowed unless they are specifically authorized by agreement or statute. (*Smith v. Krueger* (1983) 150 Cal.App.3d 752, 756.) Government Code section 6259, subdivision (d)

specifically allows a prevailing plaintiff in litigation filed pursuant to the CPRA to recover costs and reasonable attorney fees. (Govt. Code, § 6259, subd. (d).) "Section 6259 was enacted to carry out the purposes of the California Public Records Act. Through the device of awarding attorney fees, citizens can enforce its salutary objectives." (*Braun v. City of Taft* (1984) 154 Cal.App.3d 332, 348-349.)

This bill would entitle a prevailing plaintiff in litigation over improperly held or redacted police personnel records to recover twice the party's costs and attorney fees. Though this bill uses the word "damages," there would never be any determination of actual damages that were suffered as result of the violation. However, given the importance of the information being sought – police misconduct – there may be some justification for awarding double costs and fees to someone who is forced to invoke the CPRA to get improperly withheld records. In any other instance, the prevailing party in CPRA litigation only recovers actual costs and fees.

For clarity, the proposed Committee amendments specify that this provision of this bill would apply "notwithstanding Government Code Section 6259, subdivision (d)," and delete the term "damages."

10) **Attorney-Client Privilege as Applied to Disclosure of Police Records under the CPRA**:

a) **Background**: "The attorney-client privilege incorporated into the [C]PRA by section 6254(k) [of the Government Code] is described in Evidence Code section 950 et seq., enacted in 1965. (See Evid. Code, div. 8, ch. 4, art. 3 ['Lawyer-Client Privilege'].) This privilege . . . holds a special place in the law of our state. (See *Mitchell v. Superior Court* (1984) 37 Cal.3d 591, 599 [208 Cal.Rptr. 886, 691 P.2d 642] (*Mitchell*) ['The attorney-client privilege has been a hallmark of Anglo-American jurisprudence for almost 400 years.'].) And for good reason: its 'fundamental purpose … is to safeguard the confidential relationship between clients and their attorneys so as to promote full and [frank] discussion of the facts and tactics surrounding individual legal matters.' (*Ibid.* ['the public policy fostered by the privilege seeks to insure "the right of every person to freely and fully confer and confide in one having knowledge of the law, and skilled in its practice, in order that the former may have adequate advice and a proper defense"'].)" (*Los Angeles County Bd. of Supervisors v. Superior Court* (2016) 2 Cal.5th 282, 292 (*Los Angeles County*).)

There are several statutory exceptions to the attorney-client privilege. (See Evid. Code, §§ 956-962.) As the United States Supreme Court has noted: "The reasons for protecting the 'confidences of wrongdoers' 'ceas[e] to operate . . . where the desired advice refers not to prior wrongdoing, but to future wrongdoing.'" (*United States v. Zolin* (1989) 491 U.S. 554, 562–63.) Accordingly, California has two exceptions based on future wrongdoing -- communications involving an intent to do future harm (Evid. Code, § 956.5) and matters of fraud (Evid. Code, § 956). California also has statutory exceptions related to a deceased client (Evid. Code, §§ 957, 960, 961), communications relevant to breach of duty arising out of the attorney-client relationship (Evid. Code, § 958), where the attorney is an attesting witness regarding the intent of competence of a client executing an attested document (Evid. Code, § 959), and as to joint clients when the communication is offered in a civil proceeding, as specified (Evid. Code, § 962).

b) **Factual Investigation**: This bill would create another statutory exception to the attorney-client privilege. For purposes of releasing police records under the CPRA, the attorney-client privilege could not be asserted to limit the disclosure of factual information provided by the public entity to its attorney, factual information discovered by any investigation done by the public entity's attorney, or billing records related to the work done by the attorney. This provision of the bill involves dual policy considerations of police transparency and public entities' need for confidential legal advice. Does limiting the exception to factual information and billing records strike the best balance of these interests?

> [C]ourts recognize that public entities need confidential legal advice to the same extent as do private clients: "'Government should have no advantage in legal strife; neither should it be a second-class citizen. . . . "Public agencies face the same hard realities as other civil litigants. An attorney who cannot confer with his client outside his opponent's presence may be under insurmountable handicaps. . . ." Settlement and avoidance of litigation are particularly sensitive activities, whose conduct would be grossly confounded, often made impossible, by undiscriminating insistence on open lawyer-client conferences.'" (*Sutter Sensible Planning*[(1981)] 122 Cal.App.3d [813,] 824-825.)

(*Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 374.)

Proponents of this provision of the bill argue this exception to the attorney-client privilege is necessary to obtain factual information when the public entity hires outside counsel to conduct the misconduct investigation and then asserts the privilege to avoid disclosing the information discovered through that investigation. However, hiring an attorney does not necessarily make the investigation privileged. There are parameters to the privilege under California case law. In *City of Petaluma v. Superior Court* (2016) 248 Cal.App.4th 1023, the California Court of Appeal held that a privileged relationship exists where the attorney is providing a legal service through the attorney's investigative expertise without providing any legal advice. (*City of Petaluma v. Superior Court* (2016) 248 Cal.App.4th 1023, 1027.) There, the attorney rendered a legal service because she was "expected to use her legal expertise" to "identify the pertinent facts, synthesize the evidence, and come to a conclusion as to what actually happened."(*Id.* at p. 1035.) But not all attorney-led investigations amount to legal service. If the attorney engaged in "routine fact-finding" rather than "legal work," no legal service was provided. (*Ibid.*)

In light of the current body of case law addressing this issue, is this provision of the bill necessary? Moreover, given the broad language of this provision, it appears to implicate an agency's ability to claim the attorney-client privilege as to factual information provided to the agency's attorney even when related to a lawsuit in which the agency itself is a party.

c) **Billing Records**: In *Los Angeles County,* a CPRA matter, the California Supreme Court held that billing statements are not "categorically privileged," but "[w]hen a legal matter remains pending and active, the privilege encompasses everything in an invoice, including the amount of aggregate fees." (*Los Angeles County, supra*, 2 Cal.5th at p. 297.) That is because, "[t]o the extent that billing information is conveyed 'for the purpose of

legal representation'—perhaps to inform the client of the nature or amount of work occurring in connection with a pending legal issue—such information lies in the heartland of the attorney-client privilege. And even if the information is more general, such as aggregate figures describing the total amount spent on continuing litigation during a given quarter or year, it may come close enough to this heartland to threaten the confidentiality of information directly relevant to the attorney's distinctive professional role. The attorney-client privilege protects the confidentiality of information in both those categories, even if the information happens to be transmitted in a document that is not itself categorically privileged." (*Ibid.*; see also *County of Los Angeles Board of Supervisors v. Superior Court* (2017) 12 Cal.App.5th 1264 ["*Los Angeles County* teaches that invoices related to pending or ongoing litigation are privileged and are not subject to [C]PRA disclosure"].)

The Court noted "the same may not be true for fee totals in legal matters that concluded long ago. In contrast to information involving a pending case, a cumulative fee total for a long-completed matter does not always reveal the substance of legal consultation." (*Los Angeles County, supra*, 2 Cal.5th at p. 298.) Thus some portions of attorney fee invoices on matters that have been closed may not be protected by the attorney-client privilege.

The Court concluded it was not necessary to require "a categorical bar on disclosure of a government agency's expenditures for any legal matter, past or present, active or inactive, open or closed." (*Id.* at p. 300.) The Court explained that though the CPRA "carves out an exemption for privileged portions of government records, '[t]he fact that parts of a requested document fall within the terms of an exemption does not justify withholding the entire document.' [Citation.] Instead, government agencies must disclose "[a]ny reasonably segregable portion" of a public record "after deletion of the portions that are exempted by law." ([Govt. Code,]§ 6253, subd. (a).) (*Los Angeles County, supra*, 2 Cal.5th at p. 297.)

Does balancing the need for police transparency and a public entity's need for confidential legal advice warrant creating a new statutory exception to the attorney-client privilege for these billing records under the CPRA? Moreover, as noted *ante*, given the broad language of this provision, it appears to implicate an agency's ability to claim the attorney-client privilege as to its billing records even when related to a lawsuit in which the agency itself is a party.

(d) **Pending Litigation Exception under the CPRA**: In addition to incorporating the attorney-client privilege, the CPRA also provides an exemption for pending litigation to which a public agency is a party. (Govt. Code, § 6254, subd. (b).) It is not entirely clear whether the provision of this bill creating an exception to attorney-client privilege for factual information and billing records overrides this exemption. Arguably, it does not contradict the pending litigation exemption, and thus shouldn't trump it. (*Becerra v. The Superior Court of the City of San Francisco*, *supra*, 44 Cal.App.5th at p. 925.)

11) **Due Process and Equal Protection**: Currently there is a litigation pending in New York regarding release of unsubstantiated and non-final disciplinary records of police officers, firefighters, and corrections officers. (https://www.democratandchronicle.com/story/news/politics/albany/2020/07/16/judge-blocks-nyc-releasing-police-discipline-records-now/5452652002/ [as of 7/23/2020].)

The suit raises federal due process and equal protection claims. (https://www.documentcloud.org/documents/6990185-154982-2020-Uniformed-Fire-Officer-v-Uniformed.html [as of 7/23/2020].)

12) **Argument in Support**: According to the *American Civil Liberties Union of California*, "[SB 776] expands the types of peace officer misconduct records that would be available to the public in an effort to further improve and expand law enforcement transparency and accountability.

"The California legislature significantly improved law enforcement transparency with the passage of SB 1421 (Skinner, Chapter 988, Statutes of 2018). That bill expanded Penal Code 832.7 by piercing the secrecy that shrouds deadly uses of force and serious officer misconduct by providing public access to information about these critical incidents, such as when an officer shoots, kills, or seriously injures a member of the public, is proven to have sexually assaulted a member of the public, or is proven to have planted evidence, committed perjury, or otherwise been dishonest in the reporting, investigation, or prosecution of a crime. Access to records of how departments handle these serious uses – and abuses – of police power is necessary to allow the public to make informed judgments about whether existing processes and infrastructures are adequate.

"Following the killings of George Floyd, Breonna Taylor, Ahmaud Arbery, Sean Monterrosa, Erik Salgado, Andres Guardado, and many others, people across the nation are asking elected officials to divest from police, increase accountability and oversight, and reinvest in communities. SB 776 is one of several attempts by the Legislature to strengthen accountability by increasing the law enforcement records available to the public.

"Specifically, SB 776 requires all law enforcement agencies to retain records of misconduct indefinitely, eliminating the current five-year retention period. It also removes the requirement of complaints needing to be sustained for those records to be publicly available in the areas of use of force, sexual assault, or dishonesty, so long as the underlying complaint is found to be nonfrivolous. Additionally, it expands access to complaint records capturing bias against protected classes so long as the underlying complaint is found to be non-frivolous. The bill would also allow records relating to wrongful arrests and wrongful searches to be public so long as these records were sustained by an investigating agency.

"Notably, the bill also seeks to address the issue of peace officers resigning during an investigation in attempt to stop a sustained finding of misconduct. SB 776 would require the release of records relating to investigations in these categories, although the peace officer resigned before the investigating agency concluded its investigation. This is critically important because resigning to avoid a finding of misconduct is a major loophole that peace officers often use to avoid accountability, frequently to be hired by another law enforcement agency.

"Lastly, the bill would provide safeguards for families that seek to uncover these public records on their own but are prevented due to extraordinary costs placed by the agency to produce these public documents. The bill makes clear that an agency cannot include costs of editing or redacting these records and can charge only reasonable fees for duplication. To increase accountability on the producing law enforcement agencies, the bill also imposes a

civil fine of $1,000 per day for each day the records are not disclosed 30 days after the initial request.

"This bill continues to chip away at the multiple levels of policy secrecy in California, building upon the initial gains of SB 1421…."

13) **Argument in Opposition**: According to the *Peace Officers Research Association of California*, "SB 776 is over-broad and places an innocent officer's career and personal life in jeopardy. PORAC would be willing to discuss expanding the use of force disclosures to other types of injuries, in addition to death and GBI. Perhaps, re-defining 'serious injury' to include more types of injuries would be helpful, in lieu of the current language which applies to all uses of force.

"Regarding the release of not-sustained dishonesty or sexual assault investigations, PORAC is very opposed. Peace officers should not have to defend themselves with the public, or with their family and friends, if the investigation has already shown that they did their jobs correctly. We would ask that only sustained complaints be released.

"Finally, PORAC believes that requiring an officer to self-report all uses of force is extremely overbroad since many agencies define any laying of hands on an individual as 'force.'

"To reiterate, PORAC is willing to discuss the expansion of what is released when using force. We also support the mandatory reporting of an officer who retires in lieu of an investigation for certain serious allegations. Lastly, PORAC continues to support the release of sustained investigations for dishonesty and sexual assault when added to the potential of creating a POST certificate revocation system, as is being proposed by SB 731 by Senator Bradford. Combined with this measure, an officer who has sustained serious misconduct will not only have the misconduct made public, but will likely never work as a peace officer in California again…."

14) **Related Legislation**:

a) SB 731 (Bradford) would disqualify a person from being employed as a peace officer if that person has a certificate issued by POST and that certificate has been revoked by POST. SB 731 is scheduled to be heard in this Committee on August 5, 2020.

b) SB 1220 (Umberg) would require any law enforcement agency to, upon request, provide a prosecuting agency a list of names and badge numbers of officers who have had sustained findings of specified misconduct or group bias, been convicted of certain criminal offenses, or are facing criminal charges, and establishes a procedure for the officer to contest their inclusion on the list. SB 1220 is scheduled to be heard in this Committee on August 5, 2020.

c) AB 1299 (Salas) would create a rubric at the Commission on Peace Officer Standards and Training (POST) for information on investigations and results of sustained findings of misconduct to be housed and accessed by law enforcement agencies conducting pre-employment background investigations on candidates for employment. AB 1299 is scheduled to be heard in the Senate Public Safety Committee on July 31, 2020.

d) AB 1599 (Cunningham) would, commencing January 1, 2021, require law enforcement agencies to complete initiated administrative investigations of officer misconduct as related to specified uses of force, sexual assault, and dishonesty regardless of whether an officer leaves the employment of the agency. AB 1599 is scheduled to be heard in the Senate Public Safety Committee on July 31, 2020.

15) **Prior Legislation**:

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

b) AB 1957 (Quirk), of the 2015-2016 Legislative Session, would have provided a set of procedures for disclosing footage from a law enforcement officer's body-worn camera. AB 1957 failed passage on the Assembly Floor.

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

d) SB 1019 (Romero), of the 2007-2008 Legislative Session, would have abrogated the holding in *Copley Press*, *supra*, 39 Cal.4th 1272, for law enforcement agencies operating under a federal consent decree on the basis of police misconduct. SB 1019 failed passage in the Assembly Public Safety Committee.

REGISTERED SUPPORT / OPPOSITION:

Support

Alameda; City of
Alliance for Boys and Men of Color
American Civil Liberties Union/northern California/southern California/san Diego and Imperial Counties
Asian Solidarity Collective
California Attorneys for Criminal Justice
California Innocence Coalition: Northern California Innocence Project, California Innocence Project, Loyola Project for The Innocent
California Newspaper Publishers Association
California Pan - Ethnic Health Network
California Public Defenders Association
Californians for Safety and Justice
Disability Rights California
Drug Policy Alliance
First Amendment Coalition
Friends Committee on Legislation of California
League of Women Voters of California

National Association of Social Workers, California Chapter
Oakland; City of
Pillars of the Community
San Francisco District Attorney's Office
San Francisco Public Defender
Think Dignity
Voices for Progress
We the People

Opposition

California Association of Highway Patrolmen
California Law Enforcement Association of Records Supervisors (CLEARS)
California Peace Officers Association
California State Sheriffs' Association
League of California Cities
Peace Officers Research Association of California (PORAC)

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[i] According to the discussion of Rule 3-100, paragraph 13: "Rule 3-100 is not intended to augment, diminish, or preclude reliance upon, any other exceptions to the duty to preserve the confidentiality of client information recognized under California law. (Added by order of the Supreme Court, operative July 1, 2004.)"

Amended Mock-up for 2019-2020 SB-776 (Skinner (S))

Mock-up based on Version Number 97 - Amended Assembly 7/27/20
Submitted by: Cheryl Anderson, Assembly Committee on Public Safety

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

SECTION 1. Section 1045 of the Evidence Code is amended to read:

1045. (a) This article does not affect the right of access to records of complaints, or investigations of complaints, or discipline imposed as a result of those investigations, concerning an event or transaction in which the peace officer or custodial officer, as defined in Section 831.5 of the Penal Code, participated, or which the officer perceived, and pertaining to the manner in which the officer performed the officer's duties, provided that information is relevant to the subject matter involved in the pending litigation.

(b) In determining relevance, the court shall examine the information in chambers in conformity with Section 915, and shall exclude from disclosure both of the following:

(1) In any criminal proceeding the conclusions of any officer investigating a complaint filed pursuant to Section 832.5 of the Penal Code.

(2) Facts sought to be disclosed that are so remote as to make disclosure of little or no practical benefit.

(c) In determining relevance where the issue in litigation concerns the policies or pattern of conduct of the employing agency, the court shall consider whether the information sought may be obtained from other records maintained by the employing agency in the regular course of agency business which would not necessitate the disclosure of individual personnel records.

(d) Upon motion seasonably made by the governmental agency which has custody or control of the records to be examined or by the officer whose records are sought, and upon good cause showing the necessity thereof, the court may make any order which justice requires to protect the officer or agency from unnecessary annoyance, embarrassment or oppression.

(e) The court shall, in any case or proceeding permitting the disclosure or discovery of any peace or custodial officer records requested pursuant to Section 1043, order that the records disclosed or discovered may not be used for any purpose other than a court proceeding pursuant to applicable law.

SEC. 2. Section 832.5 of the Penal Code is amended to read:

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

(2) Each department or agency that employs custodial officers, as defined in Section 831.5, may establish a procedure to investigate complaints by members of the public against those custodial officers employed by these departments or agencies, provided however, that any procedure so established shall comply with the provisions of this section and with the provisions of Section 832.7.

(b) Complaints and any reports or findings relating to these complaints shall be retained, including all complaints and any reports currently in the possession of the department or agency. All complaints retained pursuant to this subdivision may be maintained either in the peace or custodial officer's general personnel file or in a separate file designated by the department or agency as provided by department or agency policy, in accordance with all applicable requirements of law. However, prior to any official determination regarding promotion, transfer, or disciplinary action by an officer's employing department or agency, the complaints described by subdivision (c) shall be removed from the officer's general personnel file and placed in separate file designated by the department or agency, in accordance with all applicable requirements of law.

(c) Complaints by members of the public that are determined by the peace or custodial officer's employing agency to be frivolous, as defined in Section 128.5 of the Code of Civil Procedure, or unfounded or exonerated, or any portion of a complaint that is determined to be frivolous, unfounded, or exonerated, shall not be maintained in that officer's general personnel file. However, these complaints shall be retained in other, separate files that shall be deemed personnel records for purposes of the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code) and Section 1043 of the Evidence Code.

(1) Management of the peace or custodial officer's employing agency shall have access to the files described in this subdivision.

(2) Management of the peace or custodial officer's employing agency shall not use the complaints contained in these separate files for punitive or promotional purposes except as permitted by subdivision (f) of Section 3304 of the Government Code.

(3) Management of the peace or custodial officer's employing agency may identify any officer who is subject to the complaints maintained in these files which require counseling or additional training. However, if a complaint is removed from the officer's personnel file, any reference in the personnel file to the complaint or to a separate file shall be deleted.

(d) As used in this section, the following definitions apply:

(1) "General personnel file" means the file maintained by the agency containing the primary records specific to each peace or custodial officer's employment, including evaluations, assignments, status changes, and imposed discipline.

(2) "Unfounded" means that the investigation clearly established that the allegation is not true.

(3) "Exonerated" means that the investigation clearly established that the actions of the peace or custodial officer that formed the basis for the complaint are not violations of law or department policy.

