California State Assembly

PUBLIC SAFETY

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CHAIR

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AGENDA

Tuesday, June 29, 2021
9 a.m. -- State Capitol, Room 4202

Part III

SB 23 (Rubio) – SB 519 (Wiener)

Date of Hearing: June 29, 2021
Counsel: Sandy Uribe

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

SB 23 (Rubio) – As Amended March 18, 2021

As Proposed to be Amended in Committee

SUMMARY: Extends the statute of limitations for the crime of "revenge porn" to allow prosecution to commence within one year of the discovery of the offense, but not more than four years after the image was distributed.

EXISTING LAW:

1) Makes it a misdemeanor for a person to intentionally distribute an image of the intimate body parts of another or of the person depicted engaged in a sex act under circumstances in which the persons agreed or understood that the image would remain private, and the person distributing the image knows or should know that the distribution of the image will cause serious emotional distress, and the person depicted suffers that distress. This crime is commonly known as "revenge porn." (Pen. Code, § 647, subd. (j)(4).)

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

3) Provides that prosecution for an offense punishable by imprisonment in state prison or pursuant to realignment must commence within three years of the commission of the offense, except as specified. (Pen. Code, § 801.)

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

5) Provides exceptions for the one-year statute of limitations for specified misdemeanors. (Pen. Code, § 802.)

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

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

   a) An indictment or information is filed;

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

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

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

FISCAL EFFECT: Unknown.

COMMENTS:

1) **Author's Statement**: According to the author, "SB 23 will strengthen protections for victims of revenge porn by extending the statute of limitations to one year from discovery, giving a victim more time to seek justice against those who violate their privacy. California led the nation in 2013 when it created the crime of revenge porn. Data shows that this form of 'cyber revenge' is an invasive and increasingly common crime intended to shame and intimidate its victims, and the significant emotional distress it causes them can have severe consequences. Unfortunately, the current statute of limitations for revenge porn in California leaves many victims without the ability to seek justice against those who violate their privacy. Under existing law, the crime of revenge porn must be prosecuted within one year from the date the photo was first distributed. However, victims often will not discover until years later that an image intended to be kept private has been shared.

   "SB 23 empowers victims of revenge porn by changing the statute of limitations to be one year from the date that the victim discovers that the image has been distributed, as long as the criminal action is filed within 6 years of the commission of the offense. This approach of starting the clock upon the victim's discovery of the violation already exists in the Penal Code for similar invasive crimes. By making this commonsense change, the abusers who cause devastating, long-lasting impacts on a revenge porn victim's personal and professional life can be held accountable."

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

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

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

   These principals are reflected in court decisions. The United States Supreme Court has stated that statutes of limitations are the primary guarantee against bringing overly stale criminal charges. (*United States v. Ewell* (1966) 383 U.S. 116, 122.) There is a measure of predictability provided by specifying a limit beyond which there is an irrebuttable

presumption that a defendant's right to a fair trial would be prejudiced. Such laws reflect legislative assessments of the relative interests of the state and the defendant in administering and receiving justice.

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

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

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

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

This bill, as proposed to be amended, would provide that a charge for the crime of revenge porn may be filed within one year of the discovery of the offense, but no more than four years after its commission. The four-year extension is consistent with what this Committee has previously passed, and the Legislature has approved, for misdemeanor crimes that are not necessarily immediately discoverable. (See e.g. SB 610 (Nguyen), Chapter 74, Statutes of

2017, extending the statute of limitations for misdemeanor of concealing an accidental death.)

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

   Under these principles, the extended statute of limitations provided for in this bill cannot be applied to cases in which the period has expired.

4) **Argument in Support**: According to the *Alameda County District Attorney*, a co-sponsor of this bill, "This bill would extend the statute of limitations for Invasion of Privacy cases (commonly referred to as "revenge porn") to be one year from the time the victim discovers any intimate materials posted without the victims consent, rather than a year from their posting.

   "Cyber revenge is an invasive and increasingly common crime, which often involves the online posting of private or intimate phots of another person without the person's consent. In many cases, the pictures are taken over the course of a relationship and while the victim may have consented to the original taking of the picture, he or she did not consent to the electronic distribution of the images. Typically, these photos are posted to social media sites to shame, embarrass, harass, and intimidate the victim.

   "Under existing law, the crime of revenge porn must be prosecuted within one year from the date the photo was first distributed. Unfortunately, victims often will not discover until years later that an image intended to be kept private has been shared.

   "SB 23 empowers victims of revenge porn by changing the statute of limitations to be one year from the date that the victim discovers that the image has been distributed. This approach already exists in the Penal Code for similar invasive crimes, such as when a person uses a concealed camera to photograph a person without their knowledge or consent. Recently, in Tulare County, a victim of revenge porn was unable to seek justice because she did not discover a private photo of her was shared online until years after it was distributed. SB 23 will ensure that the law will never again fail to protect victims like her."

5) **Related Legislation**:

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

   b) AB 1247 (Chau) permits the tolling of the statute of limitations for the prosecution of a felony offense for specified computer crimes until the discovery of the commission of the offense, or within three years that the offense could have reasonably been discovered, but no more than six years from the commission of the offense. AB 1247 is pending in the Senate Public Safety Committee.

6) **Prior Legislation**:

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

b) SB 610 (Nguyen), Chapter 74, Statutes of 2017, extended the statute of limitations for the misdemeanor crime of concealing an accidental death to one year after a suspect is identified by law enforcement, but no more than four years after the commission of the offense.

c) SB 255 (Cannella) Chapter 466, Statutes of 2013, established the crime of revenge porn.

REGISTERED SUPPORT / OPPOSITION:

Support
California District Attorneys Association (Sponsor)
Alameda County District Attorney's Office
California State Sheriffs' Association
Orange County District Attorney
Peace Officers Research Association of California (PORAC)

Oppose

None

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

Amended Mock-up for 2021-2022 SB-23 (Rubio (S))

Mock-up based on Version Number 98 - Amended Senate 3/18/21
Submitted by: Sandy Uribe, Assembly Public Safety Committee

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

SECTION 1. Section 803 of the Penal Code, as amended by Section 1 of Chapter 244 of the Statutes of 2020, is amended to read:

803. (a) Except as provided in this section, a limitation of time prescribed in this chapter is not tolled or extended for any reason.

(b) The time during which prosecution of the same person for the same conduct is pending in a court of this state is not a part of a limitation of time prescribed in this chapter.

(c) A limitation of time prescribed in this chapter does not commence to run until the discovery of an offense described in this subdivision. This subdivision applies to an offense punishable by imprisonment in the state prison or imprisonment pursuant to subdivision (h) of Section 1170, a material element of which is fraud or breach of a fiduciary obligation, the commission of the crimes of theft or embezzlement upon an elder or dependent adult, or the basis of which is misconduct in office by a public officer, employee, or appointee, including, but not limited to, the following offenses:

(1) Grand theft of any type, forgery, falsification of public records, or acceptance of, or asking, receiving, or agreeing to receive, a bribe, by a public official or a public employee, including, but not limited to, a violation of Section 68, 86, or 93.

(2) A violation of Section 72, 118, 118a, 132, 134, or 186.10.

(3) A violation of Section 25540, of any type, or Section 25541 of the Corporations Code.

(4) A violation of Section 1090 or 27443 of the Government Code.

(5) Felony welfare fraud or Medi-Cal fraud in violation of Section 11483 or 14107 of the Welfare and Institutions Code.

(6) Felony insurance fraud in violation of Section 548 or 550 of this code or former Section 1871.1, or Section 1871.4, of the Insurance Code.

(7) A violation of Section 580, 581, 582, 583, or 584 of the Business and Professions Code.

(8) A violation of Section 22430 of the Business and Professions Code.

(9) A violation of Section 103800 of the Health and Safety Code.

(10) A violation of Section 529a.

(11) A violation of subdivision (d) or (e) of Section 368.

(d) If the defendant is out of the state when or after the offense is committed, the prosecution may be commenced as provided in Section 804 within the limitations of time prescribed by this chapter, and no time up to a maximum of three years during which the defendant is not within the state shall be a part of those limitations.

(e) A limitation of time prescribed in this chapter does not commence to run until the offense has been discovered, or could have reasonably been discovered, with regard to offenses under Division 7 (commencing with Section 13000) of the Water Code, under Chapter 6.5 (commencing with Section 25100) of, Chapter 6.7 (commencing with Section 25280) of, or Chapter 6.8 (commencing with Section 25300) of, Division 20 of, or Part 4 (commencing with Section 41500) of Division 26 of, the Health and Safety Code, or under Section 386, or offenses under Chapter 5 (commencing with Section 2000) of Division 2 of, Chapter 9 (commencing with Section 4000) of Division 2 of, Section 6126 of, Chapter 10 (commencing with Section 7301) of Division 3 of, or Chapter 19.5 (commencing with Section 22440) of Division 8 of, the Business and Professions Code.

(f) (1) Notwithstanding any other limitation of time described in this chapter, if subdivision (b) of Section 799 does not apply, a criminal complaint may be filed within one year of the date of a report to a California law enforcement agency by a person of any age alleging that the person, while under 18 years of age, was the victim of a crime described in Section 261, 286, 287, 288, 288.5, or 289, former Section 288a, or Section 289.5, as enacted by Chapter 293 of the Statutes of 1991 relating to penetration by an unknown object.

(2) This subdivision applies only if all of the following occur:

(A) The limitation period specified in Section 800, 801, or 801.1, whichever is later, has expired.

(B) The crime involved substantial sexual conduct, as described in subdivision (b) of Section 1203.066, excluding masturbation that is not mutual.

(C) There is independent evidence that corroborates the victim's allegation. If the victim was 21 years of age or older at the time of the report, the independent evidence shall clearly and convincingly corroborate the victim's allegation.

(3) Evidence shall not be used to corroborate the victim's allegation if that evidence would otherwise be inadmissible during trial. Independent evidence excludes the opinions of mental health professionals.

(4) (A) In a criminal investigation involving any of the crimes listed in paragraph (1) committed against a child, if the applicable limitations period has not expired, that period shall be tolled from the time a party initiates litigation challenging a grand jury subpoena until the end of the litigation, including any associated writ or appellate proceeding, or until the final disclosure of evidence to the investigating or prosecuting agency, if that disclosure is ordered pursuant to the subpoena after the litigation.

(B) This subdivision does not affect the definition or applicability of any evidentiary privilege.

(C) This subdivision shall not apply if a court finds that the grand jury subpoena was issued or caused to be issued in bad faith.

(g) (1) Notwithstanding any other limitation of time described in this chapter, a criminal complaint may be filed within one year of the date on which the identity of the suspect is conclusively established by DNA testing, if both of the following conditions are met:

(A) The crime is one that is described in subdivision (c) of Section 290.

(B) The offense was committed before January 1, 2001, and biological evidence collected in connection with the offense is analyzed for DNA type no later than January 1, 2004, or the offense was committed on or after January 1, 2001, and biological evidence collected in connection with the offense is analyzed for DNA type no later than two years from the date of the offense.

(2) For purposes of this section, "DNA" means deoxyribonucleic acid.

(h) For any crime, the proof of which depends substantially upon evidence that was seized under a warrant, but which is unavailable to the prosecuting authority under the procedures described in People v. Superior Court (Laff) (2001) 25 Cal.4th 703, People v. Superior Court (Bauman & Rose) (1995) 37 Cal.App.4th 1757, or subdivision (c) of Section 1524, relating to claims of evidentiary privilege or attorney work product, the limitation of time prescribed in this chapter shall be tolled from the time of the seizure until final disclosure of the evidence to the prosecuting authority. This section does not otherwise affect the definition or applicability of any evidentiary privilege or attorney work product.

(i) (1) Notwithstanding any other limitation of time described in this chapter, a criminal complaint may be filed within one year of the date on which a hidden recording is discovered related to a violation of paragraph (2) or (3) of subdivision (j) of Section 647.

(2) Notwithstanding any other limitation of time described in this chapter, a criminal complaint may be filed within one year of the date on which it is discovered that, but not more than ~~six~~ **four**

years after, an image was intentionally distributed in violation of paragraph (4) of subdivision (j) of Section 647.

(j) Notwithstanding any other limitation of time described in this chapter, if a person flees the scene of an accident that caused death or permanent, serious injury, as defined in subdivision (d) of Section 20001 of the Vehicle Code, a criminal complaint brought pursuant to paragraph (2) of subdivision (b) of Section 20001 of the Vehicle Code may be filed within the applicable time period described in Section 801 or 802 or one year after the person is initially identified by law enforcement as a suspect in the commission of the offense, whichever is later, but in no case later than six years after the commission of the offense.

(k) Notwithstanding any other limitation of time described in this chapter, if a person flees the scene of an accident, a criminal complaint brought pursuant to paragraph (1) or (2) of subdivision (c) of Section 192 may be filed within the applicable time period described in Section 801 or 802, or one year after the person is initially identified by law enforcement as a suspect in the commission of that offense, whichever is later, but in no case later than six years after the commission of the offense.

(l) A limitation of time prescribed in this chapter does not commence to run until the discovery of an offense involving the offering or giving of a bribe to a public official or public employee, including, but not limited to, a violation of Section 67, 67.5, 85, 92, or 165, or Section 35230 or 72530 of the Education Code.

(m) Notwithstanding any other limitation of time prescribed in this chapter, if a person actively conceals or attempts to conceal an accidental death in violation of Section 152, a criminal complaint may be filed within one year after the person is initially identified by law enforcement as a suspect in the commission of that offense, provided, however, that in any case a complaint may not be filed more than four years after the commission of the offense.

(n) (1) Notwithstanding any other limitation of time described in this chapter, a criminal complaint brought pursuant to a violation of Section 367g may be filed within one year of the discovery of the offense or within one year after the offense could have reasonably been discovered.

(2) This subdivision applies to crimes that were committed on or after January 1, 2021, and to crimes for which the statute of limitations that was in effect before January 1, 2021, has not run as of January 1, 2021.

Date of Hearing: June 29, 2021
Counsel: Matthew Fleming

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

SB 538 (Rubio) – As Amended May 25, 2021

SUMMARY: Permits electronic filing and remote appearances in the context of domestic violence restraining orders (DVRO) and gun violence restraining orders (GVRO). Specifically, **this bill**:

1) Requires, by July 1, 2023, that a court or court facility that receives petitions for DVROs or GVROs, to permit those petitions and any filings related to those petitions to be submitted electronically during and after normal business hours.

2) Provides that the deadlines applicable to any action taken by the court with respect to a petition filed directly with the court shall apply to any action taken with respect to a petition submitted electronically.

3) Requires the superior court of each county to develop local rules and instructions for electronic filing permitted under these provisions, and requires them be posted on its internet website.

4) Requires the superior court of each county to provide, and post on its internet website, a telephone number for the public to call to obtain information about electronic filing permitted under these provisions.

5) Requires that the telephone number be staffed during regular business hours, and that court staff shall respond to all telephonic inquiries within one business day.

6) Authorizes a party or witness to appear remotely at the hearing on a petition for a DVRO or a GVRO.

7) Requires the superior court of each county to develop local rules and instructions for remote appearances permitted under these provisions, which shall be posted on its internet website.

8) Requires the superior court of each county to provide, and post on its internet website, a telephone number for the public to call to obtain assistance regarding remote appearances and that the telephone number be staffed 30 minutes before the start of the court session at which the hearing will take place, and during the court session.

9) Specifies that there are no filing fees related to a petition for a DVRO or a GVRO.

EXISTING LAW:

1) Establishes procedural and substantive requirements for the issuance of a DVRO, whether issued ex parte, after notice and hearing, or in a judgment, that prohibits specified acts of abuse, excluding a person from a dwelling, or enjoining other specified behavior. (Fam. Code, §§ 6218, 6300 et seq.)

2) Authorizes the issuance of a temporary DVRO which generally requires notice to the respondent unless there is a showing that great or irreparable injury would result to the petitioner before the matter can be heard on notice. (Fam. Code, § 240, et seq.)

3) Provides that a temporary DVRO generally lasts 21 days, although the court may extend it for a reasonable period of time. (Fam. Code, §§ 242, 245.)

4) Provides that an ex parte restraining order may be extended for up to five years (and subsequently renewed) following a hearing for which notice was provided to the respondent at least five days before the hearing. (Fam. Code, §§ 6320.5, 6340, 6345, 6302.)

5) Requires, in Emergency Rules of Court, that courts provide a means of filing ex parte requests for protective orders even during court shutdowns, whether by physical location, drop box, or electronic means; deems service on the respondent to be complete if the respondent appears at the hearing in which the court grants the restraining order. (Cal. Rules of Court, Emergency Rule 8 (April 6, 2020).)

6) Authorizes, in the Emergency Rules of Court: conducting proceedings remotely, including by video, audio, and telephonic means; the electronic and authentication of documentary evidence; e-filing and e-service; the use of remote interpreting; and the use of remote reporting and electronic recording to make the official record of an action or proceeding. (Cal. Rules of Court, Emergency Rule 3(a)(3) (April 6, 2020).)

7) Defines a GVRO as an order in writing, signed by the court, prohibiting and enjoining a named person from having in his or her custody or control, owning, purchasing, possessing, or receiving any firearms or ammunition. (Pen. Code, § 18100.)

8) Prohibits a person that is subject to a GVRO from having in his or her custody any firearms or ammunition while the order is in effect. (Pen. Code, § 18120, subd. (a).)

9) Allows law enforcement to obtain a temporary GVRO if the officer asserts, and the court finds, that there is reasonable cause to believe the following:

    a) The subject of the petition poses an immediate and present danger of causing injury to himself, herself, or another by possessing a firearm; and

    b) The emergency GVRO is necessary to prevent personal injury to the subject of the order or another because less restrictive alternatives have been tried and been ineffective or have been determined to be inadequate under the circumstances. (Pen. Code, § 18125, subd. (a).)

10) States that a temporary GVRO shall expire 21 days from the date the order is issued. (Pen. Code, § 18125, subd. (b).)

11) States that a law enforcement officer who requests a temporary emergency gun violence restraining order shall do all of the following:

   a) If the request is made orally, sign a declaration under penalty of perjury reciting the oral statements provided to the judicial officer and memorialize the order of the court on the form approved by the Judicial Council;

   b) Serve the order on the restrained person, if the restrained person can reasonably be located;

   c) File a copy of the order with the court as soon as practicable after issuance; and,

   d) Have the order entered into the computer database system for protective and restraining orders maintained by the Department of Justice. (Pen. Code §18140.)

12) Allows an immediate family member, as defined, or law enforcement officer to file a petition requesting that the court issue an ex parte GVRO enjoining a person from having in his or her custody or control, owning, purchasing, or receiving a firearm or ammunition. (Pen. Code, § 18150, subd. (a)(1).)

13) Allows a court to issue an ex parte GVRO if an affidavit, made in writing and signed by the petitioner under oath, or an oral statement, and any additional information provided to the court on a showing of good cause that the subject of the petition poses a significant risk of personal injury to himself, herself, or another by having under his or her custody and control, owning, purchasing, possessing, or receiving a firearm as determined by balancing specified factors. (Pen. Code, §§ 18150, subd. (b) & 18155.)

14) Requires a law enforcement officer to serve the ex parte GVRO on the restrained person, if the restrained person can reasonably be located. When serving a gun violence restraining order, the law enforcement officer shall inform the restrained person that he or she is entitled to a hearing and provide the restrained person with a form to request a hearing. (Pen. Code, § 18160.)

15) States that an ex-parte GVRO shall expire no later than 21 days from the date the order is issued. (Pen. Code, § 18155, subd. (c).)

16) Allows an immediate family member or law enforcement officer to file a petition requesting that the court issue a GVRO after notice and a hearing enjoining a person from having in his or her custody or control, owning, purchasing, or receiving a firearm or ammunition. (Pen. Code, § 18170.)

17) States that at the hearing, the petitioner has the burden of proof, which is to establish by clear and convincing evidence that the person poses a significant danger of causing personal injury to himself, herself, or another by having under his or her custody and control, owning, purchasing, possessing, or receiving a firearm. (Pen. Code, § 18175, subd. (b).)

18) Allows a restrained person to file one written request for a hearing to terminate the order. (Pen. Code, §18185.)

19) Allows a request for renewal of a GVRO. (Pen. Code, § 18190.)

20) States that every person who files a petition for an ex parte GVRO or a GVRO issued after notice and a hearing, knowing the information in the petition to be false or with the intent to harass, is guilty of a misdemeanor. (Pen. Code, § 18200.)

21) States that every person who violates an ex parte GVRO or a GVRO issued after notice and a hearing, is guilty of a misdemeanor and shall be prohibited from having under his or her custody and control, owning, purchasing, possessing, or receiving, or attempting to purchase or receive, a firearm or ammunition for a five-year period, to commence upon the expiration of the existing gun violence restraining order. (Pen. Code, § 18205.)

FISCAL EFFECT: Unknown.

COMMENTS:

1) **Author's Statement**: According to the author, "Studies show the most dangerous time for a victim is during separation and when seeking a restraining order. In addition, California continues to face systemic barriers preventing survivors of abuse from seeking protective orders. We have seen double-digit increases in the volume of domestic violence cases in the U.S., which has been referred to, as a 'pandemic within a pandemic.' By giving victims an option to testify remotely at a hearing and electronically file for a domestic violence or gun violence restraining order, SB 538 removes barriers and further establishes additional protections for victims."

2) **Gun Violence Restraining Orders**: California's GVRO laws are modeled after restraining orders for domestic violence and they went into effect on January 1, 2016. Once a GVRO has been issued against a person it prohibits him or her from purchasing or possessing firearms or ammunition and authorizes law enforcement to remove any firearms or ammunition already in the individual's possession.

   The statutory scheme establishes three types of GVRO's: 1) a temporary emergency GVRO, 2) an ex-parte GVRO, and 3) a GVRO issued after notice and hearing. All three GVROs prohibit the subject of the order from having in his or her custody or control, owning, purchasing, possessing, or receiving, or attempting to purchase or receive, a firearm or ammunition.

   A law enforcement officer may seek a temporary emergency GVRO from a judicial officer orally or by submitting a written petition to a judicial officer. The officer must assert and the judicial officer must find that there is reasonable cause to believe two things. First, the subject of the order poses an immediate and present danger to him or herself by virtue of access to a firearm or ammunition. Second, the temporary emergency order is necessary to prevent injury to the subject of the order or another because alternative solutions have proved ineffective or are otherwise inadequate or inappropriate. A temporary emergency GVRO expires 21 days after it is issued. Within those 21 days, there must be a hearing to determine whether a more permanent GVRO should be issued.

An immediate family member or a law enforcement officer can petition for an ex parte GVRO. An ex parte GVRO is based on an affidavit filed by the petitioner which sets forth the facts establishing the grounds for the order. The court will determine whether good cause exists to issue the order. If, the court issues the order, it can remain in effect for up to 21 days. Within that time frame, the court must provide an opportunity for a hearing. At the hearing, the court can determine whether the firearms should be returned to the restrained person, or whether it should issue a more permanent order. A GVRO after notice and hearing has been provided to the person to be restrained can last for up to one year.

3) **Civil DVRO:** The Domestic Violence Prevention Act (DVPA or Act) seeks to prevent acts of domestic violence, abuse, and sexual abuse, and to provide for a separation of persons involved in domestic violence for a period sufficient to create safety. The Act enables a party to seek a "protective order," also known as a restraining order, which may be issued to protect a petitioner who presents "reasonable proof of a past act or acts of abuse." (Family Code Sections 6300, 6218.)