SEC. 3. Section 832.7 of the Penal Code is amended to read:

832.7. (a) Except as provided in subdivision (b), the personnel records of peace officers and custodial officers and records maintained by a state or local agency pursuant to Section 832.5, or information obtained from these records, are confidential and shall not be disclosed in any criminal or civil proceeding except by discovery pursuant to Sections 1043 and 1046 of the Evidence Code. This section does not apply to investigations or proceedings concerning the conduct of peace officers or custodial officers, or an agency or department that employs those officers, conducted by a grand jury, a district attorney's office, or the Attorney General's office.

(b) (1) Notwithstanding subdivision (a), subdivision (f) of Section 6254 of the Government Code, or any other law, the following peace officer or custodial officer personnel records and records maintained by a state or local agency shall not be confidential and shall be made available for public inspection pursuant to the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code):

(A) A record relating to the report, investigation, or findings of any of the following:

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

(ii) An incident involving the use of force by a peace officer or custodial officer against a person~~, provided that the underlying complaint was not determined to be frivolous~~.

(B) (i) Any record relating to an incident in which a peace officer or custodial officer engaged in sexual assault involving a member of the public~~, provided that the underlying complaint was not determined to be frivolous~~.

(ii) As used in this subparagraph, "sexual assault" means the commission or attempted initiation of a sexual act with a member of the public by means of force, threat, coercion, extortion, offer of leniency or other official favor, or under the color of authority. For purposes of this definition, the propositioning for or commission of any sexual act while on duty is considered a sexual assault.

(iii) As used in this subparagraph, "member of the public" means any person not employed by the officer's employing agency and includes any participant in a cadet, explorer, or other youth program affiliated with the agency.

(C) Any record relating to an incident involving dishonesty by a peace officer or custodial officer directly relating to the reporting, investigation, or prosecution of a crime, or directly relating to the reporting of, or investigation of misconduct by, another peace officer or custodial officer, including, but not limited to, any ~~sustained finding of perjury,~~ false statements, filing false reports, destruction, falsifying, or concealing of evidence *or sustained findings of perjury*~~, provided that the underlying complaint was not determined to be frivolous~~.

(D) Any record relating to an incident, including, but not limited to, verbal statements, writings, online posts, recordings, and gestures, involving prejudice or discrimination against a person on the basis of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status~~, provided the underlying complaint was not determined to be frivolous~~.

(E) Any record relating to an incident in which a sustained finding was made by any law enforcement agency or oversight agency that the peace officer made a wrongful arrest or conducted a wrongful search.

(2) Records that shall be released pursuant to this subdivision include all investigative reports; photographic, audio, and video evidence; transcripts or recordings of interviews; autopsy reports; all materials compiled and presented for review to the district attorney or to any person or body charged with determining whether to file criminal charges against an officer in connection with an incident, whether the officer's action was consistent with law and agency policy for purposes of discipline or administrative action, or what discipline to impose or corrective action to take; documents setting forth findings or recommended findings; and copies of disciplinary records relating to the incident, including any letters of intent to impose discipline, any documents reflecting modifications of discipline due to the Skelly or grievance process, and letters indicating final imposition of discipline or other documentation reflecting implementation of corrective action. Records that shall be released pursuant to this subdivision also include records relating to an incident specified in paragraph (1) in which the peace officer or custodial officer resigned before the law enforcement agency or oversight agency concluded its investigation into the alleged incident.

(3) A record from a separate and prior investigation or assessment of a separate incident shall not be released unless it is independently subject to disclosure pursuant to this subdivision.

(4) If an investigation or incident involves multiple officers, information about allegations of misconduct by, or the analysis or disposition of an investigation of, an officer shall not be released pursuant to subparagraph (B) or (C)*, (D) or (E)* of paragraph (1), unless it relates to a ~~sustained~~ finding ~~against~~ *regarding* that officer *that is itself subject to disclosure pursuant to this section*. However, factual information about that action of an officer during an incident, or the statements

of an officer about an incident, shall be released if they are relevant to a ~~sustained~~ finding against another officer that is subject to release pursuant to subparagraph (B), ~~or~~ (C), *(D), or (E)* of paragraph (1).

(5) An agency shall redact a record disclosed pursuant to this section only for any of the following purposes:

(A) To remove personal data or information, such as a home address, telephone number, or identities of family members, other than the names and work-related information of peace and custodial officers.

(B) To preserve the anonymity of complainants and witnesses.

(C) To protect confidential medical, financial, or other information of which disclosure is specifically prohibited by federal law or would cause an unwarranted invasion of personal privacy that clearly outweighs the strong public interest in records about *possible* misconduct and ~~serious~~ use of force by peace officers and custodial officers.

(D) Where there is a specific, articulable, and particularized reason to believe that disclosure of the record would pose a significant danger to the physical safety of the peace officer, custodial officer, or another person.

(6) Notwithstanding paragraph (5), an agency may redact a record disclosed pursuant to this section, including personal identifying information, where, on the facts of the particular case, the public interest served by not disclosing the information clearly outweighs the public interest served by disclosure of the information.

(7) An agency may withhold a record of an incident described in subparagraph*s* (A)-*(E)* of paragraph (1) that is the subject of an active criminal or administrative investigation, in accordance with any of the following:

(A) (i) During an active criminal investigation, disclosure may be delayed for up to 60 days from the date the *misconduct or* use of force occurred or until the district attorney determines whether to file criminal charges related to the *misconduct or* use of force, whichever occurs sooner. If an agency delays disclosure pursuant to this clause, the agency shall provide, in writing, the specific basis for the agency's determination that the interest in delaying disclosure clearly outweighs the public interest in disclosure. This writing shall include the estimated date for disclosure of the withheld information.

(ii) After 60 days from the *misconduct or* use of force, the agency may continue to delay the disclosure of records or information if the disclosure could reasonably be expected to interfere with a criminal enforcement proceeding against an officer who *engaged in misconduct or* used the force. If an agency delays disclosure pursuant to this clause, the agency shall, at 180-day intervals as necessary, provide, in writing, the specific basis for the agency's determination that disclosure could reasonably be expected to interfere with a criminal enforcement proceeding. The writing

shall include the estimated date for the disclosure of the withheld information. Information withheld by the agency shall be disclosed when the specific basis for withholding is resolved, when the investigation or proceeding is no longer active, or by no later than 18 months after the date of the incident, whichever occurs sooner.

(iii) After 60 days from the *misconduct or* use of force, the agency may continue to delay the disclosure of records or information if the disclosure could reasonably be expected to interfere with a criminal enforcement proceeding against someone other than the officer who *engaged in the misconduct or* used the force. If an agency delays disclosure under this clause, the agency shall, at 180-day intervals, provide, in writing, the specific basis why disclosure could reasonably be expected to interfere with a criminal enforcement proceeding, and shall provide an estimated date for the disclosure of the withheld information. Information withheld by the agency shall be disclosed when the specific basis for withholding is resolved, when the investigation or proceeding is no longer active, or by no later than 18 months after the date of the incident, whichever occurs sooner, unless extraordinary circumstances warrant continued delay due to the ongoing criminal investigation or proceeding. In that case, the agency must show by clear and convincing evidence that the interest in preventing prejudice to the active and ongoing criminal investigation or proceeding outweighs the public interest in prompt disclosure of records about *misconduct or* use of ~~serious~~ force by peace officers and custodial officers. The agency shall release all information subject to disclosure that does not cause substantial prejudice, including any documents that have otherwise become available.

(iv) In an action to compel disclosure brought pursuant to Section 6258 of the Government Code, an agency may justify delay by filing an application to seal the basis for withholding, in accordance with Rule 2.550 of the California Rules of Court, or any successor rule, if disclosure of the written basis itself would impact a privilege or compromise a pending investigation.

(B) If criminal charges are filed related to the incident in which *misconduct occurred or* force was used, the agency may delay the disclosure of records or information until a verdict on those charges is returned at trial or, if a plea of guilty or no contest is entered, the time to withdraw the plea pursuant to Section 1018.

(C) During an administrative investigation into an incident described in subparagraph*s* (A)*-(E)* of paragraph (1), the agency may delay the disclosure of records or information until the investigating agency determines whether the *misconduct or* use of force violated a law or agency policy, but no longer than 180 days after the date of the employing agency's discovery of the *misconduct or* use of force, or allegation of use of force, by a person authorized to initiate an investigation*.* ~~; or 30 days after the close of any criminal investigation related to the peace officer or custodial officer's use of force, whichever is later.~~

(8) A record of a ~~civilian~~ complaint, or the investigations, findings, or dispositions of that complaint, shall not be released pursuant to this section if the complaint is frivolous, as defined in Section 128.5 of the Code of Civil Procedure, or if the complaint is unfounded.

(9) The cost of copies of records subject to disclosure pursuant to this subdivision that are made available upon the payment of fees covering direct costs of duplication pursuant to subdivision (b) of Section 6253 of the Government Code shall not include the costs of editing or redacting the records.

(10) For every day beyond 30 days after the date which a record is to be disclosed, as required by this subdivision, an agency shall be subject to a civil fine ~~of~~ *not to exceed* one thousand dollars ($1,000) per day for each day that the records are not disclosed.

(11) *Notwithstanding Government Code section 6259, subdivision (d), a* ~~A~~ member of the public who files a suit pursuant to Section 6258 of the Government Code for records required by this subdivision that are found to have been improperly withheld or improperly redacted shall be entitled to ~~damages equal to~~ twice the party's reasonable costs and attorney's fees.

(12) For purposes of releasing records pursuant to this subdivision, the attorney-client privilege shall not be asserted to limit the disclosure of factual information provided by the public entity to its attorney, factual information discovered by any investigation done by the public entity's attorney, or billing records related to the work done by the attorney.

(c) Notwithstanding subdivisions (a) and (b), a department or agency shall release to the complaining party a copy of the complaining party's own statements at the time the complaint is filed.

(d) Notwithstanding subdivisions (a) and (b), a department or agency that employs peace or custodial officers may disseminate data regarding the number, type, or disposition of complaints (sustained, not sustained, exonerated, or unfounded) made against its officers if that information is in a form which does not identify the individuals involved.

(e) Notwithstanding subdivisions (a) and (b), a department or agency that employs peace or custodial officers may release factual information concerning a disciplinary investigation if the officer who is the subject of the disciplinary investigation, or the officer's agent or representative, publicly makes a statement they know to be false concerning the investigation or the imposition of disciplinary action. Information may not be disclosed by the peace or custodial officer's employer unless the false statement was published by an established medium of communication, such as television, radio, or a newspaper. Disclosure of factual information by the employing agency pursuant to this subdivision is limited to facts contained in the officer's personnel file concerning the disciplinary investigation or imposition of disciplinary action that specifically refute the false statements made public by the peace or custodial officer or their agent or representative.

(f) (1) The department or agency shall provide written notification to the complaining party of the disposition of the complaint within 30 days of the disposition.

(2) The notification described in this subdivision is not conclusive or binding or admissible as evidence in any separate or subsequent action or proceeding brought before an arbitrator, court, or judge of this state or the United States.

(g) This section does not affect the discovery or disclosure of information contained in a peace or custodial officer's personnel file pursuant to Section 1043 of the Evidence Code.

(h) This section does not supersede or affect the criminal discovery process outlined in Chapter 10 (commencing with Section 1054) of Title 6 of Part 2, or the admissibility of personnel records pursuant to subdivision (a), which codifies the court decision in Pitchess v. Superior Court (1974) 11 Cal.3d 531.

(i) Nothing in this chapter is intended to limit the public's right of access as provided for in Long Beach Police Officers Association v. City of Long Beach (2014) 59 Cal.4th 59.

SEC. 4. Section 832.12 of the Penal Code is amended to read:

832.12. (a) Each department or agency in this state that employs peace officers shall make a record of any investigations of misconduct involving a peace officer in the officer's general personnel file or a separate file designated by the department or agency. A peace officer seeking employment with a department or agency in this state that employs peace officers shall give written permission for the hiring department or agency to view the officer's general personnel file and any separate file designated by a department or agency.

(b) Prior to employing any peace officer, each department or agency in this state that employs peace officers shall request, and the hiring department or agency shall review, any records made available pursuant to subdivision (a).

SEC. 5. Section 832.13 is added to the Penal Code, to read:

832.13. Every person employed as a peace officer shall immediately report all uses of force by the officer to the officer's department or agency.

SEC. 6. If the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code.

Date of Hearing: August 5, 2020
Counsel: Nikki Moore

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

SB 1064 (Skinner) – As Amended June 18, 2020

SUMMARY: Limits the use of confidential, uncorroborated information reported about a state prisoner. Specifically, **this bill**:

1) Provides that an employee of, or private entity under contract with, the Department of Corrections and Rehabilitation (CDCR) shall not find any state prisoner to be guilty of a rules violation, if the finding or decision is based on, or relies on, in whole or in part, any uncorroborated information from an in-custody confidential informant.

2) States that an employee of, or private entity under contract with, the Board of Parole Hearings (BPH) shall not make a finding or decision about any state prisoner that is based on, or relies on, in whole or in part, allegations that have not been found true following a disciplinary hearing at which the subject was provided notice, an opportunity to confront nonconfidential witnesses before an impartial hearing body, a written statement of the evidence relied upon, a written statement of the reasons for the decision, and an opportunity for appeal.

3) Provides that at least 10 days prior to any proceeding in which a decision described above is made or considered, including any interview on which a risk rating is based, the subject prisoner, and the prisoner's attorney, if the prisoner is represented by an attorney, shall receive a summary notice of any information provided by an in-custody confidential informant that may be used in the decision. The summary notice shall include all of the following:

   a) A detailed description of the information provided by the confidential informant;

   b) The date the information was provided to the department;

   c) The date of the events or actions referred to in the informant's report;

   d) The location where the information was provided by the informant;

   e) The name of the officer who obtained and recorded the informant's report;

   f) The source and nature of the informant's personal knowledge of the events or actions;

   g) The investigative steps taken by the receiving officer or other department official to confirm the facts reported and the informant's personal knowledge;

h) The informant's previous record of confidential information, including instances of information not meeting standards of reliability;

i) The evidence used to corroborate the information. If the information is corroborated by another in-custody confidential informant, a summary notice pursuant to this subdivision shall also be provided with respect to the corroborating informant. If corroboration is provided by a nonconfidential informant, or by physical evidence, that information shall be fully disclosed in the notice; and,

j) A signed statement by the decisionmaker that the decisionmaker has made the determination required, described below.

4) Defines "state prisoner" to mean "any person under the jurisdiction of the department who is not on parole."

5) Provides that confidential information is "corroborated" if "information about the same person, act, time, and place has been separately and independently provided by another confidential informant, nonconfidential informant, or physical evidence. Information is provided independently if the decisionmaker determines there has been no contact or communication between the in-custody confidential informant and the corroborating source, and there has been no prior knowledge of any supporting physical evidence."

6) Defines "in-custody confidential informant" to mean "a person in custody in any local, state, or federal jail, penal institution, or correctional institution, whose name and full statement has not been disclosed to the prisoner who is the subject of the decision by the department or board."

EXISTING LAW:

1) Establishes a system of state prisons under the jurisdiction of the California Department of Corrections and Rehabilitation (CDCR). (Pen. Code, § 2000 et seq.)

2) Authorizes CDCR to develop and amend regulations and rules for the administration of the state's prisons. (Pen. Code, § 5058.)

3) Establishes the Board of Parole Hearings (BPH) and delineates its duties, including conducting parole consideration hearings. (Pen. Code, §§ 5075, 5075.1.)

4) Provides that inmate misconduct shall be handled by verbal counseling, counseling only rules violation reports, or rules violation reports. (Cal. Code. Regs, tit. 15, § 3312, subd. (a).)

5) Provides that when inmate misconduct is believed to be a violation of the law or is not minor in nature, it shall be reported on a Rules Violation Report (RVR). (Cal. Code. Regs, tit. 15, § 3312, subd. (a)(3).)

6) Requires the RVR to contain the following: the charged inmate's name, number, release date, facility, housing assignment; violation date and time; whether or not the misconduct was related to Security Threat Group activity; circumstances surrounding the misconduct; the reporting employee's name and title; RVR log number; the violated CCR Title 15 rule

number, specific act, level, division; whether or not the charge will be referred for prosecution; reviewing supervisor's name and title; and the classifying official's name and title. (Cal. Code. Regs, tit. 15, § 3312, subd. (a)(3).)

7) Requires the RVR to include a section for the inmate to indicate whether or not they wish to postpone the RVR process if felony prosecution is likely and a section to indicate if they wish to request or waive an assignment of a Staff Assistant or Investigative Employee. Provides that a summary of disciplinary procedures and inmate rights is provided to the inmate explaining the administrative hearing time frames and the roles of both the staff assistant and the investigative employee. Provides that the referral for prosecution and the inmate's appeal rights are explained. (Cal. Code. Regs, tit. 15, § 3312, subd. (a)(3).)

8) Provides the circumstances under which an RVR be classified as administrative. (Cal. Code Regs., tit. 15, § 3314.)

9) Provides the circumstances under which an RVR be classified as serious. Establishes the structure of the investigation and hearing for a serious RVR. (Cal. Code Regs., tit. 15, § 3315.)

10) Requires the following types of information to be classified as confidential:

    a) Information which, if known to the inmate, would endanger the safety of any person;

    b) Information which would jeopardize the security of the institution;

    c) Specific medical or psychological information which, if known to the inmate, would be medically or psychologically detrimental to the inmate;

    d) Information provided and classified confidential by another governmental agency; and,

    e) A Security Threat Group debrief report, reviewed and approved by the debriefing subject, for placement in the confidential section of the central file. (Cal. Code Regs., tit. 15, § 3321, subd. (a).)

11) Prohibits a decision from being based upon information from a confidential source, unless other documentation corroborates information from the source, or unless other circumstantial evidence surrounding the event and the documented reliability of the source satisfies the decision maker that the information is true. (Cal. Code Regs., tit. 15, § 3321, subd. (b)(1).)

12) Requires that any document containing information from a confidential source include an evaluation of the source's reliability, a brief statement of the reason for the conclusion reached, and a statement of reason why the information or source is not disclosed. (Cal. Code Regs., tit. 15, § 3321, subd. (b)(2).)

13) Requires that the documentation given to the inmate include:

    a) The fact that the information came from a confidential source; and

b) As much of the information as can be disclosed without identifying its source including an evaluation of the source's reliability; a brief statement of the reason for the conclusion reached; and a statement of reason why the information or source is not disclosed. (Cal. Code Regs., tit. 15, § 3321, subd. (b)(3).)

14) Provides that a confidential source's reliability may be established by one or more of the following criteria:

a) The confidential source has previously provided information which proved to be true;

b) Other confidential source have independently provided the same information;

c) The information provided by the confidential source is self-incriminating;

d) Part of the information provided is corroborated through investigation or by information provided by non-confidential sources;

e) The confidential source is the victim; and,

f) This source successfully completed a polygraph examination. (Cal. Code Regs., tit. 15, § 3321, subd. (c).)

15) Prohibits a parole consideration decision from being based upon information that is not available to the inmate unless the information has been designated confidential under the rules of the department and is necessary to the decision. (Cal. Code Regs., tit. 15, § 2235.)

16) Requires that the reliability of confidential information to be used be established to the satisfaction of the hearing panel. Requires a finding of reliability to be documented by the hearing panel. Provides that a hearing may be continued to establish the reliability of the information or to request the department to designate the information as nonconfidential. (Cal. Code Regs., tit. 15, § 2235.)

17) Requires the inmate to be notified of reports on which the panel relied if confidential information affected a decision. (Cal. Code Regs., tit. 15, § 2235.)

18) Provides for the use of comprehensive risk assessments by the BPH hearing panel when making parole consideration decisions. Outlines the process by which an inmate or the inmate's attorney may object to a factual error believed to be contained in the risk assessment and the process by which BPH evaluates the allegation. (Cal. Code Regs., tit. 15, § 2240.)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "Incarcerated people are currently deprived of their due process rights when uncorroborated information about them is entered into their confidential prison files. Under the state's existing system, an in-custody confidential informant can make an unsubstantiated allegation against another inmate, and that allegation can then be entered into the accused's inmate's confidential prison file — without the

accused person's knowledge. This information is often inaccurate or lacking physical evidence to prove the accusation, yet can negatively impact parole hearings & justify discipline by CDCR.