   Petitioners who need immediate protection may seek a temporary restraining order or TRO, which becomes effective upon receiving a judge's signature and being served on the respondent. TROs may be issued "ex parte" (Latin for "by or for one party")—that is, without formal notice to, or the presence of, the respondent. (Family Code Section 241.) Speed is by necessity an issue in obtaining the TRO, so processes that make it quicker and easier to file for, and receive, the TRO are important. Because a restrained party may not have had the opportunity to defend their interests, TROs are out of necessity short in duration. If a noticed hearing is not held within 21 days (or 25 if the court finds good cause), the TRO is no longer enforceable, unless a court grants a continuance. (Family Code Sections 242, 245.) After a duly noticed hearing, however, the court is authorized to extend the original TRO into a "permanent" protective order (also known as orders after hearing) that may last up to five years. (Family Code Sections 6345, 6302.)

4) **Emergency Rules Related to COVID-19**: The COVID-19 pandemic led to the temporary closure of courts throughout the state. In recognition of the public's need for continued access to the courts, the Judicial Council adopted emergency rules in the early days of the pandemic to provide access to the courts in a manner that was consistent with the Governor's stay-at-home order and public health guidelines.

   Of relevance to this bill is the emergency rule pertaining to emergency protective orders, temporary restraining orders, and criminal protective orders that were requested, issued, or set to expire during the state of emergency related to the pandemic. (Emergency Rules Related to COVID-19, available at: https://www.courts.ca.gov/documents/appendix-i.pdf, [as of June 18, 2021].) The rule applies to DVROs as well as GVROs. The rule provides: "Any temporary restraining order or gun violence emergency protective order issued or set to expire during the state of emergency related to the COVID-19 pandemic must remain in effect for a period of time that the court determines is sufficient to allow for a hearing on the long-term order to occur, for up to 90 days." (*Id.*) The rule further provides: "Upon the filing of a request to renew a restraining order after hearing that is set to expire during the state of emergency related to the COVID-19 pandemic, the current restraining order after hearing must remain in effect until a hearing on the renewal can occur, for up to 90 days from the date of expiration." (*Id.*) The rule additionally requires that courts provide a means

of filing ex parte requests for temporary restraining orders and requests to renew restraining orders, and specifies that this may be done by providing a physical location, drop box, or through electronic means, if feasible. (*Id.*)

Another emergency rule adopted by the Judicial Council authorized courts to require that judicial proceedings and court operations be conducted remotely, including by video, audio, and telephonic means; the electronic exchange and authentication of documentary evidence; e-filing and e-service; the use of remote interpreting; and the use of remote reporting and electronic recording to make the official record of an action or proceeding. (*Id.*) These rules will sunset 90 days after the Governor declares that the state of emergency related to the COVID-19 pandemic is lifted, or until amended or repealed by the Judicial Council.

5) **The Need for this Bill**: This bill seeks to make electronic filing and remote appearances in the context of DVROs and GVROs permanent. As stated above, the current rules permitting e-filing and remote appearances are temporary in nature and stem from the state of emergency due to the pandemic. Specifically, this bill would require that a court or court facility that receives petitions for any restraining order permit those petitions to be submitted electronically during and after normal business hours, and requires that the deadlines applicable to any action taken by the court with respect to a petition filed directly with the court apply to any action taken with respect to a petition submitted electronically. This bill would allow a party or witness to appear remotely at the hearing on a petition for a GVRO. This bill would also require each county superior court to develop local rules and instructions for electronic filing and remote appearances and to post those rules and instructions on the court's website. This bill would additionally require that each county superior court provide a staffed phone number for the public to call to obtain information about electronic filing and assistance regarding remote appearances. The author submits that by making these rules permit, barriers to obtaining a DVRO or GVRO will be reduced, and protections for victims will be increased.

   The Judicial Council has expressed reservations about the current version of the bill. Although they are not currently in formal opposition, they concerns about the specificity and the prescriptiveness of the current language.

6) **Argument in Support**: According to the *San Diego District Attorney*: "Our office is a leader in helping survivors of Domestic Violence survive this insidious crime. We have specialized victim advocates who work in coordination with our San Diego Family Justice Center's wrap-around-services network. Each case, because of the inherent danger for the crimes to escalate, is reviewed in-depth by our office to ensure the survivor has the best plan as the case moves through the criminal justice system.

   "As you know, many times, part of any Domestic Violence survivor's exit plan includes petitioning the court for a domestic violence restraining order and sometimes it also requires petitioning the court for a gun violence restraining order. Before the COVID 19 pandemic, both petitions had to be filed in person at the courthouse. However, the silver-lining of this past year spent in lock-down has shown that necessity is the mother of invention.

   "On April 6, 2020, the California Judicial Council provided Emergency Rules of Court which provides a mean of filing ex parte requests for protective orders even during court shutdowns. Included in the Rules of Court was the provision that authorizes the court to

conduct proceedings remotely and allows the electronic filing of petitions for domestic violence restraining orders and gun violence restraining orders. This has been a game changer for hundreds of San Diego survivors of domestic violence who endured months of lock-down with their abuser during the COVID 19 pandemic.

"In addition, various barriers like transportation, dependent care, poverty, and paid jobs all present hurdles for individuals seeking restraining orders. By allowing restraining orders to be automatically integrated into a court's electronic case management system, this would allow for victims to seek the vital protection needed for safety concerns. It will also allow judges and court staff to share and view filings simultaneously, and from multiple locations, providing court efficiencies and cost savings.

"Furthermore, domestic violence survivors have voiced the courthouse is the most anxiety-inducing place they must go to while pursuing safety for themselves, their children, and their family. Petitioners that deal with trauma and anxiety can become confused or frustrated by the unfamiliar process or even worse, they endure continuous harassment or intimidation by their abuser. These issues deprive domestic violence survivors and family's access to justice in a time of crisis, and of the safety, they seek and deserve. SB 538 will help immeasurably."

7) **Argument in Opposition**: According to *SEIU California*: "Court reporters are obligated to maintain the sanctity of the official verbatim record, and in order to fulfill that obligation (and, retain the licenses under which they are authorized to operate) must produce transcripts upon which the courts, and various court users must rely for appealate and other purposes. Unfortunately, our experience with remote proceedings and appearances during the pandemic has proven that with existing technology, our court reporters ability to do their very jobs is all but impossible. Many restraining order proceedings are held in conjunction with other court proceedings; which means that although the bill limits remote appearances only to DVRO and GVRO proceedings, it is entirely possible that other appearances might be undertaken by the courts. This is particularly problematic where such proceedings are in relation to felony matters, where the sanctity of the official verbatim record is of utmost importance.

"Finally, the cost of purchasing, installing, and maintaining the technology necessary to allow for remote appearances in criminal and family court rooms would be in the tens of millions of dollars. With the backlog and anticipated increase in workload associated both with full reopening of the courts and the impending expiration of the eviction moratorium pursuant to SB 91, we are gravely concerned regarding this level of expenditure; not only due to the fiscal impact on the courts, but also due to the delitorious and potentially disenfranchizing effect on court users."

8) **Related Legislation**: AB 887 (Levine) would require courts to receive domestic violence restraining order petitions electronically by January 1, 2023. AB 887 is pending in the Senate Judiciary Committee.

9) **Prior Legislation**: AB 1796 (Levine) of the 2019 – 2020 Legislative Session, would have required courts to provide drop boxes for domestic violence restraining order petitions. AB 1796 died in the Senate Appropriations Committee.

REGISTERED SUPPORT / OPPOSITION:

Support

California Partnership to End Domestic Violence
Change for Justice
City of San Diego
Free to Thrive
Giffords
Los Angeles County District Attorney's Office
San Diego City Attorney's Office
San Diego County District Attorney's Office
The People Concern

Oppose

Seiu California

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

Date of Hearing: June 29, 2021
Counsel: Cheryl Anderson

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

SB 16 (Skinner) – As Amended May 20, 2021

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), imposes certain requirements regarding the time frames and costs associated with CPRA requests, and prohibits assertion of the attorney-client privilege to limit disclosure of factual information and billing records. Specifically, **this bill**:

1) Expands the use of force category subject to disclosure under the CPRA to include:

   a) A complaint alleging unreasonable or excessive force; and,

   b) A sustained finding that an officer failed to intervene against another officer who was using clearly unreasonable or excessive force.

2) Adds new categories of disclosure under the CPRA for:

   a) Records relating to an incident in which a sustained finding was made of conduct 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; and,

   b) Records relating to sustained findings of unlawful arrests and unlawful searches.

3) Provides that records otherwise subject to disclosure shall be released when an officer resigned before the law enforcement agency or oversight agency concluded its investigation into the alleged incident.

4) States that the identity of victims and whistleblowers may be redacted, in addition to witnesses and complainants, to preserve anonymity.

5) 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.

6) Clarifies that agencies may withhold records pending criminal or administrative investigations or proceedings, as specified, to include all records of misconduct or use of force. Eliminates the option to withhold records until 30 days after the close of a criminal investigation relating to the incident.

7) Requires records subject to disclosure be provided at the earliest possible time and no later than 45 days from the date of a request for their disclosure, except where records are permitted to be withheld for a longer period due to specified conditions involving ongoing investigations.

8) 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.

9) Makes the five-year minimum retention period for complaints against officers and any related reports and findings applicable to records in which there was not a sustained finding of misconduct. Requires retention for a minimum of 15 years for records where there was a sustained finding of misconduct. Provides that a record shall not be destroyed while a request related to that record is being processed or litigated.

10) Modifies the evidentiary limitation relating to law enforcement records in court proceedings so that courts cannot automatically exclude from discovery or disclosure information consisting of complaints concerning conduct that took place more than five years before the event that is the subject of the litigation.

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

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

13) Provides a phased-in implementation of this bill so that records that relate to the new categories of misconduct added by this bill and occurred before January 1, 2022, shall not be required to be disclosed until January 1, 2023.

14) Makes other nonsubstantive changes.

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. (Gov. Code, § 6253, subd. (b).)

4) States that, except as in other sections of the CPRA, disclosure of specified records is not required, 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) 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).)

6) 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).)

7) 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).)

8) 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 the Act. (Gov. Code, § 6258.)

9) 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).)

10) *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).)*

11) *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).)*

12) *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).)*

13) 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).)

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

15) 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).)

16) *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).)*

17) States that an agency shall redact a disclosed record for specified purposes, including anonymity of witnesses and complainants. (Pen. Code, § 832.7, subd. (b)(5)(A)-(D).)

18) 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).)

19) 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).)

20) 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).)

21) 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.)

22) *Requires each department or agency in this state that employs peace officers to 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.)*

23) 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.)

24) *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).)*

25) *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).)*

26) 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.)

27) 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.)

28) 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).

29) 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.)

30) 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]

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 16, 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 16 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 16 also 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 their 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 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, SB 1421 gave the general public access to otherwise confidential police personnel records relating to serious police misconduct in an effort to increase transparency.

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

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

(*Commission on Police Officer Standards*, at pp. 297–298, fn. omitted.) Release of the personnel records specified in SB 1421 was a step in furtherance of the Court's interpretation of the CPRA and was intended to promote public scrutiny of, and accountability for, law enforcement.

Again, in furtherance of the goal of public scrutiny of, and accountability for, law enforcement, this bill would expand the categories of personnel records of peace officers and custodial officers that are subject to disclosure under the CPRA. First, it would expand the use of force category subject to disclosure to include complaints alleging unreasonable or excessive force, as well as sustained findings that an officer failed to intervene against another officer who was using clearly unreasonable or excessive force. Second, it would add new categories of disclosure for records relating to sustained findings of prejudicial or discriminatory misconduct and sustained findings of unlawful arrests and unlawful searches.

This bill would also increase a defendant's access to discovery of otherwise-confidential peace officer records through the *Pitchess* process; it would remove the limitation prohibiting courts from disclosing complaints of officer misconduct that took place five years before the event at issue in the pending litigation. It would also require an agency to retain all sustained complaints currently in its possession for a minimum of 15 years (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 the officer's misconduct.

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].)