"In 2011, California barred the conviction of criminal defendants based on uncorroborated testimony from in-custody informants (SB 687, Leno), because of the inherent unreliability of that information. However, such uncorroborated allegations are still used to deny parole to people in state prisons.

"SB 1064 protects the basic due process rights of incarcerated people in the collection and use of information from in-custody confidential informants by California's Department of Corrections and Rehabilitation (CDCR). Specifically, the bill prevents CDCR and the Board of Parole Hearings (BPH) from making findings or decisions that rely in whole or in part on allegations that are uncorroborated and come from an in-custody confidential informant. Information from a confidential informant can be used only if it is substantiated with evidence that supports the allegation. Additionally, if CDCR or BPH are going to meet and consider information regarding an incarcerated person, the person accused shall receive a summary notice of any information provided by an in-custody confidential informant that may be used in the decision making process. This allows the accused inmate an opportunity to offer evidence proving the claim is false or appeal, while the confidential informant's identity remains undisclosed."

2) **Uncorroborated Information in a Person's Confidential File Poses a Substantial Barrier to the Grant of Parole**: This bill sets forth due process procedures for a person who is detained in a state prison, granting them the right to know and contest uncorroborated allegations and statements made by an in-custody informant which are contained in the confidential portion of a person's file.

When a person confined in state prison receives an indeterminate sentence, e.g. 15 years to life, the person must appear before the BPH prior to eligibility for parole. The BPH considers the person's file, including the confidential portion which contains information potentially including allegations by in-custody informant. The BPH considers various other topics including the inmate's rehabilitative efforts, disciplinary history, and psychological evaluations that discuss likelihood of future violence.

California law provides that parole shall "normally" be granted, unless the BPH determines that a person poses "an unreasonable risk of danger to society if released from prison." In making that determination, the BPH may consider all relevant and reliable information to determine a person's suitability for parole. The BPH is limited in denying parole based on information that the person is unaware of, unless that information has been designated "confidential."

Advocates for this bill assert that often the BPH often relys on information contained in the confidential portions of a person's file that is uncorroborated, not reliable, and which the person does not have full knowledge of, and thus is unable to properly address.

Here are a few examples provided to this committee:

"In June 2012, Parole Applicant #1 was denied parole based solely on a confidential memo

that was included in his central file. The Board gave no guidance about what information this memo contained, who created it, or whether it had been corroborated, verified, or investigated in any way. Months later, in response to PA #1's administrative appeal (CDCR Form 602), prison officials revealed that the confidential information actually involved a different person altogether but was erroneously placed in PA #1's file. The Board's decision was vacated, a new hearing was conducted, and PA #1 was found suitable in February 2013. These unproven allegations cost PA #1 eight additional months in prison."

"Parole Applicant #2 received a CDC-115 (rule violation report) in 2002. Between 2002 and 2004, four confidential memoranda were generated about the 115. When an investigation by prison officials cleared PA #2 of the initial charge, the 115 was dismissed, and all references to it were supposed to be removed from his file. However, the memos in his confidential folder remained. It took many years of administrative appeals, court orders, and parole hearings before PA #2 was finally released. During those years, at least one set of parole commissioners found that PA #2's insistence on having the unlawful information removed from his file actually worked against a finding of parole suitability. Similarly, the Board's psychologist used the presence of the confidential information to elevate the prediction of PA #2's risk to public safety, and the Governor reversed one of PA #2's parole grants based on the existence of the confidential information. His release was delayed roughly eight years due to this unproven information."

"Improper reliance on unproven allegations extended Parole Applicant #3's time in prison by fifteen years. In fact, both the Board of Parole Hearings and the Governor cited those false allegations in blocking his release – and they included allegations for which PA #3 had been acquitted decades earlier. It took multiple court orders and numerous parole hearings before PA #3 was finally released in 2018, after nearly 40 years in prison and some 15 years after the first time he was granted parole."

"After 15 years in prison, Parole Applicant #7 made the choice to turn her life around. She received her last 115 (write-up) in 2008; however, unproven statements in her confidential file allege that she acted violently as recently as 2017. Despite the fact that she has not received any documented rule violations in the past twelve years, PA #7's former gang activity has made her a target for malicious and uncorroborated allegations regarding her conduct, and her name is frequently used by others who wish to be transferred to other institutions. In her last psychological evaluation (Comprehensive Risk Assessment) in February 2020, a Board psychologist wrote that despite 'receiving no violations since 2008 [...] she appears to have engaged in undetected rule breaking' due to the information in her confidential file. Based on the allegations of undetected rule breaking, the psychologist then determined that, if released on parole, PA #7 would have a high-risk of violence."

"Parole Applicant #9 was denied parole for three years in December 2019. She has received no rule violation reports since 1998 (22 years ago). Although she has been incarcerated for nearly 30 years, the Board denied parole in part based on a "credibility" finding related to unproven allegations from four years ago. Even worse, the Board used that credibility finding to discredit PA #9's extensive testimony about physical and sexual abuse by the victim in her crime."

3) **Arguments in Support**:

a) According to *Uncommon Law*, "During the course of most parole hearings (more than 6,000 were scheduled in 2019), parole commissioners discuss the possibility of relying on confidential information in making their parole decision. Until recently, the Board did not consider itself obligated to disclose any of the substance of the allegations contained in the confidential material. Even now, their disclosure is so limited as to leave parole applicants and counsel guessing about what the specific allegation is, where the conduct occurred, who might have been involved, and what the applicant's role was. Unfortunately, I have seen too many parole commissioners and their psychologists decide that a person is dangerous or not credible based on confidential information that has not been subjected to any standard of proof. They were mere allegations that might have been made by someone with their own motives for falsely implicating the parole applicant in misconduct. Fundamental due process requires much more, particularly when someone's future hangs in the balance after decades in prison and extensive positive programming. In just the last few weeks, we have reviewed nearly two dozen cases of individuals who were denied parole based at least in part on unproven allegations. In some of those cases, further investigation – after the Board had already denied parole – proved that the allegations were completely false."

b) According to the *California Public Defenders Association*, "SB 1064 provides prisoners with basic due process. Specifically, Senate Bill 1064 requires that any rules violation, which is alleged against a prisoner by a Department of Corrections and Rehabilitation employee, be supported by more than the report of a confidential informant. Going a step further, Senate Bill 1064 prohibits the Board of Parole hearings from considering allegations against a prisoner unless the prisoner: 1) was found to have committed the violation after a disciplinary hearing for which the prisoner was properly noticed; 2) had an opportunity to confront non-confidential witness at a hearing; 3) was found in violation, which was documented in a written statement of evidence that was relied upon; 4) was found in violation, which was supported by a written statement of reasons for the adverse finding; and 5) had an opportunity to appeal the finding. Lastly, Senate Bill 1064 lists the information that must be included in the notice of violation that is provided to a prisoner prior to any disciplinary hearing.

"Confidential informants are unreliable. SB 1064 acknowledges this unreliability, and the unfairness that results from punishment that is solely based on the word of a confidential informant. By requiring independent corroboration, Senate Bill 1064 gives prisoners much needed protection from arbitrary punishment. Further, Senate Bill 1064 prohibits the Parole Board from delaying an individual's release because of a violation that was determined by an unfair process. By carefully articulating the requirements of any adverse finding, and particularly laying out the content of any notice that is provided to a prisoner, Senate Bill 1064 will provide prisoners with fundamental protection from arbitrary punishment."

4) **Argument in Opposition**: According to the *California District Attorneys Association*, "This bill would deprive the California Department of Corrections and Rehabilitation (CDCR) from using reliable evidence of inmate criminal activity to hold them accountable in disciplinary hearings, thwart criminal prosecutions, prohibit the Board of Parole Hearings (BPH) from considering relevant criminal misconduct at lifer parole hearings, deprive

forensic psychologists from considering relevant information in determining an inmate's risk for future violence, and jeopardize the safety of inmates and correctional staff.

"Currently, when an inmate is alleged to have committed a serious rules violation (115), they are given notice of the proposed disciplinary hearing, including a written rights advisement and circumstances of the violation. The names of the confidential informant(s) or non-confidential informant(s) are not provided to the inmate and correctional staff takes great care to avoid giving the inmate facts that would unmask informants to ensure the safety of the informant(s), their friends and family, and correctional staff. Inmates have the choice of proceeding with the 115 hearing or postponing it until the District Attorney's Office has made a decision whether or not to prosecute. Most inmates postpone the 115 hearing. Currently, at a parole suitability hearing BPH can consider 'all relevant and reliable information,' including the conduct behind the 115 hearings that have been dismissed for technical issues such as timeliness. BPH give the information the weight it should be given just as a court would determine weight and admissibility of evidence. Under current law, life inmates are given notice of the use of confidential information (Form 1030) in advance of their parole suitability hearing pursuant to California Code of Regulations, Title 15, section 3321. The notice includes the date of confidential source items and a summary of the confidential information. The notice does not name confidential or non-confidential informants or provide facts that would unmask their identity and jeopardize their safety and the security of the institution. During a parole suitability hearing, BPH commissioners may ask the inmate about confidential information if they choose to. If they determine they will use confidential information to reach a decision, they must make a confidential tape for that part of the decision. That tape, the entire inmate central file, including the confidential section, are provided to a reviewing court if an appeal is filed. This process mirrors the criminal justice process regarding the use of confidential informants. Currently, forensic psychologists have access to all relevant information necessary for them to reach an accurate assessment of an inmate's risk for future violence prepared in advance of a parole suitability hearing, which can be relied upon by BPH.

[...]

"SB 1064 will upend the parole suitability hearing process. Forensic psychologists would be deprived of relevant information necessary to make a thorough examination and determination of an inmate's risk for future violence. That means that the commissioners would be relying upon risk assessments that are incomplete and inaccurate when making parole suitability decisions. AB 1064 would prevent BPH from relying upon relevant confidential information introduced at 115 hearings where inmates were found not guilty, unfairly and dangerously tilting the scales towards parole suitability. The proposal would also likely prevent the use by BPH of CDCR Forms 128(a) and (b), which contain valuable information regarding an inmate's minor rules violations and other relevant information, in determining parole suitability. This only serves to protect the criminal actor, not hold them accountable for their misconduct.

"Lastly, SB 1064 is unnecessary. Existing law already affords inmates facing disciplinary hearings a summary of the evidence substantiated the charges against them. At the hearing, inmates can call witnesses or introduce evidence on their behalf. Likewise, under current law, at a lifer suitability hearing, inmates are given notice, including a summary of any confidential information that may be considered by BPH at the hearing. If confidential

information is used by the commissioners in reaching their decision, that information is preserved and available for review by the court on appeal."

5) **Prior Legislation**: SB 687 (Leno), Chapter 153, Statutes of 2011, established that a defendant cannot be convicted based on the uncorroborated testimony of an in-custody informant.

REGISTERED SUPPORT / OPPOSITION:

Support

American Civil Liberties Union/northern California/southern California/san Diego and Imperial Counties
American Friends Service Committee (AFSC)
Asian Americans Advancing Justice - California
Asian Solidarity Collective
California Attorneys for Criminal Justice
California Public Defenders Association
Center for Constitutional Rights
Community Legal Services in East Palo Alto
Community Works
Drug Policy Alliance
Ella Baker Center for Human Rights
End Solitary Santa Cruz County
Friends Committee on Legislation of California
Haiti Action Committee
Initiate Justice
Legal Services for Prisoners With Children
Pillars of The Community
San Francisco Public Defender
Silicon Valley De-bug
Team Justice
Temple Beth El, Aptos, CA
Think Dignity
Tides Advocacy
Uncommon Law
We the People - San Diego

Oppose

California District Attorneys Association

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

Date of Hearing: August 5, 2020
Counsel: David Billingsley

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

SB 1196 (Umberg) – As Amended July 27, 2020

As Proposed to be Amended in Committee

SUMMARY: Includes a person or entity that was not selling specified goods and services prior to the proclamation or declaration of an emergency within the scope of the crime of price gouging. Allows the Governor or the Legislature to extend the time frame for price gouging beyond 30 days without extending the order at the end of each 30 day period. Specifically, **this bill**:

1) Includes pandemic or epidemic disease outbreak in the lists of events that can trigger a declaration of emergency.

2) Specifies that a person, business, or other entity may not sell specified goods and services for a price of more than 10 percent greater than the price charged by that person for those goods or services immediately prior to the proclamation or declaration of emergency, or prior to a date set in the proclamation or declaration.

3) If the person, contractor, business, or other entity did not charge a price for the goods or services immediately prior to the proclamation or declaration of emergency, it may not charge a price that is more than 50 percent greater than either the seller's existing costs, as specified, and the amount that the seller paid for the goods or, if the seller did not purchase the goods, the seller's costs in selling or providing the goods or services.

4) Allows the Governor or the Legislature to extend the time frame for price gouging beyond 30 days without limit, while continuing to specify that each extension of the price gouging provisions by a local legislative body or local official shall not exceed 30 days.

1) **EXISTING LAW**:

Finds that during emergencies and major disasters, including, but not limited to, earthquakes, fires, floods, or civil disturbances, some merchants have taken unfair advantage of consumers by greatly increasing prices for essential consumer goods and services. (Pen. Code, § 396, subd. (a).)

2) States that it is the intent of the Legislature to protect citizens from excessive and unjustified increases in the prices charged during or shortly after a declared state of emergency for goods and services that are vital and necessary for the health, safety, and welfare of consumers. (Pen. Code, § 396, subd. (a).)

3) Provides that upon the declaration of a state of emergency resulting from an earthquake, flood, fire, riot, storm, or natural or manmade disaster declared by the President of the United

States or the Governor, or upon the declaration of a local emergency resulting from an earthquake, flood, fire, riot, storm, or natural or manmade disaster by the executive officer of any county, city, or city and county, and for a period of 30 days following that declaration, it is unlawful for a person, contractor, business, or other entity to sell or offer to sell any consumer food items or goods, goods or services used for emergency cleanup, emergency supplies, medical supplies, home heating oil, building materials, housing, transportation, freight, and storage services, or gasoline or other motor fuels for a price of more than 10 percent above the price charged by that person for those goods or services immediately prior to the proclamation of emergency. (Pen. Code, § 396, subd. (b).)

4) States that upon the declaration of a state of emergency, as specified, and for a period of 180 days following that declaration, it is unlawful for a contractor to sell or offer to sell any repair or reconstruction services or any services used in emergency cleanup for a price of more than 10 percent above the price charged by that person for those services immediately prior to the proclamation or declaration of emergency. (Pen. Code, § 396, subd. (c).)

5) Provides that a greater price increase is not unlawful if that person can prove that the increase in price was directly attributable to additional costs imposed on it by the supplier of the goods, or directly attributable to additional costs for labor or materials used to provide the services, provided that in those situations where the increase in price is attributable to the additional costs imposed by the contractor's supplier or additional costs of providing the service during the state of emergency or local emergency, the price represents no more than 10 percent above the total of the cost to the contractor plus the markup customarily applied by the contractor for that good or service in the usual course of business immediately prior to the onset of the state of emergency or local emergency. (Pen. Code, § 396, subd. (c).)

6) Specifies that upon the proclamation of a state of emergency, as specified, and for a period of 30 days following that proclamation or declaration, it is unlawful for an owner or operator of a hotel or motel to increase the hotel or motel's regular rates, as advertised immediately prior to the proclamation or declaration of emergency, by more than 10 percent. However, a greater price increase is not unlawful if the owner or operator can prove that the increase in price is directly attributable to additional costs imposed on it for goods or labor used in its business, to seasonal adjustments in rates that are regularly scheduled, or to previously contracted rates. (Pen. Code, § 396, subd. (d).)

7) Specifies that, a greater price increase for the goods and services, mentioned above, is not unlawful if that person can prove that the increase in price was directly attributable to additional costs imposed by specified circumstances. (Pen. Code, § 396, subd. (a)-(c).)

8) States that up the proclamation of a state of emergency and for a period of 30 days following that proclamation or declaration, or any period the proclamation or declaration is extended by the applicable authority, it is unlawful for any person, business, or other entity, to increase the rental price, as defined, advertised, offered, or charged for housing, to an existing or prospective tenant, by more than 10 percent. (Pen. Code, § 396, subd. (e).)

9) Specifies that it is unlawful for a person, business, or other entity to evict any residential tenant of residential housing after the proclamation of a state of emergency and for a period of 30 days following that proclamation or declaration, or any period that the proclamation or declaration is extended by the applicable authority and rent or offer to rent to another person

at a rental price greater than the evicted tenant could be charged under this section. (Pen. Code, § 396, subd. (f).)

10) Provides that time frame prohibiting specified price increases may be extended for additional 30-day periods by a local legislative body or the California Legislature, if deemed necessary to protect the lives, property, or welfare of the citizens. (Pen. Code, § 396, subd. (g).)

11) States that the conduct described above is a misdemeanor punishable by imprisonment in a county jail for a period not exceeding one year, or by a fine of not more than ten thousand dollars ($10,000), or by both that fine and imprisonment. (Pen. Code, § 396 subd. (h).)

12) Specifies that the conduct described above shall constitute an unlawful business practice and an act of unfair competition. (Pen. Code, § 396 subd. (i).)

13) Defines "State of emergency" as "a natural or manmade emergency resulting from an earthquake, flood, fire, riot, storm, drought, plant or animal infestation or disease, or other natural or manmade disaster for which a state of emergency has been declared by the President of the United States or the Governor of California." (Pen. Code, § 396, subd. (j)(1).)

14) Defines "Local emergency" as "a natural or manmade emergency resulting from an earthquake, flood, fire, riot, storm, drought, plant or animal infestation or disease, or other natural or manmade disaster for which a local emergency has been declared by an official, board, or other governing body vested with authority to make such a declaration in any county, city, or city and county in California.." (Pen. Code, § 396, subd. (j)(2).)

15) Defines "Housing" as "any rental housing with an initial lease term of no longer than one year, including, but not limited to, a space rented in a mobilehome park or campground" for purposes of criminal price gouging. (Pen. Code, § 396, subd. (j)(11).)

16) Specifies that "cost" as applied to production includes the cost of raw materials, labor and all overhead expenses of the producer. (Bus. and Prof. Code, § 17026.)

17) States that "cost" as applied to distribution means the invoice or replacement cost, whichever is lower, of the article or product to the distributor and vendor, plus the cost of doing business by the distributor and vendor and in the absence of proof of cost of doing business a markup of 6 percent on such invoice or replacement cost shall be prima facie proof of such cost of doing business. (Bus. and Prof. Code, § 17026.)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "The COVID-19 pandemic has exposed inadequacies in California's law governing price gouging, which prohibits sellers from unlawfully increasing the cost of essential goods during an emergency. During the COVID-19 pandemic, we are seeing unscrupulous sellers buying vitally needed consumer goods and personal protective equipment, thus depleting store shelves, and then selling those essential goods for extortionately high prices, online as well as in traditional retail stores. Current law

prevents law enforcement from prosecuting new sellers who opportunistically enter into a market during an emergency for profit.

"To help ensure that all Californians have access to essential goods during an emergency, SB 1196 would

- Specify that a seller cannot sell an item for more than 50% above its costs, as defined, if that seller did not sell the item prior to the state of emergency;
- Ensure that our price gouging prohibition applies in epidemic emergencies and also to online sales as well as traditional brick-and-mortar retail sales;
- Codify the Governor's and Legislature's authority to extend price gouging protections; and
- Creates a framework for punishing price gouging that ensures the most egregious offenses, those that generate more than $10,000 in illicit profit, are eligible for felony consideration.

"SB 1196 would equip law enforcement with the tools it needs to stop all forms of unlawful price gouging that harm California's consumers."