   Under current law, records related to two types of unsustained officer conduct are subject to disclosure – a record relating to an officer's discharge of a firearm at a person and a record relating to an incident involving the use of force by an officer against a person that resulted in death or great bodily injury. (Pen. Code, § 832.7, subd. (b)(1)(A)(i) & (ii).) The Legislature has determined that the public's right to discover such "egregious peace officer misconduct" generally overrides privacy concerns. (*Ventura County Deputy Sheriffs' Assn. v. County of Ventura* (2021) 61 Cal.App.5th 585, 593.) Additionally, the Legislature has enacted safeguards to protect the officer's privacy rights. 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 officers. An agency may also redact a record 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. (*Becerra v. The Superior Court of the City of San Francisco*, *supra*, 44 Cal.App.5th at pp. 923-929; *Ventura County Deputy Sheriffs' Assn. v. County of Ventura*, *supra*, 61 Cal.App.5th at pp. 592-593; Govt. Code, §§ 6254, subd. (c), 6255, subd. (a); Pen. Code, § 832.7, subd. (b)(5)(C) & (6).)

   This bill would require disclosure of additional records of unsustained officer conduct – records relating to an incident involving a complaint that alleges unreasonable or excessive force. However, as discussed, there are redaction safeguards in place to protect an officer's privacy rights when such protection is warranted.

6) **First Amendment**: The reach of this bill includes disclosure of sustained 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. Therefore, it raises first amendment issues.

   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.)

As noted above, an officer's statements, writings, online posts, recordings, and gestures- all forms of speech- might be subject to disclosure if they involve group prejudice or discrimination. The bill's focus on sustained complaints may decrease the risk of increasing First Amendment litigation. Presumably, if the complaint is sustained, there was a sufficient nexus between the officer's prejudicial or discriminatory misconduct and the impact of it on the law enforcement agency.

To the extent that disclosure of records under this bill would be in tension with the First Amendment, the records are arguably 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) **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 or factual information discovered by any investigation done by the public entity's attorney. This provision of the bill involves dual policy considerations of police transparency and public entities' need for confidential legal advice.

> [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.)

Importantly, the "'protection of privilege extends only to communications and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing.'" (*Upjohn Co. v. United States* (1981) 449 U.S. 383, 395-396.)

For this reason, hiring outside counsel to conduct a misconduct investigation doesn't 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 it necessary to create a statutory exception to the attorney-client privilege for factual information? In particular, is it necessary to create a statutory exception which appears to exceed the bounds of existing case law? This new exception could undermine the effective representation of local governments by their counsel.

c) **Billing Records**: In 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.)

In light of the current body of case law addressing this issue, is it necessary to create a statutory exception to the attorney-client privilege for billing records? Again, this could undermine effective representation of local governments by their counsel, and in particular if disclosure is required while litigation is pending.

(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. (See *Becerra v. The Superior Court of the City of San Francisco*, *supra*, 44 Cal.App.5th at p. 925.)

9) **Argument in Support**: According to the *Conference of California Bar Associations*, "The CCBA seeks to promote justice through laws in California by bringing together attorney volunteers from around the State to identify, debate, and promote creative, non-partisan changes to the law for the benefit of all Californians. In 2015, the CCBA approved Resolution 07-02-2015, which sought to amend certain California laws to force disclosure of confidential police disciplinary records. The CCBA previously relied on Resolution 07-02-2015 to support SB 1421, from the 2017-2018 Regular Session. Because SB 16 is also germane to the goals of Resolution 07-02-2015, the CCBA similarly supports SB 16.

"In 2018, SB 1421 gave Californians, for the first time in 40 years, access to a limited set of records related to an officer's use of force, sexual misconduct, or on-the-job dishonesty. However, under current law, Californians have no right to know about officers who use excessive, but non-deadly, force or have a history of engaging in racist or biased actions. Such public access to information on officer conduct is essential to build trust between law enforcement and the communities they serve.

"While SB 1421 was an important breakthrough, it did not go far enough. For example, Californians would not have been able to access records about the past misconduct of Derek Chauvin, the Minneapolis officer who murdered George Floyd, unless his past use of force complaints were classified as 'causing great bodily injury' or 'deadly.' SB 16 remedies this by opening access to additional records, bringing California much closer to states like New York, Florida, Georgia, Kentucky, Ohio, and Washington. Opening access to additional categories of officer conduct provides communities with the tools to identify officers with a history of misconduct and hold local police agencies accountable.

"SB 16 also includes provisions to ensure that officers with a history of misconduct can't just quit their jobs, keep their records secret, and move on to another jurisdiction with their past actions not disclosed."

10) **Argument in Opposition**: According to the *California Peace Officers Association*, "While a major impact of the proposed changes to PC 832.5 (b) would be fiscal (for record retention purposes), the legal policy impacts would center around agencies barely able to provide essential services to their communities by having to rearrange patrol personnel to oversee records management. This leads to less of a presence for the community policing that has helped drive down crime in California over the last several years.

"As written, SB 16 expands the already burdensome SB 1421 by unjustly providing for the disclosure of records of a complaint that alleges unreasonable or excessive force. This provision is neither practical from an administrative or judicial standpoint nor aiding in the effort to sustain trust between law enforcement and the communities they took an oath to serve. In fact, the release of officer records for every single incident involving any use of force, especially those in which the officer is entirely within departmental policy, will generate the misperception that there was 'something wrong' with the officer's conduct when the proper legal findings and investigations found otherwise. That would open the agency up to unfair and undeserved scrutiny as these records are made public.

"Additionally, other conditions in PC 832.7, retain 'sustained' findings that an officer failed to intervene against another officer using force that is clearly unreasonable or excessive. There is no definition of 'clearly unreasonable,' nor 'clearly excessive,' thereby leaving both open to vague interpretation."

11) **Related Legislation**:

a) SB 2 (Bradford) grants new powers to the Commission on Peace Officer Standards and Training (POST) to investigate and determine peace officer fitness and to decertify officers who engage in "serious misconduct;" makes changes to the Bane Civil Rights Act to limit immunity, as specified, makes all records related to the revocation of a peace officer's certification public, and requires that records of an investigation be retained for 30 years. SB 2 is set to be heard in the Assembly Public Safety Committee on June 29, 2021.

b) AB 718 (Cunningham) requires 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 718 is pending before the Senate Committee on Appropriations.

12) **Prior Legislation**:

a) SB 776 (Skinner), of the 2019-2020 Legislative Session, was substantially similar to this bill. SB 776 was not brought for a concurrence vote in the Senate before the end of session.

b) SB 731 (Bradford), of the 2019-2021 Legislative Session, would have made all records related to the revocation of a police officer's certification a public record and required that investigation records be retained for 30 years, among other things. SB 731 was not brought up for a vote in the full Assembly.

c) AB 1599 (Cunningham), of the 2019-2020 Legislative Session, would have required law enforcement agencies to complete initiated administrative investigations of officer misconduct related to specified uses of force, sexual assault, and dishonesty regardless of whether an officer left the agency's employment. AB 1599 was held in the Senate Committee on Appropriations.

d) SB 1421 (Skinner), Chapter 988, Statutes of 2018, provides a public right to access certain law enforcement officer personnel records, including records relating to the discharge of a firearm at a person, an incident where the use of force resulted in death or great bodily injury, and an incident in which a sustained finding was made that an officer engaged in sexual assault involving a member of the public.

e) AB 2327 (Quirk), Chapter 966, Statutes of 2018, requires any department or agency employing law enforcement officers to maintain a record of any investigations against an officer, and required an officer seeking employment with a department to give permission for the hiring department to view their file.

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

g) 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

Advancement Project
Alameda County Public Defender's Office
American Association of Independent Music
American Civil Liberties Union
American Federation of Musicians
Artist Rights Alliance
Asian Americans Advancing Justice - California
Asian Solidarity Collective
Black Music Action Coalition
California Attorneys for Criminal Justice
California Black Media
California Broadcasters Association
California Civil Liberties Advocacy
California Faculty Association
California Immigrant Policy Center
California Innocence Coalition: Northern California Innocence Project, California Innocence Project, Loyola Project for the Innocent
California Newspaper Publishers Association

California Nurses Association
California Police Chiefs Association
California Public Defenders Association (CPDA)
Californians for Safety and Justice
Change Begins With Me Indivisible Group
City of Alameda
City of Oakland
Community Advocates for Just and Moral Governance
Conference of California Bar Associations
County of Los Angeles Board of Supervisors
Del Cerro for Black Lives Matter
Disability Rights California
Drug Policy Alliance
Ella Baker Center for Human Rights
Equal Rights Advocates
Ethnic Media Services
First Amendment Coalition
Friends Committee on Legislation of California
Hillcrest Indivisible
League of Women Voters of California
Legal Services for Prisoners with Children
Los Angeles County District Attorney's Office
Mission Impact Philanthropy
Multi-faith Action Coalition
Music Artists Coalition (MAC)
National Association of Social Workers, California Chapter
Nextgen California
Oakland Privacy
Partnership for the Advancement of New Americans
Pillars of the Community
Prosecutors Alliance of California
Racial Justice Coalition of San Diego
Recording Industry Association of America
Riseup
San Diego Progressive Democratic Club
San Francisco District Attorney's Office
San Francisco Public Defender
San Leandro for Accountability, Transparency and Equity
Screen Actors Guild-American Federation of Television and Radio Artists
Sd-qtpoc Colectivo
Seiu California
Showing Up for Racial Justice (SURJ) San Diego
Showing Up for Racial Justice North County San Diego
Smart Justice
Social Workers for Equity & Leadership
Songwriters of North America
Team Justice
Think Dignity
UC Berkeley's Underground Scholars Initiative (USI)

University of California Student Association
Uprise Theatre
Voices for Progress
We the People - San Diego

Oppose

Association of Probation Supervisors of Los Angeles County
California Association of Joint Powers Authorities (CAJPA)
California Correctional Peace Officers Association
California Law Enforcement Association of Records Supervisors (CLEARS)
California Narcotic Officers' Association
California Peace Officers Association
California State Sheriffs' Association
City of Fountain Valley
City of Thousand Oaks
Deputy Sheriffs Association of San Diego
El Segundo Police Officers Association
Hawthorne Police Officers Association
League of California Cities
Los Angeles Airport Peace Officers Association
Los Angeles Police Protective League
Los Angeles County Probation Managers Association Afscme Local 1967
Los Angeles County Sheriff's Professional Association
Los Angeles Professional Peace Officers Association
Los Angeles School Police Officers Association
Los Angeles School Police Management Association
Newport Beach Police Association
Public Risk Innovation, Solutions, and Management (PRISM)
Riverside Police Officers Association
Sacramento County Probation Association
San Diego District Attorney Investigator's Association
San Francisco Police Officers Association
Santa Ana Police Officers Association
Santa Monica Police Officers Association
Torrance Police Officers Association

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

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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.)"

Date of Hearing: June 29, 2021
Counsel: Sandy Uribe

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

SB 81 (Skinner) – As Amended April 27, 2021

As Proposed to be Amended in Committee

SUMMARY: Creates a presumption that it is in the furtherance of justice to dismiss an enhancement upon the court's finding that one of specified circumstances is true. Specifically, **this bill**:

1) Requires a court to dismiss an enhancement if it is in the furtherance of justice to do so, except under the following circumstances:

   a) Upon a showing of clear and convincing evidence that dismissal of the enhancement would endanger public safety; or,

   b) When the dismissal of an enhancement is prohibited by an initiative statute.

2) Creates a presumption that it is in the furtherance of justice to dismiss an enhancement upon the court's finding that any of the following circumstances is true:

   a) Application of the enhancement would result in a disparate racial impact;

   b) Multiple enhancements are alleged in a single case. In this case, all enhancements beyond a single enhancement shall be dismissed;

   c) The application of an enhancement could result in a sentence of over 20 years, in which case the enhancement shall be dismissed;

   d) The current offense is connected to mental illness;

   e) The current offense is connected to prior victimization or childhood trauma;

   f) The current offense is not a violent felony, as specified;

   g) The defendant was a juvenile when they committed the current offense or prior offenses;

   h) The enhancement is based on a prior conviction that is over five years old; or,

   i) Though a firearm was used in the commission of the current offense, it was inoperable or unloaded.

3) Specifies that these provisions apply prospectively.

4) Defines the following terms for purposes of dismissing enhancements:

   a) A "mental illness" is a mental disorder as identified in the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders;

   b) "Childhood trauma" means that as a minor the person experienced physical, emotional, or sexual abuse, physical or emotional neglect, or had a household member who experienced mental illness, a substance use disorder, intimate-partner violence, absence due to divorce or separation, or incarceration; and,

   c) "Prior victimization" means the person was a victim of intimate-partner violence, sexual violence, or human trafficking, or the person has experienced psychological or physical trauma, including, but not limited to, abuse, neglect, exploitation, or sexual violence.

EXISTING LAW:

1) Defines an "enhancement" as "an additional term of imprisonment added to the base term." (Cal. Rules of Court, rule 4.405(3).)

2) Provides that when the court imposes a sentence for a felony, the court shall also impose, in addition and consecutive to the offense of which the person has been convicted, the additional terms provided for any applicable enhancements. (Pen. Code, § 1170.1, subd. (d).)

3) States that when an enhancement is punishable by one of three terms, the court shall, in its discretion, impose the term that best serves the interests of justice. The court must state the reasons for its sentencing choice on the record. (Pen. Code, § 1170.1, subd. (d); Cal. Rules of Court, rule 4.428(a).)

4) Allows a court, either on its own motion or upon the application of the prosecutor, to dismiss an action in the furtherance of justice. The court must state the reasons for the dismissal orally on the record. (Pen. Code, § 1385, subd. (a).)

5) Provides that a dismissal shall not be made for any cause that would be ground of demurrer to the accusatory pleading. (Pen. Code, § 1385, subd. (a).)

6) States that if the court has the authority to strike or dismiss an enhancement, the court may instead strike the additional punishment for that enhancement in the furtherance of justice. (Pen. Code, § 1385, subd. (b); Cal. Rules of Court, rule 4.428(b).)

7) States that in determining whether to strike the entire enhancement or only the punishment for the enhancement, the court may consider the effect that striking the enhancement would have on the status of the crime as a strike, the accurate reflection of the defendant's criminal conduct on his or her record, the effect it may have on the award of custody credits, and any other relevant consideration. (Cal. Rules of Court, rule 4.428(b).)

8) Provides that the above provisions do not authorize the court to strike the additional punishment for any enhancement that cannot be stricken or dismissed. (Pen. Code, §1385, subd. (b)(2).)

FISCAL EFFECT: Unknown.

COMMENTS:

1) **Author's Statement**: According to the author, "California's penal code has over 150 sentence enhancements that can be added to a criminal charge. Sentence enhancements are not elements of the crime, they are additional circumstances that increase the penalty, or time served, of the underlying crime. While the application of an enhancement may appear straightforward, research reviewed last year by the Committee on the Revision of the Penal Code revealed inconsistency in their use.

   "Current law has a standard for dismissing sentence enhancements that lacks clarity and does not provide judges clear guidance on how to exercise this discretion. A ruling by the California Supreme Court noted that the law governing when judges should impose or dismiss enhancements remains an 'amorphous concept,' with discretion inconsistently exercised and underused because judges did not have adequate guidance.

   "Building on the California Rules of Court that guide judges in certain sentencing decisions, SB 81 aims to provide clear guidance on how and when judges may apply sentence enhancements. By clarifying the parameters a judge must follow, SB 81 codifies a recommendation developed with the input of the judges who serve on the Committee on the Revision of the Penal Code for the purpose of improving fairness in sentencing while retaining a judge's authority to apply an enhancement to protect public safety."

2) **Impetus for this Bill**: The Committee on the Revision of the Penal Code ("Committee") was established within the Law Revision Commission to study the Penal Code and recommend statutory reforms. (SB 94, Ch. 25, Stats. 2019; Gov. Code, § 8280.) The Committee is required to prepare an annual report that describes its work in the prior calendar year and its expected work for the subsequent calendar year. (Gov. Code, § 8293, subd. (b).) The Committee's first annual report made 10 recommended reforms to the Penal Code. (See < http://www.clrc.ca.gov/CRPC/Pub/Reports/CRPC_AR2020.pdf > [as of June 6, 2021].) One of the Committee's recommendations is to provide guidance for judges considering sentence enhancements. According to the Committee's report:

   > Sentence enhancements can be dismissed by sentencing judges. The current legal standard instructs judges to dismiss a sentence enhancement when "in furtherance of justice." Courts have not clarified or defined this standard, and the California Supreme Court noted that the law governing when judges should impose or dismiss enhancements remains an "amorphous concept." As a result, this discretion may be inconsistently exercised and underused because judges do not have guidance on how courts should exercise the power.
   >
   > The lack of clarity and guidance is especially concerning given demographic disparities in sentences. As noted, Three Strikes sentences and gang enhancements in California are disproportionately applied against people of color. People suffering from mental illness are also overrepresented among people currently serving life sentences under the Three Strikes law for nonviolent crimes.
   >
   > ....

> The Committee recommendation follows legal guidance provided to judges when exercising sentencing discretion in other contexts. For example, California law directs judges on how to exercise their sentencing discretion in the context of probation. Furthermore, our recommendation builds on existing California Rules of Court that guide judges on what circumstances they should consider in aggravation and mitigation in imposing a felony sentence, such as prior abuse, recency and frequency of prior crimes, and mental or physical condition of the defendant. The Committee recommendations are also informed by the California Surgeon General's recent annual report, which recommends that the criminal legal system implement policies and practices that address trauma in justice-involved youth and adults.
>
> Finally, the Committee believes that judges should retain authority to impose sentence enhancements in appropriate cases. The Committee's recommendation leaves to judges the authority to impose sentence enhancements to protect public safety. But providing guidance on how and when judges should evaluate the appropriateness of sentence enhancements would provide more consistency, predictability, and reductions in unnecessary incarceration while ensuring that punishments are focused on protecting public safety.

(*Annual Report and Recommendations 2020*, Committee on Revision of the Penal Code, pp. 40-41, fn. omitted.)

Specifically, the Committee recommendations are:

> Establish guidelines and presumptions (but not requirements) that judges should consider dismissing sentencing enhancements in furtherance of justice when:
>
> > The current offense is nonviolent.
> > The current offense is connected to mental health issues.
> > The enhancement is based on a prior conviction that is over five years old.
> > The current offense is connected to prior victimization or childhood trauma.
> > The defendant was a juvenile when he/she committed the current offense or prior offenses.
> > Multiple enhancements are alleged in a single case or the total sentence is over 20 years.
> > A gun was used but it was inoperable or unloaded.
> > Application of the enhancement would result in disparate racial impact.
>
> Provide that the presumptions can be overcome if there is "clear and convincing evidence that dismissal of the enhancement would endanger public safety."
>
> Clarify that the list is not exclusive. Judges maintain power to strike enhancements in other compelling circumstances.

(*Annual Report and Recommendations 2020*, *supra*, at p. 37.)

This bill would codify the Committee's recommendation on the application of sentence enhancements.

As noted by the author, the California Rules of Court, which are adopted by the Judicial Council of California, do provide some guidance to judges on how to exercise discretion when imposing a sentence on enhancements. Rule 4.428, titled "Factors Affecting Imposition of Enhancements," advises that "In determining whether to strike the entire enhancement or only the punishment for the enhancement, the court may consider the effect that striking the enhancement would have on the status of the crime as a strike, the accurate reflection of the defendant's criminal conduct on his or her record, the effect it may have on the award of custody credits, and any other relevant consideration." (Cal. Rules of Court, rule 4.428(b).)

Case law interpreting Penal Code section 1385 also provides some guidance on dismissing enhancements. While the judge's discretion to dismiss is very broad, the phrase "furtherance of justice" requires that in determining whether or not to dismiss, both the defendant's constitutional rights and the interests of society be considered. (*People v. Orin* (1975) 13 Cal.3d 937, 945; *People v. Bracey* (1994), 21 Cal.App.4th 1532, 1541.)

This bill enacts a presumption that it is in the furtherance of justice to dismiss an enhancement when the aforementioned specific circumstances, such as mental health issues, prior victimization or childhood trauma, disparate racial impact, the allegation of multiple enhancements, or a sentence exposure of over 20 years, are present.

3) **Penal Code Section 1385**: Penal Code section 1385 authorizes the court to dismiss an "action" if it is in furtherance of justice." (Pen. Code, § 1385, subd. (a).) The word "action" in section 1385 means "'individual charges and allegations in a criminal action.'" (*In re Varnell* (2003) 30 Cal.4th 1132, 1137].) This includes sentencing enhancements. (*People v. Thomas* (1992) 4 Cal. 4th 206, 209.) In addition, rather than dismissing an enhancement, the court has the option to strike its punishment. (Pen. Code, § 1385, subd. (b)(1).) When exercising discretion under section 1385, the court must state its reasons on the record. (Pen. Code, § 1385, subd. (a).)

   Although the statute provides that a dismissal may be ordered either on the court's own motion, or the motion of the district attorney, a defendant may "invite" the court to exercise its discretion. (*People v. Carmony* (2004) 33 Cal.4th 367, 375.)

4) **Enhancements Generally**: An "enhancement" is "an additional term of imprisonment added to the base term." (Cal. Rules of Court, rule 4.405(3).) All enhancements must be specifically alleged in the accusatory pleading and proved or admitted by the defendant. (Pen. Code, § 1170.1, subd. (e).) There are two types of enhancements, generally known as "conduct" enhancements and "status" enhancements. Conduct enhancements attach to the crime (i.e. infliction of great bodily injury, armed with a firearm, commission in furtherance of street gang activity) whereas status enhancements attach to the defendant (i.e. prior prison term, prior serious felony convictions).

   An enhancement differs from an alternative penalty scheme. An alternative penalty scheme does not add an additional term of imprisonment to the base term; instead, it provides for an alternate sentence for the underlying felony itself when it is proven that certain conditions specified in the statute are true. (See *Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 899; *People v. Jefferson* (1999) 21 Cal.4th 86, 101.) These include the Three Strikes Law (*People*

v. Superior Court (Romero) (1996) 13 Cal.4th 497, 527); Penal Code section 186.22, subdivision (b)(4) in the criminal street gang statute (*People v. Jones* (2009) 47 Cal.4th 566, 576); and the One Strike Law (*People v. Anderson* (2009) 47 Cal.4th 92, 102) among others. The presumption created by this bill applies to enhancements, but does not encompass alternative penalty schemes.

5) **Limitations on Amending Voter Initiatives:** When laws are enacted through the initiative process, there are limitations on how those laws may be subsequently amended by the Legislature. Generally, the Legislature may not amend a statute enacted by initiative without subsequent voter approval unless the initiative permits such amendment, and then only upon whatever conditions the voters attached to the Legislature's amendatory powers. (*People v. Superior Court (Pearson)* (2010) 48 Cal.4th 564, 568; see also Cal. Const., art. II, § 10, subd. (c).) The California Constitution states, "The Legislature may amend or repeal referendum statutes. It may amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without their approval." (Cal. Const., art. II, § 10, subd. (c).)Therefore, unless the initiative expressly authorizes the Legislature to amend, only the voters may alter statutes created by initiative.

   The purpose of California's constitutional limitation on the Legislature's power to amend initiative statutes is to protect the people's initiative powers by precluding the Legislature from undoing what the people have done, without the electorate's consent. Courts have a duty to jealously guard the people's initiative power and, hence, to apply a liberal construction to this power wherever it is challenged in order that the right to resort to the initiative process is not improperly annulled by a legislative body. (*Proposition 103 Enforcement Project v. Quackenbush* (1998) 64 Cal.App.4th 1473.) Yet, despite the strict bar on the Legislature's authority to amend initiative statutes, judicial decisions have recognized that the Legislature is not thereby precluded from enacting laws addressing the general subject matter of an initiative. The Legislature remains free to address a "related but distinct area" or a matter that an initiative measure "does not specifically authorize or prohibit." (*People v. Kelly* (2010) 47 Cal.4th 1008, 1025-1026.)