2) **Price Gouging:** Current law makes it unlawful for retailers and service providers to price gouge during a 30 day period (180 days for reconstruction services) after a declared state of emergency. "Price gouging" is increasing the price of specified goods and services by more than 10% above the price of those goods and services prior to the declaration of emergency. The provisions of the price gouging statute are triggered when a state of emergency has been declared by the President of the United States, the Governor, or officials at a county or municipal level, as specified.

   Price gouging applies to the following items: lodging (including permanent or temporary rental housing, hotels, motels, and mobilehomes); food and drink; emergency supplies such as water, flashlights, radios, batteries, candles, blankets, soaps, diapers, temporary shelters, tape, toiletries, plywood, nails, and hammers; and medical supplies such as prescription and nonprescription medications, bandages, gauze, isopropyl alcohol, and antibacterial products. It also applies to other goods and services including: home heating oil; building materials, including lumber, construction tools, and windows; transportation; freight; storage services; gasoline and other motor fuels; and repair and reconstruction services.

3) **Covid-19 State of Emergency:** On March 4, 2020, Governor Newsom declared a state of emergency in response to the global COVID-19 outbreak. Prior to that date, some local governments had declared a local emergency due to the growing pandemic. As the pandemic continued to spread, people started to stock up on items such as hand sanitizer and toilet paper resulting in a shortage in supply.

   On April 3, 2020, the Governor signed Executive Order N-44-20 to expand consumer protection against price gouging. The order makes it unlawful for a person or other entity (such as a business) to increase the price of food items, consumer goods, medical and emergency supplies, or any materials previously designated by the U.S. Secretary of Health and Human Services as Scarce Materials or Threatened Materials by more than 10 percent of what a seller charged for that item on February 4, 2020. Exceptions to this prohibition exist if

the seller has experienced increased costs in labor, goods, or materials, or if the seller sold the item at a discount on February 4, 2020, in which case they may sell the item for no more than 10 percent greater than the price at which they ordinarily sold the item. If the seller did not offer the item for sale on February 4, 2020, the seller may not sell the item at a price that is 50 percent greater than what they paid for it, or, if the seller produced the item, they may not sell it for a price that is 50 percent greater than the cost to produce and sell the item. The order also waived the time limitation set forth in Penal Code section 396 prohibiting price gouging in times of emergency so that the prohibitions shall be in effect through September 4, 2020. A violation of the order is punishable as a misdemeanor. (https://www.gov.ca.gov/wp-content/uploads/2020/04/4.3.20-EO-N-44-20-text.pdf.)

The existing law on price gouging specifies that the law applies for 30 days after the declaration of emergency and the base price for goods is established by the date of the emergency declaration. The application of the price gouging statute can be extended for additional 30 day periods, but require a determination every 30 days. The Governor in his executive order on price gouging stated that the provisions would be in effect until September 4, 2020 without requiring additional extensions every 30 days. The Governor's order also specified that the date to establish the base price was February 4, 2020, not the date the emergency was declared. This bill would codify in the existing price gouging law some of the elements of the Governor's executive order on price gouging. This bill would Governor could extend the prohibition on price gouging for a period of more than 30 days during a declared state of emergency. This bill would also allow the Governor or any other body declaring a state of emergency to set a date other than the date the emergency was declared that would determine the base price of goods and services covered by the price gouging statute.

4) **Violations of Price Gouging Can be Punished Both Criminally and Civilly:** Price gouging is somewhat unique in that criminal charges are not the only way to punish price gouging offenders and provide deterrence for such conduct. The price gouging statute specifically authorizes the Attorney General and district attorneys (as well as county and city attorneys, under some circumstances) to pursue price gougers under the unfair competition statutes.

   Under the unfair competition statutes each incident of unfair competition can be punished separately and cumulatively. Each violation can be punished by a fine of up to $2500. Under the unfair competition statutes the Attorney General or a district attorney can seek an injunction against the business engaged in price gouging can seek an injunction. If an injunction is granted any violations of the injunction because of price gouging can be fine up to $6000 per incident. Claims under the unfair competition statute can be pursued in **addition** to a criminal case. Each violation of unfair competition is *punishable* cumulatively. Bus. and Prof. Code, § 17205. There are additional civil penalties if the act of unfair competition involves a senior citizen or a disabled person.

   Proposed amendments to be adopted in Committee remove provisions of the bill which would have established an alternate felony/misdemeanor charge for specified price gouging conduct.

5) **Argument in Support**: According to the *County of San Diego*, " Under existing law, upon the proclamation of a state of emergency, by the President of the United States or the Governor,

or upon the declaration of a local emergency by the executive officer of any county, city, or city and county, and for 30 days following the proclamation or declaration of emergency, it is a misdemeanor for a person, contractor, business, or other entity to sell or offer to sell certain goods or services for a price 10% greater than the price charged by that person immediately prior to the proclamation or declaration of emergency.

"SB 1196 would strengthen current law by clarifying that price gouging penalties also apply during a pandemic or epidemic disease outbreak, that all sales, including online sales, are covered by a price gouging prohibition, establishes a price measure of price gouging by new sellers, authorizes the Governor or the Legislature to extend the duration of price gouging prohibitions past 30 days, and changes the law to alternate felony/misdemeanor with a $10,000 takings threshold for the felony. Existing law only covers established sellers with a loophole existing for newer sellers, such as internet sellers or newer sellers who buy a desired or wanted product, stockpile it, then sell it during an emergency for a high mark-up."

6) **Argument in Opposition**: According to the *California Grain and Feed Association*, "Penal Code Section 396's existing provisions are not structured to address goods that are subject to nationally recognized markets, indexes or reporting entity surveys and place our commodity providers in a position where they are forced to either violate the penal code, breach a contract, or sell the commodity outside of California. Often, these commodity contracts may be "supply contracts" for a duration of time and are pegged to a nationally recognized index, survey or commodity market. Farmers, cooperatives and handlers are subject to these commodity markets and contracts to ensure the goods are available and can move freely through the chain of commerce. Many of these contracts are complex financial instruments used for risk management or to allow these perishable goods to flow freely across state lines and international borders in a timely manner with little additional impediments.

"Penal Code Section 396's existing provisions are not structured to address goods that are subject to nationally recognized markets, indexes or reporting entity surveys and place our commodity providers in a position where they are forced to either violate the penal code, breach a contract, or sell the commodity outside of California. Often, these commodity contracts may be "supply contracts" for a duration of time and are pegged to a nationally recognized index, survey or commodity market. Farmers, cooperatives and handlers are subject to these commodity markets and contracts to ensure the goods are available and can move freely through the chain of commerce. Many of these contracts are complex financial instruments used for risk management or to allow these perishable goods to flow freely across state lines and international borders in a timely manner with little additional impediments."

7) **Related Legislation**: AB 1936 (Rodriguez), would include Public Safety Power Shut Offs as an emergency for which price gouging is prohibited if a state of emergency has been declared by specified governing bodies or government officials. AB 1936 was never heard in the Assembly Appropriations Committee.

8) **Prior Legislation**:

   a) AB 1919 (Wood), Chapter 631, Statutes of 2018, expanded the scope of the crime price gouging by including rental housing that was not on the market at the time of the proclamation or declaration of emergency. Defines and clarifies the "rental price" of

housing for purposes of price gouging.

b) AB 2820 (Chiu), Chapter 671, Statutes of 2016, specified that criminal price gouging includes rental of any housing with an initial lease of up to one year for purposes of criminal price gouging. Included the transportation of persons and towing services in the criminal price gouging during a declared emergency.

c) AB 457 (Nunez), Legislative Session of 2005-2006, would have authorized the Governor to proclaim an abnormal market disruption, as defined. AB 457 died in the Senate.

d) SB 1363 (Ducheny), Chapter 492, Statutes of 2004, prohibits the owner or operator of a hotel or motel from increasing its regular advertised rates by more than 10% for 30 days following a proclamation or declaration of emergency, except as specified.

REGISTERED SUPPORT / OPPOSITION:

Support

Orange County District Attorney (Co-Sponsor)
San Diego County District Attorney's Office (Co-Sponsor)
San Diego Districts Attorney's Office (Co-Sponsor)
AARP
AARP California
Alameda County District Attorney's Office
California Association for Health Services At Home
California Dental Association
California District Attorneys Association
California Law Enforcement Association of Records Supervisors (CLEARS)
Calpirg, California Public Interest Research Group
Center for Public Interest Law
City of Thousand Oaks
Consumer Federation of California
Consumer Protection Coalition
County of San Diego
County of Santa Clara, District Attorney
Fresno County District Attorney's Office
Los Angeles County District Attorney's Office
Orange; County of
Riverside Sheriffs' Association
San Diego; County of
Santa Barbara County District Attorney's Office
Sonoma County District Attorney

Opposition

Association of California Egg Farmers
California Association of Wheat Growers
California Bean Shippers Association
California Farm Bureau Federation

California Grain & Feed Association
California Seed Association
California Warehouse Association
Pacific Coast Rendering Association
Pacific Egg & Poultry Association

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

Amended Mock-up for 2019-2020 SB-1196 (Umberg (S))

Mock-up based on Version Number 93 - Amended Assembly 7/27/20
Submitted by: David Billingsley, Assembly Public Safety Committee

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

SECTION 1. Section 396 of the Penal Code is amended to read:

396. (a) The Legislature hereby finds that during a state of emergency or local emergency, including, but not limited to, an earthquake, flood, fire, riot, storm, drought, plant or animal infestation or disease, pandemic or epidemic disease outbreak, or other natural or manmade disaster, some merchants have taken unfair advantage of consumers by greatly increasing prices for essential consumer goods and services. While the pricing of consumer goods and services is generally best left to the marketplace under ordinary conditions, when a declared state of emergency or local emergency results in abnormal disruptions of the market, the public interest requires that excessive and unjustified increases in the prices of essential consumer goods and services be prohibited. It is the intent of the Legislature in enacting this act to protect citizens from excessive and unjustified increases in the prices charged during or shortly after a declared state of emergency or local emergency for goods and services that are vital and necessary for the health, safety, and welfare of consumers, whether those goods and services are offered or sold in person, in stores, or online. Further, it is the intent of the Legislature that this section be liberally construed so that its beneficial purposes may be served.

(b) Upon the proclamation of a state of emergency declared by the President of the United States or the Governor, or upon the declaration of a local emergency by an official, board, or other governing body vested with authority to make that declaration in any county, city, or city and county, and for a period of 30 days following that proclamation or declaration, it is unlawful for a person, contractor, business, or other entity to sell or offer to sell any consumer food items or goods, goods or services used for emergency cleanup, emergency supplies, medical supplies, home heating oil, building materials, housing, transportation, freight, and storage services, or gasoline or other motor fuels for a price of more than 10 percent greater than the price charged by that person for those goods or services immediately prior to the proclamation or declaration of emergency, or prior to a date set in the proclamation or declaration. However, a greater price increase is not unlawful if that person can prove that the increase in price was directly attributable to additional costs imposed on it by the supplier of the goods, or directly attributable to additional costs for labor or materials used to provide the services, during the state of emergency or local emergency, and the price is no more than 10 percent greater than the total of the cost to the seller plus the markup customarily applied by that seller for that good or service in the usual course of

business immediately prior to the onset of the state of emergency or local emergency. If the person, contractor, business, or other entity did not charge a price for the goods or services immediately prior to the proclamation or declaration of emergency, it may not charge a price that is more than 50 percent greater than either the seller's existing costs as defined in Section 17026 of the Business and Professions Code, and the amount that the seller paid for the goods or, if the seller did not purchase the goods, the seller's costs in selling or providing the goods or services.

(c) Upon the proclamation of a state of emergency declared by the President of the United States or the Governor, or upon the declaration of a local emergency by an official, board, or other governing body vested with authority to make that declaration in any county, city, or city and county, and for a period of 180 days following that proclamation or declaration, it is unlawful for a contractor to sell or offer to sell any repair or reconstruction services or any services used in emergency cleanup for a price of more than 10 percent above the price charged by that person for those services immediately prior to the proclamation or declaration of emergency. However, a greater price increase is not unlawful if that person can prove that the increase in price was directly attributable to additional costs imposed on it by the supplier of the goods, or directly attributable to additional costs for labor or materials used to provide the services, during the state of emergency or local emergency, and the price represents no more than 10 percent greater than the total of the cost to the contractor plus the markup customarily applied by the contractor for that good or service in the usual course of business immediately prior to the onset of the state of emergency or local emergency.

(d) Upon the proclamation of a state of emergency declared by the President of the United States or the Governor, or upon the declaration of a local emergency by an official, board, or other governing body vested with authority to make that declaration in any county, city, or city and county, and for a period of 30 days following that proclamation or declaration, it is unlawful for an owner or operator of a hotel or motel to increase the hotel or motel's regular rates, as advertised immediately prior to the proclamation or declaration of emergency, by more than 10 percent. However, a greater price increase is not unlawful if the owner or operator can prove that the increase in price is directly attributable to additional costs imposed on it for goods or labor used in its business, to seasonal adjustments in rates that are regularly scheduled, or to previously contracted rates.

(e) Upon the proclamation of a state of emergency declared by the President of the United States or the Governor, or upon the declaration of a local emergency by an official, board, or other governing body vested with authority to make that declaration in any city, county, or city and county, and for a period of 30 days following that proclamation or declaration, or any period the proclamation or declaration is extended by the applicable authority, it is unlawful for any person, business, or other entity, to increase the rental price, as defined in paragraph (11) of subdivision (j), advertised, offered, or charged for housing, to an existing or prospective tenant, by more than 10 percent. However, a greater rental price increase is not unlawful if that person can prove that the increase is directly attributable to additional costs for repairs or additions beyond normal maintenance that were amortized over the rental term that caused the rent to be increased greater than 10 percent or that an increase was contractually agreed to by the tenant prior to the proclamation or declaration. It shall not be a defense to a prosecution under this subdivision that

an increase in rental price was based on the length of the rental term, the inclusion of additional goods or services, except as provided in paragraph (11) of subdivision (j) with respect to furniture, or that the rent was offered by, or paid by, an insurance company, or other third party, on behalf of a tenant. This subdivision does not authorize a landlord to charge a price greater than the amount authorized by a local rent control ordinance.

(f) It is unlawful for a person, business, or other entity to evict any residential tenant of residential housing after the proclamation of a state of emergency declared by the President of the United States or the Governor, or upon the declaration of a local emergency by an official, board, or other governing body vested with authority to make that declaration in any city, county, or city and county, and for a period of 30 days following that proclamation or declaration, or any period that the proclamation or declaration is extended by the applicable authority and rent or offer to rent to another person at a rental price greater than the evicted tenant could be charged under this section. It shall not be a violation of this subdivision for a person, business, or other entity to continue an eviction process that was lawfully begun prior to the proclamation or declaration of emergency.

(g) The prohibitions of this section may be extended for additional periods, as needed, by a local legislative body, local official, the Governor, or the Legislature, if deemed necessary to protect the lives, property, or welfare of the citizens. Each extension by a local legislative body or local official shall not exceed 30 days.

(h) ~~(1)~~ A violation of this section ~~that involves the charging of prices on one or more goods in one or more transactions where the aggregate amount charged is less than ten thousand dollars ($10,000) above the amount permitted under this section~~ is ***a misdemeanor*** punishable by imprisonment in a county jail for a period not exceeding one year, by a fine of not more than ten thousand dollars ($10,000), or by both that fine and imprisonment.

~~(2) A violation of this section that involves the charging of prices on one or more goods in one or more transactions where the aggregate amount charged exceeds the amount permitted under this section by ten thousand dollars ($10,000) or more is punishable by imprisonment in a county jail not exceeding one year or by imprisonment pursuant to subdivision (h) of Section 1170, by a fine of not more than ten thousand dollars ($10,000), or by both that fine and imprisonment.~~

~~(3) It is the intent of the Legislature that this subdivision be reviewed within five years to consider the effects of inflation on the aggregated dollar amount charged that is stated herein~~.

(i) A violation of this section shall constitute an unlawful business practice and an act of unfair competition within the meaning of Section 17200 of the Business and Professions Code. The remedies and penalties provided by this section are cumulative to each other, the remedies under Section 17200 of the Business and Professions Code, and the remedies or penalties available under all other laws of this state.

(j) For the purposes of this section, the following terms have the following meanings:

(1) "State of emergency" means a natural or manmade emergency resulting from an earthquake, flood, fire, riot, storm, drought, plant or animal infestation or disease, pandemic or epidemic disease outbreak, or other natural or manmade disaster for which a state of emergency has been declared by the President of the United States or the Governor.

(2) "Local emergency" means a natural or manmade emergency resulting from an earthquake, flood, fire, riot, storm, drought, plant or animal infestation or disease, pandemic or epidemic disease outbreak, or other natural or manmade disaster for which a local emergency has been declared by an official, board, or other governing body vested with authority to make that declaration in any county, city, or city and county in California.

(3) "Consumer food item" means any article that is used or intended for use for food, drink, confection, or condiment by a person or animal.

(4) "Repair or reconstruction services" means services performed by any person who is required to be licensed under the Contractors' State License Law (Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code), for repairs to residential or commercial property of any type that is damaged as a result of a disaster.

(5) "Emergency supplies" includes, but is not limited to, water, flashlights, radios, batteries, candles, blankets, soaps, diapers, temporary shelters, tape, toiletries, plywood, nails, and hammers.

(6) "Medical supplies" includes, but is not limited to, prescription and nonprescription medications, bandages, gauze, isopropyl alcohol, and antibacterial products.

(7) "Building materials" means lumber, construction tools, windows, and anything else used in the building or rebuilding of property.

(8) "Gasoline" means any fuel used to power any motor vehicle or power tool.

(9) "Transportation, freight, and storage services" means any service that is performed by any company that contracts to move, store, or transport personal or business property or that rents equipment for those purposes, including towing services.

(10) "Housing" means any rental housing with an initial lease term of no longer than one year, including, but not limited to, a space rented in a mobilehome park or campground.

(11) "Rental price" for housing means any of the following:

(A) For housing rented within one year prior to the time of the proclamation or declaration of emergency, the actual rental price paid by the tenant. For housing not rented at the time of the declaration or proclamation, but rented, or offered for rent, within one year prior to the proclamation or declaration of emergency, the most recent rental price offered before the proclamation or declaration of emergency. For housing rented at the time of the proclamation or declaration of emergency but which becomes vacant while the proclamation or declaration of

emergency remains in effect and which is subject to any ordinance, rule, regulation, or initiative measure adopted by any local governmental entity that establishes a maximum amount that a landlord may charge a tenant for rent, the actual rental price paid by the previous tenant or the amount specified in subparagraph (B), whichever is greater. This amount may be increased by 5 percent if the housing was previously rented or offered for rent unfurnished, and it is now being offered for rent fully furnished. This amount shall not be adjusted for any other good or service, including, but not limited to, gardening or utilities currently or formerly provided in connection with the lease.

(B) For housing not rented and not offered for rent within one year prior to the proclamation or declaration of emergency, 160 percent of the fair market rent established by the United States Department of Housing and Urban Development. This amount may be increased by 5 percent if the housing is offered for rent fully furnished. This amount shall not be adjusted for any other good or service, including, but not limited to, gardening or utilities currently or formerly provided in connection with the lease.

(C) Housing advertised, offered, or charged, at a daily rate at the time of the declaration or proclamation of emergency, shall be subject to the rental price described in subparagraph (A), if the housing continues to be advertised, offered, or charged, at a daily rate. Housing advertised, offered, or charged, on a daily basis at the time of the declaration or proclamation of emergency, shall be subject to the rental price in subparagraph (B), if the housing is advertised, offered, or charged, on a periodic lease agreement after the declaration or proclamation of emergency.

(D) For mobilehome spaces rented to existing tenants at the time of the proclamation or declaration of emergency and subject to a local rent control ordinance, the amount authorized under the local rent control ordinance. For new tenants who enter into a rental agreement for a mobilehome space that is subject to rent control but not rented at the time of the proclamation or declaration of emergency, the amount of rent last charged for a space in the same mobilehome park. For mobilehome spaces not subject to a local rent control ordinance and not rented at the time of the proclamation or declaration of emergency, the amount of rent last charged for the space.

(12) "Goods" has the same meaning as defined in subdivision (c) of Section 1689.5 of the Civil Code.

(k) This section does not preempt any local ordinance prohibiting the same or similar conduct or imposing a more severe penalty for the same conduct prohibited by this section.

(l) A business offering an item for sale at a reduced price immediately prior to the proclamation or declaration of the emergency may use the price at which it usually sells the item to calculate the price pursuant to subdivision (b) or (c).

(m) This section does not prohibit an owner from evicting a tenant for any lawful reason, including pursuant to Section 1161 of the Code of Civil Procedure.

~~(n) This section shall remain in effect only until January 1, 2026, and as of that date is repealed.~~

SEC. 2. Section 396 is added to the Penal Code, to read:

396. (a) The Legislature hereby finds that during a state of emergency or local emergency, including, but not limited to, an earthquake, flood, fire, riot, storm, drought, plant or animal infestation or disease, pandemic or epidemic disease outbreak, or other natural or manmade disaster, some merchants have taken unfair advantage of consumers by greatly increasing prices for essential consumer goods and services. While the pricing of consumer goods and services is generally best left to the marketplace under ordinary conditions, when a declared state of emergency or local emergency results in abnormal disruptions of the market, the public interest requires that excessive and unjustified increases in the prices of essential consumer goods and services be prohibited. It is the intent of the Legislature in enacting this act to protect citizens from excessive and unjustified increases in the prices charged during or shortly after a declared state of emergency or local emergency for goods and services that are vital and necessary for the health, safety, and welfare of consumers, whether those goods and services are offered or sold in person, in stores, or online. Further, it is the intent of the Legislature that this section be liberally construed so that its beneficial purposes may be served.

(b) Upon the proclamation of a state of emergency declared by the President of the United States or the Governor, or upon the declaration of a local emergency by an official, board, or other governing body vested with authority to make that declaration in any county, city, or city and county, and for a period of 30 days following that proclamation or declaration, it is unlawful for a person, contractor, business, or other entity to sell or offer to sell any consumer food items or goods, goods or services used for emergency cleanup, emergency supplies, medical supplies, home heating oil, building materials, housing, transportation, freight, and storage services, or gasoline or other motor fuels for a price of more than 10 percent greater than the price charged by that person for those goods or services immediately prior to the proclamation or declaration of emergency, or prior to a date set in the proclamation or declaration. However, a greater price increase is not unlawful if that person can prove that the increase in price was directly attributable to additional costs imposed on it by the supplier of the goods, or directly attributable to additional costs for labor or materials used to provide the services, during the state of emergency or local emergency, and the price is no more than 10 percent greater than the total of the cost to the seller plus the markup customarily applied by that seller for that good or service in the usual course of business immediately prior to the onset of the state of emergency or local emergency. If the person, contractor, business, or other entity did not charge a price for the goods or services immediately prior to the proclamation or declaration of emergency, it may not charge a price that is more than 50 percent greater than either the amount that the seller paid for the goods or, if the seller did not purchase the goods, the seller's costs in selling or providing the goods or services.

(c) Upon the proclamation of a state of emergency declared by the President of the United States or the Governor, or upon the declaration of a local emergency by an official, board, or other governing body vested with authority to make that declaration in any county, city, or city and county, and for a period of 180 days following that proclamation or declaration, it is unlawful for a contractor to sell or offer to sell any repair or reconstruction services or any services used in emergency cleanup for a price of more than 10 percent above the price charged by that person for

those services immediately prior to the proclamation or declaration of emergency. However, a greater price increase is not unlawful if that person can prove that the increase in price was directly attributable to additional costs imposed on it by the supplier of the goods, or directly attributable to additional costs for labor or materials used to provide the services, during the state of emergency or local emergency, and the price represents no more than 10 percent greater than the total of the cost to the contractor plus the markup customarily applied by the contractor for that good or service in the usual course of business immediately prior to the onset of the state of emergency or local emergency.

(d) Upon the proclamation of a state of emergency declared by the President of the United States or the Governor, or upon the declaration of a local emergency by an official, board, or other governing body vested with authority to make that declaration in any county, city, or city and county, and for a period of 30 days following that proclamation or declaration, it is unlawful for an owner or operator of a hotel or motel to increase the hotel or motel's regular rates, as advertised immediately prior to the proclamation or declaration of emergency, by more than 10 percent. However, a greater price increase is not unlawful if the owner or operator can prove that the increase in price is directly attributable to additional costs imposed on it for goods or labor used in its business, to seasonal adjustments in rates that are regularly scheduled, or to previously contracted rates.

(e) Upon the proclamation of a state of emergency declared by the President of the United States or the Governor, or upon the declaration of a local emergency by an official, board, or other governing body vested with authority to make that declaration in any city, county, or city and county, and for a period of 30 days following that proclamation or declaration, or any period the proclamation or declaration is extended by the applicable authority, it is unlawful for any person, business, or other entity, to increase the rental price, as defined in paragraph (11) of subdivision (j), advertised, offered, or charged for housing, to an existing or prospective tenant, by more than 10 percent. However, a greater rental price increase is not unlawful if that person can prove that the increase is directly attributable to additional costs for repairs or additions beyond normal maintenance that were amortized over the rental term that caused the rent to be increased greater than 10 percent or that an increase was contractually agreed to by the tenant prior to the proclamation or declaration. It shall not be a defense to a prosecution under this subdivision that an increase in rental price was based on the length of the rental term, the inclusion of additional goods or services, except as provided in paragraph (11) of subdivision (j) with respect to furniture, or that the rent was offered by, or paid by, an insurance company, or other third party, on behalf of a tenant. This subdivision does not authorize a landlord to charge a price greater than the amount authorized by a local rent control ordinance.

(f) It is unlawful for a person, business, or other entity to evict any residential tenant of residential housing after the proclamation of a state of emergency declared by the President of the United States or the Governor, or upon the declaration of a local emergency by an official, board, or other governing body vested with authority to make that declaration in any city, county, or city and county, and for a period of 30 days following that proclamation or declaration, or any period that the proclamation or declaration is extended by the applicable authority and rent or offer to rent to another person at a rental price greater than the evicted tenant could be charged under this section.

~~It shall not be a violation of this subdivision for a person, business, or other entity to continue an eviction process that was lawfully begun prior to the proclamation or declaration of emergency.~~

~~(g) The prohibitions of this section may be extended for additional periods, as needed, by a local legislative body, local official, the Governor, or the Legislature, if deemed necessary to protect the lives, property, or welfare of the citizens. Each extension by a local legislative body or local official shall not exceed 30 days.~~

~~(h) A violation of this section is punishable by imprisonment in a county jail for a period not exceeding one year, by a fine of not more than ten thousand dollars ($10,000), or by both that fine and imprisonment.~~

~~(i) A violation of this section shall constitute an unlawful business practice and an act of unfair competition within the meaning of Section 17200 of the Business and Professions Code. The remedies and penalties provided by this section are cumulative to each other, the remedies under Section 17200 of the Business and Professions Code, and the remedies or penalties available under all other laws of this state.~~

~~(j) For the purposes of this section, the following terms have the following meanings:~~

~~(1) "State of emergency" means a natural or manmade emergency resulting from an earthquake, flood, fire, riot, storm, drought, plant or animal infestation or disease, pandemic or epidemic disease outbreak, or other natural or manmade disaster for which a state of emergency has been declared by the President of the United States or the Governor.~~

~~(2) "Local emergency" means a natural or manmade emergency resulting from an earthquake, flood, fire, riot, storm, drought, plant or animal infestation or disease, pandemic or epidemic disease outbreak, or other natural or manmade disaster for which a local emergency has been declared by an official, board, or other governing body vested with authority to make that declaration in any county, city, or city and county in California.~~

~~(3) "Consumer food item" means any article that is used or intended for use for food, drink, confection, or condiment by a person or animal.~~

~~(4) "Repair or reconstruction services" means services performed by any person who is required to be licensed under the Contractors' State License Law (Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code), for repairs to residential or commercial property of any type that is damaged as a result of a disaster.~~

~~(5) "Emergency supplies" includes, but is not limited to, water, flashlights, radios, batteries, candles, blankets, soaps, diapers, temporary shelters, tape, toiletries, plywood, nails, and hammers.~~

~~(6) "Medical supplies" includes, but is not limited to, prescription and nonprescription medications, bandages, gauze, isopropyl alcohol, and antibacterial products.~~

(7) "Building materials" means lumber, construction tools, windows, and anything else used in the building or rebuilding of property.

(8) "Gasoline" means any fuel used to power any motor vehicle or power tool.

(9) "Transportation, freight, and storage services" means any service that is performed by any company that contracts to move, store, or transport personal or business property or that rents equipment for those purposes, including towing services.

(10) "Housing" means any rental housing with an initial lease term of no longer than one year, including, but not limited to, a space rented in a mobilehome park or campground.

(11) "Rental price" for housing means any of the following:

(A) For housing rented within one year prior to the time of the proclamation or declaration of emergency, the actual rental price paid by the tenant. For housing not rented at the time of the declaration or proclamation, but rented, or offered for rent, within one year prior to the proclamation or declaration of emergency, the most recent rental price offered before the proclamation or declaration of emergency. For housing rented at the time of the proclamation or declaration of emergency but which becomes vacant while the proclamation or declaration of emergency remains in effect and which is subject to any ordinance, rule, regulation, or initiative measure adopted by any local governmental entity that establishes a maximum amount that a landlord may charge a tenant for rent, the actual rental price paid by the previous tenant or the amount specified in subparagraph (B), whichever is greater. This amount may be increased by 5 percent if the housing was previously rented or offered for rent unfurnished, and it is now being offered for rent fully furnished. This amount shall not be adjusted for any other good or service, including, but not limited to, gardening or utilities currently or formerly provided in connection with the lease.

(B) For housing not rented and not offered for rent within one year prior to the proclamation or declaration of emergency, 160 percent of the fair market rent established by the United States Department of Housing and Urban Development. This amount may be increased by 5 percent if the housing is offered for rent fully furnished. This amount shall not be adjusted for any other good or service, including, but not limited to, gardening or utilities currently or formerly provided in connection with the lease.

(C) Housing advertised, offered, or charged, at a daily rate at the time of the declaration or proclamation of emergency, shall be subject to the rental price described in subparagraph (A), if the housing continues to be advertised, offered, or charged, at a daily rate. Housing advertised, offered, or charged, on a daily basis at the time of the declaration or proclamation of emergency, shall be subject to the rental price in subparagraph (B), if the housing is advertised, offered, or charged, on a periodic lease agreement after the declaration or proclamation of emergency.

(D) For mobilehome spaces rented to existing tenants at the time of the proclamation or declaration of emergency and subject to a local rent control ordinance, the amount authorized under the local

~~rent control ordinance. For new tenants who enter into a rental agreement for a mobilehome space that is subject to rent control but not rented at the time of the proclamation or declaration of emergency, the amount of rent last charged for a space in the same mobilehome park. For mobilehome spaces not subject to a local rent control ordinance and not rented at the time of the proclamation or declaration of emergency, the amount of rent last charged for the space.~~

~~(12) "Goods" has the same meaning as defined in subdivision (c) of Section 1689.5 of the Civil Code.~~

~~(k) This section does not preempt any local ordinance prohibiting the same or similar conduct or imposing a more severe penalty for the same conduct prohibited by this section.~~

~~(l) A business offering an item for sale at a reduced price immediately prior to the proclamation or declaration of the emergency may use the price at which it usually sells the item to calculate the price pursuant to subdivision (b) or (c).~~

~~(m) This section does not prohibit an owner from evicting a tenant for any lawful reason, including pursuant to Section 1161 of the Code of Civil Procedure.~~

~~(n) This section shall become operative on January 1, 2026.~~

SEC. 3. The changes made to subdivision (a) of Section 396 of the Penal Code by this act do not constitute a change in, but are declaratory of, existing law.

SEC. 4. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.

Date of Hearing: August 5, 2020
Counsel: Cheryl Anderson

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

SB 1220 (Umberg) – As Amended July 28, 2020

SUMMARY: Requires each prosecuting agency to maintain a *Brady* list and any law enforcement agency to, annually and upon request, provide a prosecuting agency a list of names and badge numbers of officers employed in the five years prior to providing the list that meet specified criteria, including having a sustained finding for conduct of moral turpitude or group bias, and establishes a due process procedure for the officer to contest their inclusion on the list. Specifically, **this bill**:

1) Requires each prosecuting agency to maintain a *Brady* list, as specified.
2) Requires any law enforcement agencies maintaining personnel records of peace officers and custodial officers to, annually on and after January 1, 2022, provide to each city, county, or state prosecuting agency within its jurisdiction, and upon request at any time to any city county or state prosecuting agency, a list of names and badge numbers of officers employed by the agency in the five years prior to providing the list who meet specified criteria, including officers who:
   a) Have had sustained findings that they engaged in sexual assault involving a member of the public;
   b) Have had sustained findings that they engaged in an act of dishonesty related to the reporting, investigation, or prosecution of a crime or misconduct, including but not limited to a sustained finding of perjury, false statements, filing false reports, destruction, falsifying or concealing of evidence;
   c) Have had sustained findings for conduct of moral turpitude;
   d) Have had sustained findings for group bias;
   e) Have been convicted of a crime of moral turpitude;
   f) Who are facing currently pending criminal charges; or
   g) Who are on probation for a criminal offense.
3) Specifies that a "crime of moral turpitude means" conduct or crimes found to be conduct or crimes of moral turpitude in published appellate court decisions.
4) Provides that these requirements do not limit the discovery obligations of law enforcement or prosecutors under any other law.

5) Requires the prosecuting agency to keep this list confidential, except as constitutionally required through the criminal discovery process under *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*).

6) States that the list may be used by either a prosecutor or criminal defense attorney to establish good cause for in camera review by a court of confidential peace officer records or information, as specified.

7) Requires a prosecuting agency, prior to placing an officer's name on a *Brady* list, to notify the officer and provide the officer an opportunity to present information to the prosecuting agency against the officer's placement on the list. If that prior notice cannot be provided consistently with the prosecutor's discovery obligations, the prosecuting agency shall comply with its discovery obligations, notify the officer as soon as practicable, and provide the officer an opportunity to present information to the prosecuting agency favoring the officer's removal from the list.

8) Specifies that this provision does not create a right to judicial or administrative review of the prosecuting agency's decision to place or retain a peace officer's name on a *Brady* list.

9) States that the decision to place or retain an officer's name on a *Brady* list shall be within the sound discretion of the prosecuting agency.

10) Removes the limitation on relevance at trial and disclosure of information of an officer's misconduct that occurred more than five years before the event or transaction that is the subject of the litigation for which discovery or disclosure is sought, if the information is required to be disclosed pursuant to *Brady*.

EXISTING LAW:

1) Provides that in any case in which discovery or disclosure is sought of peace or custodial officer personnel records, as specified, or information from those records, the party seeking the discovery or disclosure shall file a written motion with the appropriate court or administrative body upon written notice to the governmental agency which has custody and control of the records upon written notice to the governmental agency that has custody or control of the records, as specified. (Evid. Code, *§ 1043, subd. (a).)*

2) Requires that upon receipt of the notice, the governmental agency served shall immediately notify the individual whose records are sought. (Evid. Code, *§ 1043, subd. (c).)*

3) Provides that a motion for discovery or disclosure of personnel records shall include all of the following:

   a) Identification of the proceeding in which discovery or disclosure is sought, the party seeking discovery or disclosure, the peace or custodial officer whose records are sought, the governmental agency that has custody and control of the records, and the time and place at which the motion for discovery or disclosure shall be heard;

   b) A description of the type of records or information sought; and,

c) Affidavits showing good cause for the discovery or disclosure sought, setting forth the materiality thereof to the subject matter involved in the pending litigation and stating upon reasonable belief that the governmental agency identified has the records or information from the records. (Evid. Code *§ 1043, subd. (b).)*

4) *States that nothing in this article shall be construed to affect the right of access to records of complaints, or investigations of complaints, or discipline imposed as a result of those investigations, concerning an event or transaction in which the peace officer or custodial officer, as defined, participated, or which he or she perceived, and pertaining to the manner in which he or she performed his or her duties, provided that information is relevant to the subject matter involved in the pending litigation.* (Evid. Code *§ 1045, subd. (a).)*

5) *States that in determining relevance, the court shall examine the information in chambers, as specified, and shall exclude from disclosure certain items, including information consisting of complaints concerning conduct occurring more than five years before the event or transaction that is the subject of the litigation in aid of which discovery or disclosure is sought. (Evid. Code, § 1045, subd. (b)(1).)*

6) States that courts shall, in any case or proceeding permitting the disclosure or discovery of any peace or custodial officer records requested, order that the records disclosed or discovered may not be used for any purpose other than a court proceeding pursuant to applicable law. (Evid. Code, *§ 1045, subd. (e).)*

7) *States that, except as specified,* the personnel records of peace officers and custodial officers and records maintained by any state or local agency, or information obtained from these records, are confidential and shall not be disclosed in any criminal or civil proceeding except though specified litigation discovery processes. This section shall not apply to investigations or proceedings concerning the conduct of peace officers or custodial officers, or an agency or department that employs those officers, conducted by a grand jury, a district attorney's office, or the Attorney General's office. (Pen. Code, *§ 832.7, subd. (a).)*

8) *Provides that the following peace officer or custodial records maintained by their agencies shall not be confidential and shall be made available for public inspection pursuant to the California Public Records Act (CPRA):*

a) A record relating to the report, investigation, or findings of any of the following:

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

ii) An incident in which the use of force by a peace officer or custodial officer against a person resulted in death, or in great bodily injury;

b) Any record relating to an incident in which a sustained finding was made by any law enforcement agency or oversight agency that a peace officer or custodial officer engaged in sexual assault involving a member of the public; and,

c) Any record relating to an incident in which a sustained finding was made by any law enforcement agency or oversight agency of dishonesty by a peace officer or custodial officer directly relating to the reporting, investigation, or prosecution of a crime, or

directly relating to the reporting of, or investigation of misconduct by, another peace officer or custodial officer, including, but not limited to, any sustained finding of perjury, false statements, filing false reports, destruction, falsifying, or concealing of evidence. (Pen. Code, *§ 832.7, subd. (b)(1).)*

9) Provides that a punitive action, or denial of promotion on grounds other than merit, shall not be undertaken by any public agency against any public safety officer solely because that officer's name has been placed on a *Brady* list, or that the officer's name may otherwise be subject to disclosure pursuant to *Brady v. Maryland* (1963) 373 U.S. 83. (Govt. Code, § 3305.5, subd. (a).)

10) States that this shall not prohibit a public agency from taking punitive action, denying promotion on grounds other than merit, or taking other personnel action against a public safety officer based on the underlying acts or omissions for which that officer's name was placed on a *Brady* list, or may otherwise be subject to disclosure pursuant to *Brady v. Maryland* (1963) 373 U.S. 83, if the actions taken by the public agency otherwise conform to this chapter and to the rules and procedures adopted by the local agency. (Govt. Code, § 3305.5, subd. (b).)

11) Specifies that evidence that a public safety officer's name has been placed on a *Brady* list, or may otherwise be subject to disclosure pursuant to *Brady v. Maryland* (1963) 373 U.S. 83, shall not be introduced for any purpose in any administrative appeal of a punitive action, except (Govt. Code, § 3305.5, subd. (c)):

    a) Evidence that a public safety officer's name was placed on a *Brady* list may be introduced if, during the administrative appeal of a punitive action against an officer, the underlying act or omission for which that officer's name was placed on a *Brady* list is proven and the officer is found to be subject to some form of punitive action. If the hearing officer or other administrative appeal tribunal finds or determines that a public safety officer has committed the underlying acts or omissions that will result in a punitive action, denial of a promotion on grounds other than merit, or any other adverse personnel action, and evidence exists that a public safety officer's name has been placed on a *Brady* list, or may otherwise be subject to disclosure pursuant to *Brady v. Maryland* (1963) 373 U.S. 83, then the evidence shall be introduced for the sole purpose of determining the type or level of punitive action to be imposed. (Govt. Code, § 3305.5, subd. (d).)