   This bill specifies that its provisions do not apply to an enhancement if dismissal of that enhancement is prohibited by any initiative statute.

6) **Argument in Support**: According to the *California Attorneys for Criminal Justice*, a co-sponsor of this bill, "Penal Code section 1385 generally authorizes trial judge to dismiss sentencing enhancements 'in the furtherance of justice.' But the statute provides no standards to guide a court's exercise of discretion. Consequently, grave sentencing disparities occur among defendants convicted of identical offenses – even when they have comparable criminal histories, and their crimes are committed under similar circumstances.

   "In addition to these disparities, case law precludes a court from exercising its discretion to dismiss enhancements unless 'extraordinary' circumstances exist. (See, e.g., People v. Mayfield (2020) 50 Cal.App.4th 1096, 1105.) This standard has contributed to California's mass incarceration crisis. Indeed, a significant portion of inmates serving sentences where the period imposed for an enhancement is greater than the time imposed for the crime itself. As an example, robbery is punishable by imprisonment for two, three, or five years. But a gun enhancement imposed under Penal Code section 12022.53 will increase that sentence by ten,

twenty, or 25 years to life.

"SB 81 seeks to rectify the issues. It does this by ensuring that enhancements will not be imposed if various conditions are met, unless there is proof – by clear and convincing evidence – that dismissal of the enhancement would jeopardize public safety. This approach simultaneously encourages uniformity of sentencing, and the imposition of enhancements only when necessary to protect the public."

7) **Argument in Opposition**: According to the *California District Attorneys Association*, "This bill would severely limit the use of sentencing enhancements by establishing a presumption that an enhancement be dismissed under a wide variety of circumstances. Specific enhancements – also known as conduct-based enhancements – are directly related to the underlying offense and are based on the defendant's conduct during a crime, such as use/discharge of a firearm, infliction of serious bodily injury, amount of theft/damage, and victim's vulnerable status (i.e., elderly, child, racial minority). Certainly, defendants should be held accountable if they engage in aggravated conduct during the commission of a crime, particularly if it results in added trauma or injury to a victim.

"Judges should be permitted to consider various factors when evaluating whether to impose or dismiss an enhancement, but SB 81 essentially prohibits enhancements in multiple circumstances. The bill creates a presumption in favor of dismissing an enhancement unless overcome by clear and convincing evidence, thus taking discretion away from judges who are in the best position to evaluate the facts of the case and the particulars of the offender.

"We are particularly concerned with several of the circumstances listed in SB 81 that mandate dismissal of an enhancement, including:

- Disparate racial impact - specific enhancements are tied to an offender's conduct and a defendant's race should not play a factor (with the limited exception of race-based hate crimes).
- Multiple enhancements or total sentence over 20 years - if a defendant engages in various conduct that results in multiple enhancements, such as the use of several weapons or infliction of serious injury on multiple victims, then multiple enhancements would be warranted to hold the defendant accountable for his aggravated conduct.
- Offense is connected to prior victimization or childhood trauma - it is unclear what the term 'connected' means and the definition of 'prior victimization' and 'childhood trauma' is simply too broad.
- Offense is non-violent - this provision is unclear as many times it is the enhancement (based on the aggravating nature of the conduct such as use of a firearm or infliction of serious injury) that makes an offense violent.
- Defendant was a juvenile – a specific enhancement is tied to conduct, regardless of age.
- Prior convictions over 5 years old - this washout period is inadequate and does not take into account a defendant's conduct over the washout period (i.e., has the defendant been free from the commission of an offense or incarceration over that period).

- Inoperable or unloaded firearm - surely a firearm that is used as a blunt object to seriously injure or kill a victim, even though inoperable or unloaded, should qualify. And an unloaded firearm nevertheless instills fear in a victim and increases the chances of a violent confrontation.

"Finally, it is unclear what the standard for overcoming the mandatory dismissal of an enhancement – 'showing by clear and convincing evidence that dismissal of an enhancement would endanger public safety' – actually means and how it will be interpreted by courts.

"Judges are in the best position to evaluate the circumstances of the crime, the particulars of a defendant's background, and the interests of justice and public safety. As such, judges should be given discretion and flexibility in determining whether to impose or dismiss an enhancement, something judges currently have under existing law."

8) **Related Legislation**:

a) AB 1509 (Lee) repeals several firearm enhancements, reduces the penalty for using a firearm in the commission of specified crimes from 10 years, 20 years, or 25-years-to-life to one, two or three years, and authorizes recall and resentencing for a person serving a term for these enhancements. AB 1509 was held in the Assembly Appropriations Committee.

b) SB 483 (Allen) retroactively applies the repeal of sentence enhancements for prior prison or county jail felony terms and for prior convictions of specified crimes related to controlled substances. SB 483 is pending hearing in this committee.

REGISTERED SUPPORT / OPPOSITION:

Support

California Attorneys for Criminal Justice (Co-Sponsor)
ACLU California Action
Alliance San Diego
Arts for Healing and Justice Network
Asian Solidarity Collective
Bend the Arc: Jewish Action
California Calls
California Catholic Conference
California Public Defenders Association (CPDA)
Californians for Safety and Justice
Cat Clark Consulting Services LLC
Center on Juvenile and Criminal Justice
Change Begins With Me Indivisible Group
Communities United for Restorative Youth Justice (CURYJ)
Courage California
Del Cerro for Black Lives Matter
Democratic Club of Vista

Democrats of Rossmoor
Dolores Huerta Foundation
Drug Policy Alliance
Ella Baker Center for Human Rights
Essie Justice Group
Faith in Action Bay Area
Fresno Barrios Unidos
Friends Committee on Legislation of California
Hillcrest Indivisible
Initiate Justice
Legal Services for Prisoners With Children
Los Angeles Regional Reentry Partnership (LARRP)
Mission Impact Philanthropy
Multi-faith Action Coalition
Partnership for The Advancement of New Americans
Pillars of The Community
Prosecutors Alliance California
Re:store Justice
Represent Justice
Riseup
Rubicon Programs
San Diego Progressive Democratic Club
San Francisco Public Defender
Sd-qtpoc Colectivo
Showing Up for Racial Justice (SURJ) San Diego
Showing Up for Racial Justice North County San Diego
Smart Justice California
Social Workers for Equity & Leadership
Team Justice
Think Dignity
Time for Change Foundation
UC Berkeley's Underground Scholars Initiative (USI)
Underground Scholars Initiative UC Berkeley
Uprise Theatre
We the People - San Diego

Oppose

Arcadia Police Officers' Association
Burbank Police Officers Association
California Coalition of School Safety Professionals
California District Attorneys Association
California Narcotic Officers' Association
California Police Chiefs Association
California State Sheriffs' Association
Culver City Police Officers Association
Fullerton Police Officers' Association
Inglewood Police Officers Association
Los Angeles School Police Officers Association

Newport Beach Police Association
Orange County District Attorney
Palos Verdes Police Officers Association
Peace Officers Research Association of California (PORAC)
Pomona Police Officers' Association
Riverside Sheriffs' Association
San Diegans Against Crime
San Diego County District Attorney's Office
San Diego District Attorneys Association
Santa Ana Police Officers Association

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

Amended Mock-up for 2021-2022 SB-81 (Skinner (S))

Mock-up based on Version Number 95 - Amended Senate 4/27/21
Submitted by: Sandy Uribe, Assembly Public Safety Committee

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

SECTION 1. Section 1385 of the Penal Code is amended to read:

1385. (a) The judge or magistrate may, either on motion of the court or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed. The reasons for the dismissal shall be stated orally on the record. The court shall also set forth the reasons in an order entered upon the minutes if requested by either party or in any case in which the proceedings are not being recorded electronically or reported by a court reporter. A dismissal shall not be made for any cause that would be ground of demurrer to the accusatory pleading.

(b) (1) If the court has the authority pursuant to subdivision (a) to strike or dismiss an enhancement, the court may instead strike the additional punishment for that enhancement in the furtherance of justice in compliance with subdivision (a).

(2) This subdivision does not authorize the court to strike the additional punishment for any enhancement that cannot be stricken or dismissed pursuant to subdivision (a).

(c) (1) ~~Except as specified in paragraph (4),~~ **Notwithstanding any other law,** the court shall dismiss an enhancement if it is in the furtherance of justice to do so**, except if dismissal of that enhancement is prohibited by any initiative statute**.

(2) There shall be a presumption that it is in the furtherance of justice to dismiss an enhancement upon a finding that any of the circumstances in subparagraphs (A) to (I), inclusive, are true. This presumption shall only be overcome by a showing of clear and convincing evidence that dismissal of the enhancement would endanger public safety.

(A) Application of the enhancement would result in a disparate racial impact.

(B) Multiple enhancements are alleged in a single case. In this instance, all enhancements beyond a single enhancement shall be dismissed.

(C) The application of an enhancement could result in a sentence of over 20 years. In this instance, the enhancement shall be dismissed.

(D) The current offense is connected to mental illness.

(E) The current offense is connected to prior victimization or childhood trauma.

(F) The current offense is not a violent felony as defined in subdivision (c) of Section 667.5.

(G) The defendant was a juvenile when they committed the current offense or prior offenses.

(H) The enhancement is based on a prior conviction that is over five years old.

(I) Though a firearm was used in the current offense, it was inoperable or unloaded.

(3) The circumstances listed in paragraph (2) are not exclusive and the court maintains authority to dismiss or strike an enhancement in accordance with subdivision (a).

(4) For the purposes of subparagraph (D) of paragraph (2), a mental illness is a mental disorder as identified in the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders, including, but not limited to, bipolar disorder, schizophrenia, schizoaffective disorder, or post-traumatic stress disorder, but excluding antisocial personality disorder, borderline personality disorder, and pedophilia. A court may conclude that a defendant's mental illness was connected to the offense if, after reviewing any relevant and credible evidence, including, but not limited to, police reports, preliminary hearing transcripts, witness statements, statements by the defendant's mental health treatment provider, medical records, records or reports by qualified medical experts, or evidence that the defendant displayed symptoms consistent with the relevant mental disorder at or near the time of the offense, the court concludes that the defendant's mental illness substantially contributed to the defendant's involvement in the commission of the offense.

(5) For the purposes of this subdivision, the following terms have the following meanings:

(A) "Childhood trauma" means that as a minor the person experienced physical, emotional, or sexual abuse, physical or emotional neglect, or had a household member who experienced mental illness, a substance use disorder, intimate partner violence, absence due to divorce or separation, or incarceration.

(B) "Prior victimization" means the person was a victim of intimate partner violence, sexual violence, or human trafficking, or the person has experienced psychological or physical trauma, including, but not limited to, abuse, neglect, exploitation, or sexual violence.

~~(6) This subdivision does not apply to an enhancement if dismissal of that enhancement is prohibited by any initiative statute.~~

(7) This subdivision shall not apply retroactively.

Date of Hearing: June 29, 2021
Counsel: David Billingsley

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

SB 317 (Stern) – As Amended June 23, 2021

SUMMARY: Revises the procedures when a defendant is found mentally incompetent to stand trial (IST) on misdemeanor charges. Allows a defendant to earn conduct credits when he or she is committed to a state hospital or other mental health treatment facility as IST in the same manner as if they were held in county jail. Specifically, **this bill:**

1) Repeals the existing statute which applies to a defendant facing a misdemeanor charge(s) found to be IST.