12) States that for purposes of this section, "Brady list" means any system, index, list, or other record containing the names of peace officers whose personnel files are likely to contain evidence of dishonesty or bias, which is maintained by a prosecutorial agency or office in accordance with the holding in *Brady v. Maryland* (1963) 373 U.S. 83. (Govt. Code, § 3305.5, subd. (e).)

FISCAL EFFECT:

COMMENTS:

1) **Author's Statement**: According to the author, "Under Brady v Maryland, the prosecution has a constitutional obligation not only to disclose what is already known to prosecutors, but also to learn of any such information that is known to law enforcement, including matters

related to witness credibility, even that of peace officers, and make that information available to the defense.

"Although Brady and subsequent decisions have been [in] place for many decades, some law enforcement agencies are not able to fully observe its requirements through organizational policy or practice because of the lack of clarity and the confusing patchwork of varied policies across prosecutorial jurisdictions. Brady does not provide a bright-line rule on the types of information that must be revealed and departments can have difficulty establishing protocols on compiling Brady materials from records that may be spread throughout a department.

"SB 1220 aims to strike a delicate balance between prosecutors' constitutional obligations and due process protections for peace officers. Firstly, this bill requires law enforcement agencies maintaining personnel records of peace officers to provide prosecuting agencies a list of names and badge numbers of officers employed by the agency in the five years preceding the request who meet specified criteria in accordance with the Brady case and subsequent decisions. Prosecuting agencies will be required to keep this list confidential, except as constitutionally required. Secondly, SB 1220 establishes California's first-ever minimum due process standards for officers by requiring prosecuting agencies, before placing an officer's name on a Brady list, to notify the officer and provide the officer an opportunity to request the prosecuting agency remove the officer from the list."

2) **Prosecutor Duty to Discover Exculpatory Evidence to the Defense**: In *Brady v. Maryland* (1963) 373 U.S. 83, 87, the United States Supreme Court held that federal constitutional due process creates an obligation on the part of the prosecution to disclose all evidence within its possession that is favorable to the defendant and material on the issue of guilt or punishment. *Brady* evidence includes evidence that impeaches prosecution witnesses, even if it is not inherently exculpatory. (*Giglio v. United States* (1972) 405 U.S. 150, 153-155.) Further, the prosecution's disclosure obligation under *Brady* extends to evidence collected or known by other members of the prosecution team, including law enforcement, in connection with the investigation of the case. (*In re Steele* (2004) 32 Cal.4th 682, 696-697, citing *Kyles v. Whitley* (1995) 514 U.S. 419, 437.) In order to comply with *Brady*, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." (*Kyles, supra*, 514 U.S. at p. 437; accord, *In re Brown* (1998) 17 Cal.4th 873, 879.)

   Evidence is material under *Brady* if there is a reasonable probability that the result of the proceeding would have been different had the information been disclosed. (*United States v. Bagley* (1985) 473 U.S. 667, 682.) The prosecution's duty to disclose exists whether or not the defendant specifically requests the information. (*United States v. Agurs* (1976) 427 U.S. 97, 107.) Failure to disclose evidence favorable to the accused violates due process irrespective of the good or bad faith of the prosecution. (*Brady, supra*, 373 U.S. at p. 87.)

3) **Discovery of Otherwise-Confidential Police Records in Criminal Cases**: Until recently, both police personnel records and records of citizens' complaints were generally protected from disclosure. (Gov. Code, § 6254, subd. (f); former Pen. Code, §§ 832.5 832.7, 832.8.) Before its amendment in 2018, Penal Code section 832.7 made specified peace officer records and information confidential and nondisclosable in any criminal or civil proceeding except pursuant to discovery under certain Evidence Code sections. (See Pen. Code, § 832.7,

subd. (a), as amended by Stats. 2003, ch. 102, § 1, p. 809.) "The first category of confidential records pertained to '[p]eace officer or custodial officer personnel records,' which included among other things certain records that relate to employee discipline or certain complaints and to investigations of complaints pertaining to how the officer performed his or her duties. (*Ibid.*; see § 832.8) The second category consisted of 'records maintained by any state or local agency pursuant to section 832.5' (former § 832.7, subd. (a)), which required '[e]ach department or agency in [California] that employs peace officers [to] establish a procedure to investigate complaints by members of the public against the personnel of these departments or agencies' and further required such '[c]omplaints and any reports or findings relating' to them be retained for 'at least five years' and 'maintained either in the peace or custodial officer's general personnel file or in a separate file' (§ 832.5, subds. (a)(1), (b); see also § 832.5, subds. (c), (d)(1)). The third category extended confidentiality to 'information obtained from' the prior two types of records. (former § 832.7, subd. (a).)" (*Becerra v. The Superior Court of the City of San Francisco* (2020) 44 CalApp5th 897, 914-915.)

These statutes, along with Evidence Code sections 1043 through 1047, codified the California Supreme Court's decision in *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*). *Pitchess* recognized the right of a criminal defendant under certain circumstances, and upon an adequate showing, to compel the discovery of information from an officer's otherwise-confidential personnel file. These statutes set forth the procedures under which a person may or may not access peace officer personnel records. Evidence Code section 1043, subdivision (a) requires a party seeking discovery of officer personnel records to file a motion seeking the documents, with notice to the government agency that has custody or control over them. The motion must include "[a]ffidavits showing good cause for the discovery or disclosure sought, setting forth the materiality thereof to the subject matter involved in the pending litigation and stating upon reasonable belief that the governmental agency identified has the records or information from the records." (*Id.*, subd. (b)(3).)

4) **Access to Certain Police Officer Records Under the California Public Records Act (CPRA) and Senate Bill No. 1421**: Effective January 1, 2019, Senate Bill No. 1421 amended sections 832.7 and 832.8 to provide disclosure under the CPRA of certain officer personnel records without the necessity of bringing a *Pitchess* motion – certain records involving use of force, sexual assault involving a member of the public, and incidents of officer dishonesty. (See Stats. 2018, ch. 988, §§ 2 & 3, eff. Jan. 1, 2019; see also § 832.7, subd. (a).) Officer personnel records otherwise remain confidential, and the *Pitchess* statutes "restrict a prosecutor's ability to learn of and disclose certain information regarding law enforcement officers." (*Association for Los Angeles Deputy Sheriffs v. Superior Court of Los Angeles County* (2019) 8 Cal.5th 28, 36 (ALADS).)

5) ***Brady* Lists**: Given the tension between the prosecutor's *Brady* obligations and the confidentiality concerns underlying the *Pitchess* statutes, some law enforcement agencies create what have become known as *Brady* lists. "These lists enumerate officers whom the agencies have identified as having potential exculpatory or impeachment information in their personnel files – evidence which may need to be disclosed to the defense under *Brady* and its progeny." (*ALADS, supra*, 8 Cal.5th at p. 36.)

In *ALADS*, the California Supreme Court considered the following question: "When a law enforcement agency creates an internal *Brady* list [citation], and a peace officer on that list is a potential witness in a pending prosecution, may the agency disclose to the prosecution (a)

the name and identifying number of the officer and (b) that the officer may have relevant exonerating or impeaching material in [that officer's] confidential personnel file …?" (*ALADS, supra*, 8 Cal.5th at pp. 36-37.) The Court concluded it could. (*Id.* at p. 37.)

In reaching this conclusion, the Court "[v]iew[ed] the *Pitchess* statutes 'against the larger background of the prosecution's [*Brady*] obligation [citation omitted],' and concluded "the Department may provide prosecutors with the *Brady* alerts at issue here without violating confidentiality." (*ALADS, supra*, 8 Cal.5th at p. 51.) The Court held that "the Department does not violate section 832.7(a) by sharing with prosecutors the fact that an officer, who is a potential witness in a pending criminal prosecution, may have relevant exonerating or impeaching material in that officer's confidential personnel file." (*Id.*, at p. 56.) The Court noted:

> To be clear, we do not suggest that permitting *Brady* alerts completely resolves the tension between *Brady* and the *Pitchess* statutes. Not all departments maintain *Brady* lists. And nothing guarantees that a *Brady* list will reflect all information that might prove "material" in each particular case. (*Brady, supra*, 373 U.S. at p. 87; see ante, pt. I.A.) But when a department seeks to transmit a *Brady* alert to prosecutors, allowing the department to do so mitigates the risk of a constitutional violation. With *Brady* in mind (see *Mooc, supra*, 26 Cal.4th at p. 1225), the term "confidential" (§ 832.7(a)) must be understood to permit such alerts.

(*ALADS, supra*, 8 Cal.5th at pp. 53-54.) "This is not to imply that *Brady* alerts are a constitutionally required means of ensuring *Brady* compliance; only that disclosure of *Brady* material is required, and the *Brady* alerts help to ensure satisfaction of that requirement." (*Id.* at p. 52.) Without *Brady* alerts, prosecutors may be unaware that a *Pitchess* motion should be filed and may lack the information necessary to make the required showing for the motion to succeed. (*Ibid.*)

6) **Purpose of this Bill**: As noted in *ALADS*, not all departments maintain *Brady* lists. This bill would require law enforcement agencies to provide a list of the names and badge numbers of the officers, who meet specified criteria, to prosecuting agencies. This information would be provided annually to any prosecuting agency within the law enforcement agency's jurisdiction and upon request to any prosecution agency. The list would be limited to officers employed by the agency in the five years prior to the list. This bill would also require prosecution agencies to maintain *Brady* lists.

Though this bill would not necessarily require that these lists contain all "material" information that a prosecutor is required to disclose under *Brady*, it also wouldn't relieve a prosecutor of the requirement to ensure full *Brady* compliance. As noted in *ALADS*, these lists would help "ensure satisfaction of that requirement." (*ALADS, supra,* 8 Cal.5th at p. 52.) Requiring departments to compile these otherwise-voluntary *Brady* lists and share them with the prosecution upon request is intended to "mitigate[] the risk of a constitutional violation." (*Id.* at pp. 53-54.)

Under the current *Pitchess* process, the law requires a court, in determining the relevance and whether to disclose information consisting of complaints concerning peace officer conduct, to exclude conduct that is more than five years older than the subject of the ligation. This bill

would delete that requirement where the information is required to be disclosed pursuant to *Brady*.

7) **Notice Requirement**: In *ALADS*, officers were notified of their inclusion on the *Brady* list. They were also "afforded an opportunity to object to their inclusion on the *Brady* list, by informing the Department that 'the deputy did not have a founded administrative investigation finding on one of the above policy violations' or that 'any such founded investigation had been overturned in a settlement agreement or pursuant to an appeal.'" (*ALADS, supra*, 8 Cal.5th at pp 37-38.)

   Similarly, this bill contains a notice requirement. This bill would require a prosecutor, prior to placing the officer's name on a *Brady* list, to notify the officer and provide the officer an opportunity to present information objecting to the officer's placement on the list. However, if that can't be done consistent with the prosecuting agency's discovery obligations, the agency must comply with its discovery obligations and notify the officer as soon as practicable.

8) **Argument in Support**: According to the *California District Attorneys Association*, the sponsor of this bill "SB 1220, which would mandate *Brady* notification from peace officers to prosecutors to ensure prosecutors are able to meet their constitutional obligations and to provide greater transparency in our criminal justice system.

   "The United States Constitution requires prosecutors to provide the defense in criminal cases with exculpatory evidence that is material to either guilt or punishment. (*Brady v. Maryland* (1963) 373 U.S. 83, 87.) Exculpatory evidence includes information the defense may use to impeach the credibility of peace officer witnesses, such as prior misconduct by the officer. This exculpatory information is commonly referred to as "*Brady* material." Of course, a prosecutor cannot disclose Brady material of which the prosecutor is unaware. While the overwhelming majority of peace officers' personnel files do not have *Brady* material, a percentage does. SB 1220 will help prosecutors to discover, and disclose, exculpatory evidence such as sustained disciplinary findings of group bias or dishonesty.

   "In recent years, the California Supreme Court has lauded and upheld the voluntary law enforcement practice of notifying prosecutors when an officer's file may contain *Brady* material. (*Association for Los Angeles Deputy Sheriffs v. Superior Court* (2019) 8 Cal.5th 28, 53-55; *People v. Superior Court (Johnson)* (2015) 61 Cal.4th 696, 713-714.) However, the court made clear that law enforcement agencies are not required to provide such information. Because no law compels it, some of California's largest agencies do not provide *Brady* notifications to prosecutors. Without this information, the defense is unable to confront law enforcement witnesses with prior misdeeds that may impact the witnesses' credibility.

   "SB 1220 would solve this problem by requiring law enforcement agencies to notify prosecutors when a peace officer has potential *Brady* material in his or her personnel file. Under this common sense and balanced legislation, agencies would provide prosecutors the officer's name and badge number. Because certain types of peace officer misconduct records are already subject to disclosure under the Public Records Act (2018 SB 1421, Skinner), counsel could obtain those records merely by requesting them. Otherwise, a judge would review the records and determine whether they should be disclosed to counsel. In addition, officers would have a right to notice when a prosecutor's office places their names on a list

of officers with potential *Brady* information in their personnel files. The officers would have the right to request removal if their names were included on the list without justification.

"Having consulted with the American Civil Liberties Union and the California Public Defenders Association, we support the July 28, 2020, amendments to the bill. These amendments mandate that prosecuting agencies in California maintain *Brady* lists and require law enforcement agencies to provide *Brady* notification to prosecuting agencies annually and at any other time upon request. In addition, the amendments clarify that nothing in this bill will delay or alter prosecutorial and law enforcement discovery obligations under other laws.

"By mandating *Brady* notification from law enforcement agencies to prosecutors, SB 1220 will ensure prosecutors are able to meet their Constitutional disclosure obligations and will improve the criminal justice system."

9) **Argument in Opposition**: According to the *California Attorneys for Criminal Justice*, "[Senate Bill 1220] runs afoul of the federal Constitution and conflicts with the California Supreme Court and United States Supreme Court decisions on the prosecution's *Brady v. Maryland*, 373 U.S. 83 (1963) (*Brady*).

"We support any efforts to encourage law enforcement to cooperate fully with the prosecuting agencies in criminal cases and, specifically, to provide information that might lead to the discovery of *Brady* material. However, the proposed addition of Penal Code section 1045(g)(1), places limits on the nature of the information to be disclosed and a time limit on that information, neither of which is consistent with *Brady* obligations. The proposed addition of section 1045(g)(4) also requires notice to the officers and provides them an opportunity to request removal from the list.

"First, *Brady* is a federal Constitutional requirement and cannot be limited by state statute. In fact, any attempt to limit *Brady* obligations would not only be unconstitutional but would likely result in unnecessary reversals and retrials. Just last year, the California Supreme Court reiterated, "Under *Brady*, a prosecutor must disclose to the defense evidence that is 'favorable to [the] accused' and 'material either to guilt or to punishment.'" *Association for Los Angeles Deputy Sheriffs v. Superior Court*, (2019) 8 Cal.5th 28, 40 (*ALADS*). This includes information about officers involved in the case, testifying or otherwise, that is favorable to the defense. Our Court went on to say, this is based on the federal Constitution. The United States Supreme Court has made it clear that a failure to abide by the *Brady* obligation can lead to reversal of any conviction where the failure to disclose might undermine """confidence in the outcome of the trial."""" *ALADS, supra*, 8 Cal.5th at p. 40, quoting *Smith v. Cain* (2012) 565 U.S. 73, 75. The prosecutor can fail in this obligation, again under the federal Constitution, even if their office is not aware of information in possession of the law enforcement agencies involved in the case.

"Second, this proposed legislation attempts to limit the constitutional obligations under *Brady* with analogies to the technical protocols involved in *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*). As the court in ALADS reiterated, *Pitchess* and its subsequent codification (Cal. Evid. Code §§1043-1047) was not based on constitutional grounds. Therefore, under *Pitchess* alone, the courts can impose restrictions on disclosure of material.

"However, the courts can only limit disclosure under Pitchess insofar as that disclosure is not also required by Brady because Brady is based on the federal Constitution which cannot be limited by California courts. Moreover, the California Legislature also cannot impose restrictions on Brady obligations by statute.

"Therefore, the limitation to disclosing only name and badge number to the prosecution and forcing the prosecutor to pursue more information may be convenient in a short-sighted sense. However, this puts an undue burden on the prosecutor to guess that Brady material may exist and then to file its own motion to compel disclosure of that information. Failure to get that right could lead to reversal of any conviction. That is why Brady lists were developed – they have nothing to do with Pitchess. They are designed to give the prosecutors a fighting chance to identify information that they are required to investigate and turn over to the defense if the information qualifies. Even though the prosecutor must meet the burden in court, police agencies have the duty to inform the prosecution of potential information. Law enforcement and the prosecutor should be on the same side.

"Third, *Brady* does not have a time limitation. The prosecutors are charged with the duty under *Brady* of knowing about all possible *Brady* information notwithstanding its age or other artificial factors. *Pitchess* legislation contains time limitations but that has nothing to do with the Constitutional requirements of *Brady*. SB 1220 purports to limit the reporting officer misconduct to "five years preceding the request." That limitation is both non-sensical and, even if it made sense, would violate *Brady*. It is non-sensical because the date of a request could be anytime, including, in delayed prosecutions, long after an officer left the force, meaning that misconduct at or near the time of the events charged against the defendant would not be disclosed. However, even if the proposed statute required, for example, five years before and five years after the events charged, that would still not meet the Constitutional requirements that would be based on the circumstances of the relevant misconduct.

"Fourth, the police officer has no employment rights regarding disclosure of *Brady* information. *Brady* iterates the Constitutional rights of the person accused. There is no balancing of interests of the employee or the right of the employee to suppress prior complaints sustained or otherwise. Either the misconduct is relevant to the defendant's rights under *Brady* or not. Whether the officer or the department or even the prosecutor feel that it embarrassing to the officer or whether it would be better from an employee/employer standpoint is not relevant."

10) **Related Legislation**:

a) SB 776 (Skinner) expands the categories of police personnel records that are subject to disclosure under the CPRA. SB 776 is set to be heard in this Committee on August 5, 2020.

11) **Prior Legislation**:

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

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

REGISTERED SUPPORT / OPPOSITION:

Support

California District Attorneys Association (Sponsor)
Alameda County District Attorney's Office
Los Angeles County District Attorney's Office
San Diego County District Attorney's Office
Santa Cruz County District Attorney's Office

Opposition

American Civil Liberties Union
California Attorneys for Criminal Justice
California Public Defenders Association
Analysis Prepared by: Cheryl Anderson / PUB. S. / (916) 319-3744

Date of Hearing: August 5, 2020
Counsel: David Billingsley

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

SB 409 (Wilk) – As Amended April 9, 2019

As Proposed to be Amended in Committee

SUMMARY: Increases the fines for dumping of waste in non-commercial quantities. Makes it a crime to transport waste and other specified materials for the purposes of dumping. Specifically, **this bill:**

1) Provides that it is unlawful to transport waste and other specified material for the purpose of dumping.

2) Specifies that it is unlawful to dump, cause to be dumped, or transport for the purpose of dumping, waste matter upon private property with the consent of the owner or an agent of the owner if a permit or license is required by state or local agency and was not obtained.

3) Provides that it is unlawful for a property owner or an agent of the property owner to receive waste matter if a permit or license is required from a state or local agency and was not obtained prior to receiving the waste matter.

4) Provides that it is unlawful to place, deposit, or dump, or cause to be placed, deposited or dumped, or transport for the purpose of placing depositing or dumping, rocks, concrete, asphalt, or dirt upon private property with the consent of the owner or agent of the owner if a permit or license is required by a state or local agency and was not obtained.

~~5)~~ States that the prohibition on dumping does not restrict a private owner in the use of the owner's own private property, unless the placing, depositing, or dumping of the waste matter on the property required a permit or license from a state or local agency and one was not obtained, or the placing, depositing, or dumping of waste matter on the property creates a public health and safety hazard, a public nuisance, or a fire hazard, as determined by a local health department, local fire department or district providing fire protection services, the Department of Forestry and Fire Protection, or the state or local agency with jurisdiction over the property, in which case prohibition on dumping applies.

6) Increases fines for a violation dumping as infraction to the following levels: a fine of $500-$1,000 for a first offense; a fine of $1,000-$2,500 for a second offense; and a fine of $2,500 to $4,000 for a third or subsequent offense.

EXISTING LAW:

1) States that it is unlawful to dump or cause to be dumped waste matter in or upon a public or private highway or road, including any portion of the right-of-way thereof, or in or upon private property into or upon which the public is admitted by easement or license, or upon private property without the consent of the owner, or in or upon a public park or other public

property other than property designated or set aside for that purpose by the governing board or body having charge of that property. (Pen. Code, § 374.3, subd. (a).)

2) Provides it is unlawful to place, deposit, or dump, or cause to be placed, deposited, or dumped, rocks, concrete, asphalt, or dirt in or upon a private highway or road, including any portion of the right-of-way of the private highway or road, or private property, without the consent of the owner or a contractor under contract with the owner for the materials, or in or upon a public park or other public property, without the consent of the state or local agency having jurisdiction over the highway, road, or property. (Pen. Code, § 374.3, subd. (b).)

3) States that a person violating dumping provisions is guilty of an infraction. Each day that waste placed, deposited, or dumped in violation the law is a separate violation. (Pen. Code, § 374.3, subd. (c).)

4) Provides these provisions do not restrict a private owner in the use of his or her own private property, unless the placing, depositing, or dumping of the waste matter on the property creates a public health and safety hazard, a public nuisance, or a fire hazard, as determined by a local health department, local fire department or district providing fire protection services, or the Department of Forestry and Fire Protection, in which case this section applies. (Pen. Code, § 374.3, subd. (d).)

5) Specifies a person convicted of dumping shall be punished by a mandatory fine of not less than $250 nor more than $1,000 upon a first conviction, by a mandatory fine of not less than $500 nor more than $1,500 upon a second conviction, and by a mandatory fine of not less than $750 nor more than $3,000 upon a third or subsequent conviction. If the court finds that the waste matter placed, deposited, or dumped was used tires, the fine prescribed in this subdivision shall be doubled. (Pen. Code, § 374.3, subd. (e).)

6) Provides that the court may require, in addition to any fine imposed upon a conviction, that, as a condition of probation and in addition to any other condition of probation, a person convicted under this section remove, or pay the cost of removing, any waste matter which the convicted person dumped or caused to be dumped upon public or private property. (Pen. Code, § 374.3, subd. (f).)

7) States that except when the court requires the convicted person to remove waste matter which he or she is responsible for dumping as a condition of probation, the court may, in addition to the fine imposed upon a conviction, require as a condition of probation, in addition to any other condition of probation, that a person convicted of a violation of this section pick up waste matter at a time and place within the jurisdiction of the court for not less than 12 hours. (Pen. Code, § 374.3, subd. (g).)

8) States that a person who places, deposits, or dumps, or causes to be placed, deposited, or dumped, waste matter in violation of this section in commercial quantities shall be guilty of a misdemeanor punishable by imprisonment in a county jail for not more than six months and by a fine. The fine is mandatory and shall amount to not less than $1,000 nor more than $3,000 upon a first conviction, not less than $3,000 nor more than $6,000 upon a second conviction, and not less than ($6,000) nor more than $10,000 upon a third or subsequent conviction.

9) Defines "commercial quantities" means an amount of waste matter generated in the course of a trade, business, profession, or occupation, or an amount equal to or in excess of one cubic yard.

10) States that a person who dumps sewage, sludge, cesspool or septic tank effluent, accumulation of human excreta, or solid waste, in or upon a street, alley, public highway, or road in common use or upon a public park or other public property other than property designated or set aside for that purpose by the governing board or body having charge of the property, or upon private property without the owner's consent, is guilty of a misdemeanor. (Health & Saf. Code, § 11755.)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "SB 409 provides law enforcement with additional tools to protect our environment and neighborhoods against unlawful dumping. Current statute concerning unlawful dumping addresses situations in which property owners do not consent to dumping on their property. However, a loophole exists as the statute does not address situations in which landowners do provide consent for dumping, however, without obtaining required local permits. Property owners profits from collecting cash, while a truck haulers profit from charging the high cost for the transportation of waste intended for a licensed dumpsite, and instead delivering the waste to a property owner's land for a far lower amount of money, thereby pocketing the difference. These bad actors profit for from engaging in this unlawful enterprise to the detriment of the environment and health of the local communities. SB 409 closes this loophole by clarifying that consent can only be given once local permits are obtained, while also enables haulers to face penalties for transporting waste matter for the purpose of unlawful dumping."

2) **This Bill Increases Fines for Dumping Violations:**

Under current law, dumping in commercial amounts (more than a cubic yard) is punished as a misdemeanor, while dumping at less than commercial amounts, is an infraction punishable with graduated fines. The existing fines for illegal, non-commercial, dumping are significant. The fines are on a graduated scale that increases for repeated violations of the law and include mandatory minimums. Existing law provides that a person convicted of dumping shall be punished by a mandatory fine of not less than $250 nor more than $1,000 upon a first conviction, by a mandatory fine of not less than $500 nor more than $1,500 upon a second conviction, and by a mandatory fine of not less than $750 nor more than $3,000 upon a third or subsequent conviction.

This bill would provide that a violation of dumping in non-commercial amounts is punished by a fine of $500-$1,000 for a first offense; a fine of $1,000-$2,500 for a second offense; and a fine of $2,500 to $4,000 for a third or subsequent offense.

3) **Penalty Assessments**: The amount specified in statute as a fine for violating a criminal offense are base figures, as these amounts are subject to statutorily-imposed penalty assessments, such as fees and surcharges. Assuming a defendant is fined the maximum amount of $3,000 under Penal Code Section 374.3 (illegal dumping non-commercial) for a

3rd offense infraction, the following penalty assessments would be imposed pursuant to the Government and Penal codes:

Base Fine:	$3,000.00
Penal Code § 1464 assessment ($10 for every $10):	$3,000.00
Penal Code § 1465.7 assessment (20% surcharge):	$600.00
Penal Code § 1465.8 assessment ($40 per criminal offense):	$40.00
Government Code § 70372 assessment ($5 for every $10):	$1,500.00
Government Code § 70373 assessment ($35 for infraction offense):	$35.00
Government Code § 76000 assessment ($7 for every $10):	$2,100.00
Government Code § 76000.5 assessment ($2 for every $10):	$600.00
Government Code § 76104.6 assessment ($1 for every $10):	$300.00
Government Code § 76104.7 assessment ($4 for every $10):	$1,200.00
Fine with Assessments:	$12,375.00

4) **Dumping Issues in Los Angeles County:** The sponsor of this bill, the Los Angeles District Attorney's Office, describes increasing problems with dumping of waste material within Los Angeles County. With the increased costs of licensed dumpsites in Los Angeles County and throughout the State, some property owners are giving truck owners/operators permission to dump waste matter on their land without first obtaining the required permits from state, county, and/or local agencies. A property owner profits from collecting cash, while a truck owner/operator profits from charging the high cost for the transportation of waste intended for a licensed dumpsite, and instead delivering the waste to a property owner's land for a far lower amount of money, thereby pocketing the difference.

Los Angeles County has addressed this issue by passing municipal ordinances, including one which makes it a misdemeanor for a property owner to allow more than 50 cubic yards of waste unless they have a permit. The local action by Los Angeles does raise the question of whether this issue is more appropriately dealt with on a local level with local solutions tailored to meet the needs of their respective jurisdictions. This bill would create a state law that prohibits a property owner from receiving waste without the required permits, if a state or local permit is required.

5) **Transport for Purposes of Dumping:** This bill would make it unlawful to transport waste matter and other specified materials for the purpose of dumping. Existing law makes it unlawful to dump. While transport for the purpose of dumpling is not explicitly identified as unlawful in the statute, a person can be charged and convicted with an attempt to commit a crime if the person has taken sufficient steps towards completion of the crime. Transporting waste material with the intent to dump would be attempted dumping under current law. An attempt to commit a crime is punishable by up to half the maximum punishment available for the completed crime. This bill would establish transport for purposes of dumping as a crime that could be punished by the same maximum sentence as a crime where the material has been dumped.

6) **Argument in Support**: According to the *Los Angeles County Board of Supervisors*, "SB 409 would expand the crime of illegal dumping to include the transporting of waste matter, rocks, concrete, asphalt or dirt for the purpose of dumping. The measure would also make it a crime to dump, deposit or receive those materials on private property with the consent of the owner without obtaining required permits or licenses and increase the fines for illegal dumping and make the violations an infraction.

"The County's Department of Public Works has seen a recent and significant increase in reported cases of dumping commercial waste material into private yards, vacant lots and remote canyon areas with the consent of land owners. Because it can be profitable, landowners will grant permission to haulers to dump waste material on their land without requisite licenses or approvals from state and local agencies.

"SB 409 would reduce County cleanup costs for illegal dumping, enable the District Attorney to prosecute illegal dumping and deter future, unlawful dumping."

7) **Argument in Opposition:** According to the *American Civil Liberties Union of California*, "It is already unlawful to transport the above-mentioned materials for the purpose of dumping them on private property without the owner's consent. So long as the person transporting the materials has the specific intent to commit the crime, the person can be convicted of attempted dumping under current law. (Penal Code section 21a; Penal Code section 347.3.) If a person transporting these materials does not possess the specific intent to dump them, that person should not be guilty of a crime – whether as an attempt under current law, or as a new crime under SB 409.

"While the goal of encouraging people to seek appropriate permits and licenses to deposit waste matter, rocks, concrete, asphalt, or dirt on private property may be worthwhile, failure to do so does not rise to the level of a crime. Such failures are more appropriately address through professional regulations, and in fact are under existing law.

"Lastly, criminalizing both the property owner and the person who deposited the materials, when it is likely that neither was responsible for obtaining the permit or license and may not know whether a permit or license was properly obtained, will not actually address or deter the behavior contemplated by this bill. Instead, the criminal convictions and mandatory fines may needless fall on well-intentioned property owners, and innocent low-wage workers who cannot afford the fines and whose inability to pay the fines will have lasting consequences for them and their families."

8) **Related Legislation**:

a) AB 215 (Mathis), would have created a new misdemeanor crime by specifying that the fourth violation of illegal dumping on private property is punishable by up to 30 days in county jail and a fine of not less than $750 nor more than $3,000. AB 215 was held on the Assembly Appropriations Suspense File.

b) AB 1216 (Bauer-Kahan), would have created a pilot program to employ a single law enforcement officer in both Alameda and Contra Costa counties to enforce laws prohibiting dumping. AB 1216 was held in the Assembly Appropriations Committee.

9) **Prior Legislation:**

a) AB 144 (Mathis), of the 2015-2016 Legislative Session, was identical to AB 215. AB 144 was vetoed by the Governor.

b) AB 1992 (Canciamilla), Chapter 416, Statutes of 2006, imposed the graduated penalties and increased fines for second and third violations of illegal dumping offenses. AB 1992 went through the Assembly Committee on Natural Resources Committee and was not heard in the Public Safety Committee.

REGISTERED SUPPORT / OPPOSITION:

Support

Los Angeles County District Attorney's Office (Co-Sponsor)
7th Generation Advisors
Alameda County Board of Supervisors
Alameda County District Attorney's Office
Alameda County Supervisor
California Association of Environmental Health Administrators
California Association of Professional Scientists
California Chamber of Commerce
California Compost Coalition
Californians Against Waste
Contra Costa County
Contra Costa County Administrator
Contra Costa County Board of Supervisors
County of Los Angeles Board of Supervisors
County of San Bernardino
Los Angeles County Board of Supervisors
Republic Services Inc.
San Bernardino; County of
Sierra Club
Surfrider Foundation
The 5 Gyres Institute

Oppose Unless Amended

California Construction & Industrial Materials Association

Other

American Civil Liberties Union/northern California/southern California/san Diego and Imperial Counties

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

Amended Mock-up for 2019-2020 SB-409 (Wilk (S))

Mock-up based on Version Number 98 - Amended Senate 4/9/19
Submitted by: David Billingsley, Assembly Public Safety Committee

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

SECTION 1. Section 374.3 of the Penal Code is amended to read:

374.3. (a) It is unlawful to dump, cause to be dumped, or transport for the purpose of dumping, waste matter in or upon a public or private highway or road, including any portion of the right-of-way thereof, or in or upon private property into or upon which the public is admitted by easement or license, or upon private property without the consent of the owner or an agent of the owner, or in or upon a public park or other public property other than property designated or set aside for that purpose by the governing board or body having charge of that property. ~~It is unlawful to dump, cause to be dumped, or transport for the purpose of dumping, waste matter upon private property with the consent of the owner or an agent of the owner if a permit or license is required by a state or local agency and was not obtained.~~ It is unlawful for a property owner or an agent of the property owner to receive waste matter if a permit or license is required from a state or local agency and was not obtained prior to receiving the waste matter.

(b) It is unlawful to place, deposit, or dump, or cause to be placed, deposited, or dumped, or transport for the purpose of placing, depositing, or dumping, rocks, concrete, asphalt, or dirt in or upon a private highway or road, including any portion of the right-of-way of the private highway or road, or private property, without the consent of the owner or an agent of the owner or a contractor under contract with the owner for the materials, or in or upon a public park or other public property, without the consent of the state or local agency having jurisdiction over the highway, road, or property. ~~It is unlawful to place, deposit, or dump, or cause to be placed, deposited, or dumped, or transport for the purpose of placing, depositing, or dumping, rocks, concrete, asphalt, or dirt upon private property with the consent of the owner or an agent of the owner if a permit or license is required by a state or local agency and was not obtained~~. It is unlawful for a property owner or an agent of the property owner to receive rocks, concrete, asphalt, or dirt if a permit or license is required from a state or local agency and was not obtained prior to receiving the rocks, concrete, asphalt, or dirt.

(c) A person violating this section is guilty of an infraction. Each day that waste placed, deposited, or dumped, or transported in violation of subdivision (a) or (b) remains is a separate violation.

(d) This section does not restrict a private owner in the use of the owner's own private property, unless the placing, depositing, or dumping of the waste matter on the property required a permit or license from a state or local agency and one was not obtained, or the placing, depositing, or dumping of waste matter on the property creates a public health and safety hazard, a public

nuisance, or a fire hazard, as determined by a local health department, local fire department or district providing fire protection services, the Department of Forestry and Fire Protection, or the state or local agency with jurisdiction over the property, in which case this section applies.

(e) A person convicted of a violation of this section shall be punished by a mandatory fine of not less than ~~five~~ ***two*** hundred ***fifty*** dollars (~~$500~~ ***250***) nor more than one thousand dollars ($1,000) upon a first conviction, by a mandatory fine of not less than ~~one thousand~~ ***five hundred*** dollars (~~$~~ ***500*** ~~1,000~~) nor more than ~~two~~ ***one*** thousand five hundred dollars (~~$2,500~~ ***$1,500***) upon a second conviction, and by a mandatory fine of not less than ~~two thousand five hundred~~ ***seven hundred fifty*** dollars (~~$2,500~~ ***$750***) nor more than ~~four~~ ***three*** thousand dollars (~~$4,000~~ ***$3000***) upon a third or subsequent conviction. If the court finds that the waste matter placed, deposited, or dumped was used tires, the fine prescribed in this subdivision shall be doubled.

(f) The court may require, in addition to any fine imposed upon a conviction, that, as a condition of probation and in addition to any other condition of probation, a person convicted under this section remove, or pay the cost of removing, any waste matter that the convicted person dumped, caused to be dumped, or transported for the purpose of dumping upon public or private property.

(g) Except when the court requires the convicted person to remove waste matter that the person is responsible for dumping, causing to be dumped, or transporting for the purpose of dumping as a condition of probation, the court may, in addition to the fine imposed upon a conviction, require as a condition of probation, in addition to any other condition of probation, that a person convicted of a violation of this section pick up waste matter at a time and place within the jurisdiction of the court for not less than 12 hours.

(h) (1) A person who places, deposits, or dumps, or causes to be placed, deposited, or dumped, or transports for the purpose of dumping, waste matter in violation of this section in commercial quantities shall be guilty of a misdemeanor punishable by imprisonment in a county jail for not more than six months and by a fine. The fine is mandatory and shall amount to not less than one thousand dollars ($1,000) nor more than three thousand dollars ($3,000) upon a first conviction, not less than three thousand dollars ($3,000) nor more than six thousand dollars ($6,000) upon a second conviction, and not less than six thousand dollars ($6,000) nor more than ten thousand dollars ($10,000) upon a third or subsequent conviction.

(2) "Commercial quantities" means an amount of waste matter generated in the course of a trade, business, profession, or occupation, or an amount equal to or in excess of one cubic yard. This subdivision does not apply to the dumping of household waste at a person's residence.

(i) For purposes of this section, "person" means an individual, trust, firm, partnership, joint stock company, joint venture, or corporation.

(j) Except in unusual cases where the interests of justice would be best served by waiving or reducing a fine, the minimum fines provided by this section shall not be waived or reduced.

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

Date of Hearing: August 5, 2020
Counsel: David Billingsley

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

SB 580 (Wilk) – As Amended May 22, 2019

As Proposed to be Amended in Committee

SUMMARY: Requires a court to consider ordering a defendant that has been granted probation after conviction of specified animal abuse crimes to undergo a mental health evaluation. Specifies that if the evaluating mental health professional deems it necessary, the defendant shall complete mandatory counseling as directed by the court. Specifically, **this bill**:

1) Deletes the requirement that if a defendant is granted probation for a conviction animal cruelty, the court shall order the defendant to pay for, and successfully complete, counseling, as determined by the court, designed to evaluate and treat behavior or conduct disorders.

2) Requires the court to consider for every defendant who is granted probation for specified animal abuse offenses, whether to order that the person undergo a mental health evaluation by an evaluator chosen by the court.

3) Specifies if the evaluating mental health professional deems it necessary, the defendant shall complete mandatory counseling as directed by the court.

4) States that mental health evaluations and any subsequent treatment shall be paid for by the defendant, but if the court finds that the defendant is financially unable to pay for that counseling, the court may develop a sliding fee schedule based upon the defendant's ability to pay.

5) States that an indigent defendant may negotiate a deferred payment schedule, but shall pay a nominal fee if the defendant has the ability to pay the nominal fee. County mental health departments or Medi-Cal shall be responsible for the costs of counseling required by this section only for those persons who meet the medical necessity, as specified.

6) Provides that the counseling specified in this bill shall be in addition to any other terms and conditions of probation, including any term of imprisonment and fine.

7) States that finding that the defendant suffers from a mental disorder, and any progress reports concerning the defendant's treatment, or any other records created pursuant to the provisions of this bill, shall be confidential and shall not be released or used in connection with any civil proceeding without the defendant's consent.

EXISTING LAW:

1) Specifies the actions of a person who maliciously and intentionally maims, mutilates, tortures, or wounds a living animal, or maliciously and intentionally kills an animal as a

criminal offense. (Pen. Code, § 597.)

2) Specifies when a person overdrives, overloads, drives when overloaded, overworks, tortures, torments, deprives of necessary sustenance, drink, or shelter, cruelly beats, mutilates, or cruelly kills any animal, or causes or procures any animal to be so overdriven, overloaded, driven when overloaded, overworked, tortured, tormented, deprived of necessary sustenance, drink, shelter, or to be cruelly beaten, mutilated, or cruelly killed; and whoever, having the charge or custody of any animal, either as and owner or otherwise, subjects any animal to needless suffering, or inflicts unnecessary cruelty upon the animal, or in any manner abuses any animal, or fails to provide the animal with proper food, drink, or shelter or protection from the weather, or who drives, rides, or otherwise uses the animal when unfit for labor as a criminal offense. (Pen. Code, § 597, subd. (b).)