2) Specifies that if the defendant is found mentally incompetent, the trial, judgment, or hearing on the alleged violation shall be suspended and the court may either dismiss the charges or conduct a hearing to determine if the defendant is eligible for mental health diversion.

   a) Provides that if the court deems the defendant eligible for diversion, it shall grant diversion for a period not to exceed one year from the date the individual is accepted into diversion or the maximum term of imprisonment provided by law for the most serious offense charged in the misdemeanor complaint, whichever is shorter.

   b) States that if the court finds the defendant ineligible for mental health diversion, as specified, the court may, after notice to the defendant, defense counsel, and the prosecution, hold a hearing to determine whether to do any of the following:

      i) Order modification of the treatment plan in accordance with a recommendation from the treatment provider;

      ii) Refer the defendant to assisted outpatient treatment under Laura's Law, as specified. A referral for Assisted Outpatient Treatment may occur only in a county where Laura's Law services are available, and the agency agrees to accept responsibility for treatment of the defendant:

         (1) A hearing to determine eligibility for assisted outpatient treatment must be held within 45 days from the date of the referral;

         (2) If the hearing is continued beyond the 45-day period, the defendant, if confined in county jail, shall be ordered released on their own recognizance pending that hearing;

         (3) If the defendant is accepted into assisted outpatient treatment, the charges shall be dismissed; or

iii) Refer the defendant to the county conservatorship investigator for the county of commitment for possible Lanterman Prentis Short (LPS) conservatorship proceedings for the defendant, as specified.

(1) A defendant shall only be referred to the conservatorship investigator if based on the opinion of a qualified mental health expert, the defendant appears to be gravely disabled, as specified.

(2) Any hearings required in the conservatorship proceedings shall be held in the superior court in the county of commitment.

(3) The court shall transmit a copy of the order directing initiation of conservatorship proceedings to the county mental health director or the director's designee and shall notify the county mental health director or the director's designee of the outcome of the proceedings.

(4) Before establishing a conservatorship, the public guardian shall investigate all available alternatives to conservatorship, as specified.

(5) If a petition is not filed within 60 days of the referral, the defendant, if confined in county jail, shall be ordered released on their own recognize pending conservatorship proceedings.

(6) If the outcome of the conservatorship proceedings results in the establishment of conservatorship, the charges shall be dismissed pursuant to Section 1385.

3) Specifies that if the court opts to conduct a hearing to determine eligibility for mental health diversion, the hearing shall be held no later than 30 days after the finding of incompetence.

4) States that if the hearing on diversion eligibility is continued beyond the 30-day period, the court shall order the defendant to be released on their own recognizance pending the hearing.

5) Provides that if the defendant performs satisfactorily on diversion or mandatory treatment, at the end of the period of diversion or mandatory treatment, the court shall dismiss the criminal charges that were the subject of the criminal proceedings at the time of the initial diversion or treatment.

6) States that if the defendant is found mentally incompetent and is on a grant of probation for a misdemeanor offense, the court shall dismiss the pending revocation matter and may return the defendant to supervision.

7) Allows the court to modify the terms and conditions of supervision to include appropriate mental health treatment, if the probation revocation matter is dismissed.

8) Specifies that if the criminal action for new charges is dismissed, the court shall transmit a copy of the order of dismissal to the county mental health director or the director's designee.

9) States that it is the intent of the Legislature that a defendant subject to provisions of this bill receive mental health treatment in a treatment facility and not a jail. A term of four days

will be deemed to have been served for every two days spent in actual custody against the maximum term of diversion.

10) States that if the defendant is found mentally competent, the criminal process shall resume, and the trial on the offense charged or alleged violation shall proceed.

11) Specifies that when a person is confined in or committed to a state hospital or other mental health treatment facility because they have been found IST, they are entitled to earn conduct credits in the same manner as if they were in county jail.

12) Make Legislative findings and declarations.

EXISTING LAW:

1) States that a person cannot be tried or adjudged to punishment or have his or her probation, mandatory supervision, postrelease community supervision, or parole revoked while that person is mentally incompetent. (Pen. Code, § 1367, subd. (a).)

2) Requires, when counsel has declared a doubt as to the defendant's competence, the court to hold a hearing determine whether the defendant is IST. (Pen. Code, § 1368, subd. (b).)

3) Provides that, except as provided, when an order for a hearing into the present mental competence of the defendant has been issued, all proceedings in the criminal prosecution shall be suspended until the question of whether the defendant is IST is determined. (Pen. Code, § 1368, subd. (c).)

4) Specifies how the trial on the issue of mental competency shall proceed. (Pen. Code, § 1369.)

5) Specifies that if the defendant is found mentally competent on a misdemeanor charge(s), the criminal process shall resume, the trial on the offense charged shall proceed, and judgment may be pronounced. (Pen. Code, § 1370.01, subd. (a)(1).)

6) States that if the defendant is found mentally incompetent on a misdemeanor complaint the trial, judgment, or hearing on the alleged violation shall be suspended until the person becomes mentally competent, and the court shall order that in the meantime, the defendant be delivered by the sheriff to an available public or private treatment facility approved by the county mental health director that will promote the defendant's speedy restoration to mental competence, or placed on outpatient status as specified in this section, and upon the filing of a certificate of restoration to competence, the defendant be returned to court. (Pen. Code, § 1370.01, subd. (a)(1).)

7) States that if the defendant is found mentally incompetent on a misdemeanor complaint, the court may make a finding that the defendant is an appropriate candidate for diversion, as specified. (Pen. Code, § 1370.01, subd. (a)(2).)

8) Specifies that prior to making the order directing that the defendant be confined in a treatment facility or placed on outpatient status, the court shall follow specified procedures.

(Pen. Code, § 1370.01, subd. (a)(3).)

9) States that a person subject to commitment when incompetent to stand trial on a misdemeanor may be placed on outpatient status under the supervision of the county mental health director or his or her designee by order of the court. (Pen. Code, § 1370.01, subd. (a)(5).)

10) Provides that within 90 days of a commitment, the medical director of the treatment facility to which the defendant is confined shall make a written report to the court and the county mental health director or his or her designee, concerning the defendant's progress toward recovery of mental competence. (Pen. Code, § 1370.01, subd. (b).)

11) Specifies that if the defendant has not recovered mental competence, but the report discloses a substantial likelihood that the defendant will regain mental competence in the foreseeable future, the defendant shall remain in the treatment facility or on outpatient status. Thereafter, at six-month intervals or until the defendant becomes mentally competent, where the defendant is confined in a treatment facility, the medical director of the hospital or person in charge of the facility shall report in writing to the court and the county mental health director or a designee regarding the defendant's progress toward recovery of mental competence. (Pen. Code, § 1370.01, subd. (b).)

12) States that at the end of one year from the date of commitment or a period of commitment equal to the maximum term of imprisonment provided by law for the most serious offense charged in the misdemeanor complaint, whichever is shorter, the defendant has not recovered mental competence, the defendant shall be returned to the committing court. (Pen. Code, § 1370.01, subd. (b).)

13) Allows a criminal charge to be dismissed at the end of one year or the maximum term of imprisonment on the most serious offense charged in the misdemeanor complaint, whichever is shorter. (Pen. Code, § 1370.01, subd. (d).)

14) Specifies procedures following a finding that a defendant is mentally incompetent and is developmentally disabled and provides a two year maximum term of commitment to restore a defendant's mental competence when the defendant faces felony charges. (Pen. Code, § 1370.1.)

15) Specifies the conduct credits that may be earned by inmates confined in or committed to a county jail, industrial farm, road camp, city jail, or county jail treatment facility, as defined. (Pen. Code, § 4019.)

16) States that it is the intent of the Legislature that if all days are earned, as specified, for time in the county a jail, a term of four days will be deemed to have been served for every two days spent in actual custody. (Pen. Code, § 4019, subd. (f).)

17) Provides that time spent by a person in a treatment facility or county jail as a result of incompetency proceedings shall be credited against the sentence, if any, imposed in the underlying criminal case or revocation matter giving rise to the competency proceedings. (Pen. Code, § 1375.5, subd. (a).)

18) Specifies that a person who is found to be incompetent to stand trial shall receive credits for all time during which he or she is confined in a county jail and for which he or she is otherwise eligible. (Pen. Code, § 1375.5, subd. (c).)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "Existing law provides that incompetent defendants can only receive time served credits for good conduct when in a county jail treatment facility.

"Existing law does not provide incompetent defendants adequate mental health treatment when the defendant is charged with a misdemeanor. These defendants often spend most, if not all, of their pre-trial detention waiting for a treatment bed.

"SB 317 ensures incompetent defendants are eligible for the same time served credit for good conduct as their competent counterparts, while receiving treatment in any treatment facility or as an outpatient, not just a county jail treatment.

"SB 317 provides pathways to appropriate mental health treatment for defendants charged with misdemeanors. Instead of being released before adequate treatment has been administered, there are alternate options for incompetent defendants: diversion for one year or the maximum sentencing for the more serious offense being charged (whichever is shorter), transfer to a collaborative court, refer case to a conservatorship investigator, or dismissal of the case as appropriate.

"Not all options are available for every defendant; they are dependent on the situation and mental health status of each defendant. A tailored approach allows California to use existing tools to help defendants gain competency and avoid a cycle of incarceration."

2) **Incompetent to Stand Trial:** Under state and federal law, all individuals who face criminal charges must be mentally competent to help in their defense. A defendant is mentally incompetent to stand trial "if, as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner. (Pen. Code, § 1367.) Due process requires the court to initiate a determination of competency on its own motion when substantial evidence exists that the defendant is incompetent. (*People v. Pennington* (1967) 66 Cal.2d 508, 518.) When substantial evidence of incompetence exists, the trial court cannot proceed with the case against the defendant without first holding a competency hearing. (Id. at 521.) The court must appoint a psychiatrist or licensed psychologist to examine the defendant. If defense counsel opposes a finding on incompetence, the court must appoint two experts: one chosen by the defense, one by the prosecution. (Pen. Code, § 11369, subd. (a).) The examining expert(s) must evaluate the defendant's alleged mental disorder and the defendant's ability to understand the proceedings and assist counsel, as well as address whether antipsychotic medication is medically appropriate. (Pen. Code, § 1369, subd. (a).)

Both parties have a right to a jury trial to decide competency. (Pen. Code, § 1369.) A formal trial is not required when jury trial has been waived. (*People v. Harris* (1993) 14 Cal.App.4th

984.) If the court finds a defendant mentally incompetent to stand trial, the person is committed to Department of State Hospitals (DSH) or other (inpatient or outpatient) treatment facility for treatment to regain competency in order to be brought back to court to face the charges against him or her. (Pen. Code, § 1370, subd. (a).) A treatment facility includes a county jail, if the county board of supervisors, the county mental health director, and the county sheriff, concur and make specified findings. A court can also find that the defendant is eligible for mental health diversion and may grant diversion on that basis. (Pen. Code, §§ 1370 and 1370.01.)

When a defendant is found incompetent to stand trial, the court makes a determination as to whether the defendant consents to the administration of medication. If the defendant does not consent to the administration of medication, the court holds a hearing to determine whether to issue an order for the involuntary administration of medication. The court issues such an order under the following circumstances:

a) The defendant lacks capacity to make decisions regarding antipsychotic medication, the defendant's mental disorder requires medical treatment with antipsychotic medication, and, if the defendant's mental disorder is not treated with antipsychotic medication, it is probable that serious harm to the physical or mental health of the patient will result;

b) The defendant is a danger to others, as specified; or,

c) The people have charged the defendant with a serious crime against the person or property; involuntary administration of antipsychotic medication is substantially likely to render the defendant competent to stand trial; the medication is unlikely to have side effects that interfere with the defendant's ability to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a reasonable manner; less intrusive treatments are unlikely to have substantially the same results; and antipsychotic medication is in the patient's best medical interest in light of his or her medical condition. (Pen. Code, §§ 1370 and 1370.01.)

On a felony offense or offenses, the person may be committed to the treatment facility for two years or the period equal to the maximum term of imprisonment for the most serious underlying offense with which he or she is charged, whichever is shorter. (Pen. Code, § 1370, subd. (c)(1).) If the treatment facility determines that there is no substantial likelihood that the defendant will regain mental competence in the foreseeable future or if the patient has not regained competency after this period, the defendant is returned to the committing court. (Pen. Code, § 1370, subds. (b) & (c).)