3) Specifies the actions of a person who maliciously and intentionally maims, mutilates, or tortures any mammal, bird, reptile, amphibian, or fish, as specified as a criminal offense. (Pen. Code, § 597, subd. (c).)

4) States that a violation of animal cruelty may be punished as a felony by imprisonment pursuant to subdivision (h) of Section 1170, or by a fine of not more than twenty thousand dollars ($20,000), or by both that fine and imprisonment, or alternatively, as a misdemeanor by imprisonment in a county jail for not more than one year, or by a fine of not more than twenty thousand dollars ($20,000), or by both that fine and imprisonment. (Pen. Code, § 597, subd. (d).)

5) Specifies that upon the conviction of a person charged with a violation of this section by causing or permitting an act of cruelty, as specified, all animals lawfully seized and impounded with respect to the violation by a peace officer, officer of a humane society, or officer of a pound or animal regulation department of a public agency shall be adjudged by the court to be forfeited and shall thereupon be awarded to the impounding officer for proper disposition. A person convicted of a violation of this section by causing or permitting an act of cruelty, as specified, shall be liable to the impounding officer for all costs of impoundment from the time of seizure to the time of proper disposition. (Pen. Code, § 597, subd. (g).)

6) States that if a defendant is granted probation for a conviction animal cruelty, the court shall order the defendant to pay for, and successfully complete, counseling, as determined by the court, designed to evaluate and treat behavior or conduct disorders. (Pen. Code, § 597, subd. (h).)

7) States that if the court finds that the defendant is financially unable to pay for that counseling, the court may develop a sliding fee schedule based upon the defendant's ability to pay.

8) Specifies that the counseling shall be in addition to any other terms and conditions of probation, including any term of imprisonment and any fine. (Pen. Code, § 597, subd. (h).)

9) States that the court may also order, as a condition of probation, that the convicted person be prohibited from owning, possessing, caring for, or residing with, animals of any kind, and require the convicted person to immediately deliver all animals in his or her possession to a designated public entity for adoption or other lawful disposition or provide proof to the court

that the person no longer has possession, care, or control of any animals. (Pen. Code, § 597.1, subd. (l)

10) States that any person who has been convicted of a misdemeanor violation of animal cruelty, as specified, and who, within five years after the conviction, owns, possesses, maintains, has custody of, resides with, or cares for any animal is guilty of a crime, punishable by a fine of one thousand dollars ($1,000). (Pen. Code, § 597.9, subd. (a).)

11) States that any person who has been convicted of a felony violation of animal cruelty, as specified, and who, within 10 years after the conviction, owns, possesses, maintains, has custody of, resides with, or cares for any animal is guilty of a public offense, punishable by a fine of one thousand dollars ($1,000). (Pen. Code, § 597.9, subd. (a).)

12) Allows a defendant to petition the court to reduce the duration of the mandatory ownership prohibition. Upon receipt of a petition from the defendant, the court shall set a hearing to be conducted within 30 days after the filing of the petition. At the hearing, the petitioner shall have the burden of establishing by a preponderance of the evidence all of the following: (Pen. Code, § 597.9, subd. (d)(1)(a)-(c).)

    a) He or she does not present a danger to animals;

    b) He or she has the ability to properly care for all animals in his or her possession; and,

    c) He or she has successfully completed all classes or counseling ordered by the court.

13) Specifies that if the petitioner has met his or her burden, the court may reduce the mandatory ownership prohibition and may order that the defendant comply with reasonable and unannounced inspections by animal control agencies or law enforcement. (Pen. Code, § 597.9, subd. (d)(2).)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "There is an undeniable link between animal abuse and more serious violence toward humans. More often than not, those who abuse animals at one point in their lives will go on to commit much more appalling crimes including domestic violence, rape and murder – in fact, nearly half of school shooters and serial killers have serious histories of animal abuse.

    "We know that this link exists, but we have failed to properly address it. SB 580 will help rethink the way we deal with animal abuse in the courts. The most serious crimes will call for a mental health evaluation and, if the court sees fit, treatment according to professional opinion. This ensures early intervention for those who need it most, and begins to move away from a more outdated system that fails to address the underlying problems facing animal abuse defendants."

2) **Current Law Requires A Defendant Granted Probation for an Animal Cruelty Conviction to Undergo Counseling as Directed by the Court:** Existing law states that if a

defendant is granted probation for a conviction animal cruelty, the court shall order the defendant to pay for, and successfully complete, counseling, as determined by the court, designed to evaluate and treat behavior or conduct disorders. (Pen. Code, § 597, subd. (h).) If the court finds that the defendant is financially unable to pay for that counseling, the court may develop a sliding fee schedule based upon the defendant's ability to pay. The counseling shall be in addition to any other terms and conditions of probation, including any term of imprisonment and any fine. If the court does not order custody as a condition of probation for a conviction under this section, the court shall specify on the court record the reason or reasons for not ordering custody. (Id.)

Cases involving animal cruelty can vary significantly in terms of their nature and severity. Some cases involve simple neglect where an animal isn't provided proper food or care. Other cases involve significant intentional acts of cruelty. Current law imposes a mandatory sentencing requirement of counseling. That mandatory sentencing requirement does not necessarily fit the needs or circumstances of all cases of animal cruelty.

"Society receives maximum protection when the penalty, treatment or disposition of the offender is tailored to the individual case. Only the trial judge has the knowledge, ability and tools at hand to properly individualize the treatment of the offender." (*People v. Williams* (1970) 30 Cal. 3d 470,482, citation and internal quotation marks omitted.) An effective sentencing framework seeks to avoid arbitrary or rigid sentencing procedures which lead to unjust results.

This bill would delete the requirement of mandatory counseling in every case of animal cruelty where the defendant is placed on probation, and instead would require the court to consider a mental health evaluation for a defendant who is granted probation for specified animal abuse offenses. This bill would not make the mental health evaluation mandatory. However, if a mental health evaluation is conducted and the evaluating mental health professional deems it necessary, the defendant must complete counseling as part of probation. This bill would also require the court to consider the mental health evaluation for a number of animal abuse crimes that do not currently require mandatory counseling.

3) **Amendments Proposed to be Adopted in Committee:**

   a) Remove the requirement that the court consider imposing an responsible animal owners education course when a defendant is granted probation for specified offenses involving animal abuse.

   b) Require a court to consider ordering a defendant that has been granted probation after conviction of specified animal abuse crimes to undergo a mental health evaluation, instead of making an evaluation mandatory in every case.

   The proposed amendments make this bill consistent with SB 1024 (Wilk), of the 2017-2018 Legislative Session. SB 1024 was passed by the Assembly Public Safety Committee.

4) **Argument in Support**: According to *Animal Legal Defense Fund*, "There is no specialization required for treatment for animal abusers – underlying causes may differ, from conduct disorder to anger management and beyond – so there are many mental health providers that can be available to conduct evaluations and provide treatment. The Animals &

Society Institute is one example of an organization offering resources for mental health providers to treat animal abusers such as assessment tools and tailored treatment for multiple underlying conditions. SB 580 only *requires* a mental health evaluation and only for specified animal cruelty crimes for which there *may* be an underlying mental health issue. Such an evaluation will: 1) Ensure that those who have a mental illness have the opportunity to receive treatment; and 2) Ensure that those who are found to have an underlying mental health issue get a recommendation for *appropriate* treatment. Treating mental health issues – particularly as tied to animal abuse – is not a one-size-fits all approach and it is crucial that the criminal justice system strive to order full treatments only where appropriate, and to narrowly-tailor treatments for the most effective rehabilitation for an individual offender.

"While not every animal abuser necessarily has an underlying mental health issue, nearly all offenders can benefit from humane education instruction. Offenders who commit domestic violence or child abuse are required to participate in batterer's counseling and parenting courses, respectively. As animal abuse is linked to these other crimes, it is only reasonable that humane education/responsible pet ownership courses, be a tool that judges can utilize as part of sentencing for animal abusers. These courses encourage empathy and promote understanding of the need for compassion and respect for animals. Additionally, these courses teach proper care for animals. In cases of neglect, many individuals simply do not know proper animal care or recognize animals as sentient beings. These courses are instrumental in helping to reduce recidivism for low-level offenders. Moreover, most classes are relatively inexpensive, and per DDA Guthrie, offenders can pay over time or request a reduced rate, thus addressing any concern about payment being too burdensome for some offenders.

"Mental health evaluations for certain animal abusers, as well as humane education courses, are both important tools that should be available to courts. These are both crucial for rehabilitation of animal abusers and will have a significant impact on the reduction of recidivism rates among animal abusers as well on preventing these abusers from escalating to human victims. It is long overdue that our laws, law enforcement, and correctional system recognize that animal abuse and its probable escalation to further violence is a significant issue and we must take steps as early as possible to prevent more victims. We commend Senator Wilk for introducing a holistic approach toward educating and rehabilitating those that commit such offenses."

5) **Argument in Opposition**: According to the *San Diego Humane Society,* '"Current law provides that the court is mandated to order counseling for any defendant who is granted probation upon convicted of a violation of Penal Code 597. SB 580 proposes to eliminate this mandate in lieu of psychiatric or psychological testing. While such testing may identify significant psychological disorders, it will likely miss other issues that were a result of short-lived anger management, alcohol abuse, or being linked to another crime (eg., spousal abuse that included animal cruelty). It's uncertain whether a psychological evaluation would test for or discern those causes. Failure to identify those underlying issues would not give the court a clear understanding of the cause of abuse and could eliminate the opportunity for intervention.

"While we understand what you are trying to achieve with SB 580, we cannot support the elimination of mandated counseling. There are too many incidents where a psychological evaluation may not identify a specific problem that counseling could address. For example, a family having financial problems and an animal is injured because the person is striking out

due to frustration and stress. An evaluation likely won't identify a psychological disorder, but mandated counseling could address the root cause of the outburst – the stress over financial mismanagement.

"We propose maintaining the requirement for mandatory counseling for any defendant who is granted probation for an animal cruelty conviction unless the psychological or psychiatric evaluation results in the recommendation for a greater level of treatment, which they shall undergo."

6) **Related Legislation**: AB 611 (Nazarian), would require a person convicted of a violation of sexual contact with an animal to participate counseling as directed by the court. AB 611 has been referred to the suspense file in the Senate Appropriations Committee.

7) **Prior Legislation**:

   a) SB 1024 (Wilk), of the 2017-2018 Legislative Session, was substantially similar to this bill. SB 1024 was held in the Assembly Appropriations Committee.

   b) AB 3040 (Nazarian), of the 2017-2018 Legislative Session, would have prohibited sexual contact, as defined, with any animal, and would require a person convicted of a violation of sexual contact with an animal to participate counseling as directed by the court. AB 3040 was held in the Senate Appropriations Committee.

   c) AB 628 (Chen), of the 2017-2018 Legislative Session, would have clarified procedures for notification of animal owners regarding hearings and payment of costs when an animal is seized or impounded. AB 628 was never heard in the Assembly Public Safety Committee.

   d) AB 2052 (Williams), of the 2015-2016 Legislative Session, would have required a person sentenced for two or more current convictions for specified animal abuse and animal cruelty offenses to be sentenced to consecutive terms of imprisonment. AB 2052 failed passage in the Assembly Appropriations Committee.

   e) AB 794 (Linder), Chapter 201, Statues of 2015, expanded criminal acts against law enforcement animals to include offenses against animals used by volunteers acting under the direct supervision of a peace officer.

   f) AB 2278 (Levine), of the 2014-2015 Legislative Session, would have clarified procedures for notification of animal owners regarding hearings and payment of costs when an animal is seized or impounded. AB 2278 was held in the Senate Appropriations Committee.

   g) SB 1500 (Lieu), Chapter 598, Statutes of 2012, allows pre-conviction forfeiture of an individual's seized animals in animal abuse and neglect cases.

REGISTERED SUPPORT / OPPOSITION:

Support

Animal Legal Defense Fund
Animal Wellness Action
Animal Wellness Foundation
California Police Chiefs Association
Humane Society of the United States

Opposition

San Diego Humane Society

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

Amended Mock-up for 2019-2020 SB-580 (Wilk (S))

Mock-up based on Version Number 97 - Amended Senate 5/22/19
Submitted by: David Billingsley, Assembly Public Safety Committee

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

SECTION 1. This act shall be known, and may be cited, as the Animal Cruelty and Violence Intervention Act of 2019.

SEC. 2. Section 597 of the Penal Code is amended to read:

597. (a) Except as provided in subdivision (c) of this section or Section 599c, a person who maliciously and intentionally maims, mutilates, tortures, or wounds a living animal, or maliciously and intentionally kills an animal, is guilty of a crime punishable pursuant to subdivision (d).

(b) Except as otherwise provided in subdivision (a) or (c), a person who overdrives, overloads, drives when overloaded, overworks, tortures, torments, deprives of necessary sustenance, drink, or shelter, cruelly beats, mutilates, or cruelly kills an animal, or causes or procures an animal to be so overdriven, overloaded, driven when overloaded, overworked, tortured, tormented, deprived of necessary sustenance, drink, shelter, or to be cruelly beaten, mutilated, or cruelly killed; and whoever, having the charge or custody of an animal, either as owner or otherwise, subjects an animal to needless suffering, or inflicts unnecessary cruelty upon the animal, or in any manner abuses an animal, or fails to provide the animal with proper food, drink, or shelter, or protection from the weather, or who drives, rides, or otherwise uses the animal when unfit for labor, is, for each offense, guilty of a crime punishable pursuant to subdivision (d).

(c) A person who maliciously and intentionally maims, mutilates, or tortures a mammal, bird, reptile, amphibian, or fish, as described in subdivision (e), is guilty of a crime punishable pursuant to subdivision (d).

(d) A violation of subdivision (a), (b), or (c) is punishable as a felony by imprisonment pursuant to subdivision (h) of Section 1170, or by a fine of not more than twenty thousand dollars ($20,000), or by both that fine and imprisonment, or alternatively, as a misdemeanor by imprisonment in a county jail for not more than one year, or by a fine of not more than twenty thousand dollars ($20,000), or by both that fine and imprisonment.

(e) (1) Subdivision (c) applies to a mammal, bird, reptile, amphibian, or fish that is a creature described as follows:

(A) Endangered species or threatened species as described in Chapter 1.5 (commencing with Section 2050) of Division 3 of the Fish and Game Code.

(B) Fully protected birds described in Section 3511 of the Fish and Game Code.

(C) Fully protected mammals described in Chapter 8 (commencing with Section 4700) of Part 3 of Division 4 of the Fish and Game Code.

(D) Fully protected reptiles and amphibians described in Chapter 2 (commencing with Section 5050) of Division 5 of the Fish and Game Code.

(E) Fully protected fish as described in Section 5515 of the Fish and Game Code.

(2) This subdivision does not supersede or affect any law relating to taking of the described species, including, but not limited to, Section 12008 of the Fish and Game Code.

(f) For the purposes of subdivision (c), each act of malicious and intentional maiming, mutilating, or torturing a separate specimen of a creature described in subdivision (e) is a separate offense. If a person is charged with a violation of subdivision (c), the proceedings shall be subject to Section 12157 of the Fish and Game Code.

(g) (1) Upon the conviction of a person charged with a violation of this section by causing or permitting an act of cruelty, as defined in Section 599b, all animals lawfully seized and impounded with respect to the violation by a peace officer, officer of a humane society, or officer of a pound or animal regulation department of a public agency shall be adjudged by the court to be forfeited and shall thereupon be awarded to the impounding officer for proper disposition. A person convicted of a violation of this section by causing or permitting an act of cruelty, as defined in Section 599b, shall be liable to the impounding officer for all costs of impoundment from the time of seizure to the time of proper disposition.

(2) Mandatory seizure or impoundment shall not apply to animals in properly conducted scientific experiments or investigations performed under the authority of the faculty of a regularly incorporated medical college or university of this state.

SEC. 3. Section 600.8 is added to the Penal Code, to read:

600.8. (a) For a defendant who is granted probation ~~or a suspended sentence~~ for an offense specified in subdivision (b), the court shall ***consider whether to*** order the convicted person to undergo a ~~psychological or psychiatric~~ ***mental health*** evaluation ***by an evaluator chosen by the court. Upon evaluation, if the evaluating mental health professional deems it necessary, the defendant shall complete mandatory counseling as directed by the court. Mental health evaluations and any subsequent treatment shall be paid for by the defendant.*** ~~and to undergo any treatment, at the convicted person's expense, that the court determines to be appropriate after due consideration of the evaluation.~~ If the court finds that the defendant is financially unable to pay for ***evaluation and*** counseling, the court may develop a sliding fee schedule based on the

defendant's ability to pay. An indigent defendant may negotiate a deferred payment schedule, but shall pay a nominal fee if the defendant has the ability to pay the nominal fee. County mental health departments or Medi-Cal shall be responsible for the costs of counseling required by this section only for those persons who meet the medical necessity criteria for mental health managed care pursuant to Section 1830.205 of Title 9 of the California Code of Regulations or the targeted population criteria specified in Section 5600.3 of the Welfare and Institutions Code. The counseling specified in this section shall be in addition to any other terms and conditions of probation, including any term of imprisonment and fine.

(b) This section applies to a conviction for any of the following offenses:

(1) Section 286.5.

(2) Section 596.

(3) Subdivision (a), (b), or (c) of Section 597.

(4) Paragraph (1) of subdivision (a) of Section 597.1.

(5) Section 597f.

(6) Subdivision (a), (b), or (c) of Section 600.

(c) A finding that the defendant suffers from a mental disorder, and any progress reports concerning the defendant's treatment, or any other records created pursuant to this section, shall be confidential and shall not be released or used in connection with any civil proceeding without the defendant's consent.

~~**SEC. 4.** Section 600.9 is added to the Penal Code, to read:~~

~~**600.9.** (a) For a defendant who is granted probation or a suspended sentence for an offense specified in subdivision (c), the court shall consider whether to order the defendant to complete a responsible animal owner education course described in subdivision (b).~~

~~(b) The responsible animal owner education course for offenses specified in subdivision (c) shall be one of the following:~~

~~(1) An online course approved by the State Department of Education.~~

~~(2) An online course approved for a similar purpose in another state.~~

~~(3) A live course sponsored by a municipal animal shelter, humane society, or society for the prevention of cruelty to animals (SPCA).~~

~~(c) This section applies to a conviction for any of the following offenses:~~

~~(1) Section 286.5.~~

~~(2) Section 596.~~

~~(3) Section 596.5.~~

~~(4) Subdivision (a), (b), or (c) of Section 597.~~

~~(5) Paragraph (1) of subdivision (a) of Section 597.1.~~

~~(6) Subdivision (a) or (b) of Section 597.5.~~

~~(7) Section 597.6.~~

~~(8) Section 597.7.~~

~~(9) Section 597a.~~

~~(10) Section 597b.~~

~~(11) Section 597c.~~

~~(12) Section 597e.~~

~~(13) Section 597f.~~

~~(14) Section 597g.~~

~~(15) Section 597h.~~

~~(16) Section 597i.~~

~~(17) Section 597j.~~

~~(18) Section 597k.~~

~~(19) Section 597l.~~

~~(20) Section 597m.~~

~~(21) Section 597n.~~

~~(22) Section 597o.~~

~~(23) Section 597s.~~

~~(24) Section 597t.~~

~~(25) Section 597u.~~

~~(26) Section 597v.~~

~~(27) Section 597x.~~

~~(28) Section 597z.~~

~~(29) Section 599f.~~

~~(30) Subdivision (a), (b), or (c) of Section 600.~~

~~(31) Section 600.2.~~

~~(32) Section 600.5.~~

SEC. 5. The Legislature finds and declares that Section 3 of this act, which adds Section 600.8 of the Penal Code, imposes a limitation on the public's right of access to the meetings of public bodies or the writings of public officials and agencies within the meaning of Section 3 of Article I of the California Constitution. Pursuant to that constitutional provision, the Legislature makes the following findings to demonstrate the interest protected by this limitation and the need for protecting that interest:

In order to protect the privacy of defendants with respect to mental health evaluations and treatment, it is necessary that records of those evaluations and that treatment remain confidential.