If the defendant has not regained competence after the maximum period of commitment or the treating agency finds that there is no reason to believe the offender will regain competence, the court may release the person or initiate conservatorship proceedings. (In re Davis (1973) 8 Cal.3d 798.) If the defendant is facing an indictment or an information on a felony charge involving death, great bodily injury or serious threat to another and the statutory three years has past, the court may initiate a Murphy conservatorship. Pursuant to the Lanterman–Petris–Short (LPS) Act, a civil commitment hearing may also be held to hold the defendant in a mental health facility because the defendant is unable to provide for his or her basic personal needs for food, clothing, or shelter because of a mental health disorder or presents a danger to others because of a mental disorder. (Welf. & Inst. Code, § 50000 et

seq., Pen. Code, §§ 1370 and 1370.01.)

When a defendant is charged with a misdemeanor complaint the maximum time of commitment is one year or the maximum term of imprisonment on the most serious offense, whichever is shorter. (Pen. Code, §11370.01, subd. (c).) Misdemeanor IST are only committed to DSH if the county mental health director finds that there is no less restrictive appropriate placement available. If the court determines that an IST defendant will be treated in custody, DSH are the facilities to which most IST defendants are sent. Often there is a long wait to get a bed in the state hospitals. Partly as a response to the issue, the Legislature has allowed counties to provide treatment to IST defendants in the county jail. There are questions as to whether that treatment methodology is as effective as treatment provided in a clinical environment.

3) **Delays in Treatment for ISTs:** In recent years, there has been substantial backlogs for IST beds at DSH. This has resulted in delays in treatment which have been substantial enough to implicate the defendant's constitutional due process rights. An opinion from the California First District Court of Appeal, released this month, addressed the lengthy delays in admitting IST defendants to DSH. In that case, a report from the plaintiff's expert showed that for IST defendants committed to DSH between January 1 and June 30, 2017, the mean, or average number of days between trial court commitment and admission to a state hospital was 86 and the median was 89. The mean number of days between receipt of the commitment packet by DSH and admission to a state hospital in that time period was 64 and the median was 63. (*Stiavetti v. Clendenin* (Ct. App. June 15, 2021), No. A157553, 2021 Cal. App. LEXIS 502.)

   The court noted that that the rate of referrals at DSH had been increasing over the previous five years beyond the ability of DSH to admit, creating an increase in the waitlist. The court discussed how these delays can constitute due process violations if it results in a defendant being held longer than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain [competency] in the foreseeable future. (*Id.*)

4) **Changes to the Misdemeanor IST Process Proposed by this Bill:** This bill would eliminate referrals for misdemeanor ISTs for in-custody treatment at DSH or county jails. Under the procedure established by this bill, the court could grant the defendant mental health diversion (if the defendant qualifies) or dismiss the charges, which are options available under existing law. If the court determines that the defendant is not eligible for diversion, the court can (1) order modification of the treatment plan in accordance with a recommendation from the treatment provider; (2) refer the defendant to assisted outpatient treatment (Laura's Law) if such treatment is available in the county and the agency agrees to accept responsibility for treatment of the defendant; or (3) refer for possible conservatorship proceedings if based on the opinion of a qualified mental health expert, the defendant appears to be gravely disabled. This bill would impose time limits for hearings on mental health diversion, eligibility for Laura's Law treatment, and establishing a conservatorship. Such time limits seek to prevent the type of delays in treatment that have raised due process concerns in IST cases.

   If the defendant is found IST and is on a grant of probation for a misdemeanor offense, the court would dismiss the pending revocation matter and would have the option to return the defendant to probation supervision. If the revocation matter is dismissed, the court could

modify the terms and conditions of probation to include appropriate mental health treatment.

Under the provisions of this bill, the court would no longer determine if the defendant consents to medication and no longer consider whether to issue an order for involuntary medication if the defendant does not consent to medication.

Under existing law, the treatment of an IST is specifically intended to restore the defendant to competence, at which time the criminal proceedings would resume. This bill does not contemplate restoration of competency or a resumption of criminal proceedings. Presumably, the mental health treatment would itself be the objective, rather than the resumption of criminal proceedings.

5) **Custody Credits Earned During the Time a Person is IST:** When a defendant is confined in county jail, a defendant is entitled to earn additional credits against their sentence at a rate of one (1) day of credit for every actual day served. (Pen. Code, § 4019.) For example, a person in county jail for six months can earn and receive six additional months of credits, which would equal a sentence of 12 months.

However, a person that is IST and is committed to a state hospital does not earn additional custody credits. An IST that is transferred from a county jail to a state hospital earns day for day credit against for time spent in the state hospital. Thus, if they spent 6 months in the state hospital while they were restored to competency, they would be entitled to 6 months credit against any sentence they ultimately receive on the charge(s) for which they were declared IST. A defendant committed to a state hospital is neither statutorily nor constitutionally entitled to conduct credits for preconviction custody.

SB 568 (Wiggins), Chapter 556, Statutes of 2007, allowed county jails or other county penal facilities to be used as "county jail treatment facilities," as specified, to restore a criminal defendant's mental competency. According to Senator Wiggins, the purpose of the bill was to serve as an interim measure until the defendant can gain entrance into a state hospital. (Assembly Public Safety Analysis, SB 568 (Wiggins), 2007.)

SB 1187 (Beall), Chapter 1008, Statutes of 2018, specified that an individual that has been found IST and continues to be held and treated in a county jail treatment facility, earns credits in the same manner and at the same rate as an individual in a county jail that is not IST.

This bill would require an IST to be awarded good time custody credits when a prisoner is confined in or committed to a state hospital or other mental health treatment facility at the same rate as an inmate in county jail.

6) **Argument in Support**: According to *Initiate Justice*, "Under current law, defendants earn pre-trial custody credits against any jail or prison sentence they ultimately receive. However, defendants who are deemed incompetent to stand trial only receive good time/work time credits for time spent in a jail setting and not for time spent involuntarily detained in a hospital. As a result, these defendants receive only half as much custody credit as other defendants. The perverse outcome is that defendants who suffer from mental health challenges, once restored to competence, are forced to serve longer sentences than competent defendants charged with the same offense.

"SB 317 (Stern) ensures incompetent defendants are not more harshly punished than their identically situated competent counterparts by allowing these defendants to earn the same conduct credits. SB 317 (Stern) also provides more options for appropriate mental health treatment for incompetent defendants charged with misdemeanors. Instead of months sitting on a waiting list, these defendants could be placed in a mental health diversion program or collaborative court where appropriate resources exist.

SB 317 (Stern) facilitates a treatment approach tailored to a defendant's needs. Rather than being shackled to the problems which all but debilitate the current system, this bill allows California to use existing tools to help defendants get the treatment they need and avoid the cycle of incarceration."

7) **Prior Legislation**:

a) SB 1187 (Beall), Chapter 1008, Statutes of 2018, reduced the maximum term for commitment to a treatment facility when a defendant has been found incompetent to stand trial (IST) on a felony from three years to two years. Specified that when a defendant has been found IST and is held in a county jail treatment center while undergoing treatment for restoration to competency, that person is entitled to custody credits in the same manner as any other inmate confined to a county jail.

b) AB 1810 (Committee on Budget), Chapter 34, Statutes of 2018, specified that when a defendant is determined to be IST, the court can find that they are an appropriate candidate for mental health diversion.

c) AB 1214 (Stone), Chapter 991, Statutes of 2018, revised the procedures to determine the mental competence of a juvenile charged with a crime.

d) AB 2186 (Lowenthal), Chapter 733, Statutes of 2014, made changes to the process of involuntary administration of antipsychotic mediation of individuals who are found to be incompetent to stand trial and confined in a state hospital or county jail.

e) SB 1412 (Nielsen), Chapter 759, Statutes of 2014, applied procedures relative to persons who are incompetent to stand trial (IST) to persons who may be mentally incompetent and face revocation of probation, mandatory supervision, postrelease community supervision (PRCS), or parole.

f) SB 586 (Wiggins), Chapter 556, Statutes of 2007, allowed county jails or other county penal facilities to be used as "treatment facilities", as specified, and are designed to restore a criminal defendant's mental competency.

REGISTERED SUPPORT / OPPOSITION:

Support

California Public Defenders Association (CPDA) (Co-Sponsor)
ACLU California Action
Association of Regional Center Agencies

California for Safety and Justice
California Psychological Association
Californians United for A Responsible Budget
Ella Baker Center for Human Rights
Initiate Justice
Los Angeles County Board of Supervisors
Los Angeles County District Attorney's Office
National Association of Social Workers, California Chapter
San Francisco Public Defender
Steinberg Institute
The Depression and Bipolar Support Allliance California
UC Berkeley's Underground Scholars Initiative (USI)
We the People - San Diego

Opposition

None

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Date of Hearing: June 29, 2021
Counsel: David Billingsley

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

SB 519 (Wiener) – As Amended May 20, 2021

As Proposed to be Amended in Committee

SUMMARY: Makes lawful the possession for personal use and the social sharing of specified hallucinogenic substances by persons 21 years of age or older. Specifically, **this bill**:

1) Defines mescaline as derived from plants presently classified botanically in the Echinopsis or Trichocereus genus of cacti, including, without limitation, the Bolivian Torch Cactus, San Pedro Cactus, or Peruvian Torch Cactus, but not including mescaline derived from any plant defined as peyote.

2) Provides that, if there is a change in federal law permitting the prescription, furnishing, or dispensing of a psilocybin, psiloyn, DMT, ibogaine, mescaline, LSD, or 3,4-methylenedioxymethamphetamine (MDMA) product, a physician, pharmacist, or other authorized healing arts licensee acting within their scope of practice who prescribes, furnishes, or dispenses that product in accordance with federal law, shall be deemed to be in compliance with state law.

3) Removes mescaline from the code section that prohibits the possession of specified controlled substances.

4) Removes mescaline from the code section the makes it unlawful to possess any device, instrument, or paraphernalia used for unlawfully injecting or smoking specified controlled substances, except as specified.

5) Removes "test" and "analyze" from the prohibition on the use, possession, manufacturing, or furnishing of drug paraphernalia used to plant, propagate, cultivate, grow, harvest, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance.

6) Provides that the prohibition on paraphernalia, described above, does not apply to any paraphernalia that is intended to be used to plant, propagate, cultivate, grow, harvest, compound, convert, produce, process, prepare, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body, any of the following substances: DMT, ibogaine, LSD, mescaline, psilocybin, psilocin, or MDMA.

7) Removes mescaline from the code section that makes it unlawful to visit or to be in any room or place where specified controlled substances are being unlawfully smoked or used with knowledge that such activity is occurring.

8) Removes mescaline from the code section that makes it unlawful to be under the influence of specified drugs.

9) Excepts DMT, ibogaine, LSD, psilocybin, psilocin from the statute that makes it unlawful to possess those substances, methamphetamine, and other specified controlled substances.

10) Excepts DMT, ibogaine, LSD, psilocybin, and psilocyn from the code section that makes it unlawful to sell, give away, or transport for sale specified controlled substances.

11) Excepts DMT, ibogaine, LSD, psilocybin, and psilocyn from the code section that makes it unlawful for a person who agrees, consents, or in any manner offers to unlawfully sell, furnish, transport, administer, or give specified controlled substances.

12) Repeals the provision of law that makes it unlawful for a person who, with the intent to produce psilocybin or psilocyn, cultivates any spores or mycelium capable of producing mushrooms or other material which contains such a controlled substance.

13) Repeals the provision of law that makes it unlawful to transport, import into this state, sell, furnish, gives away, or offer to transport, import into this state, sell, furnish, or give away any spores or mycelium capable of producing mushrooms or other material which contain psilocybin or psilocyn.

14) Repeals the provision of law that states that spores or mycelium capable of producing mushrooms or other material which contains psilocyn or psyoclyin may be lawfully obtained and used for bona fide research, instruction, or analysis, if not in violation of federal law, and if the research, instruction, or analysis if approved by the Research Advisory Panel.

15) Repeals existing legislative findings and declarations related to drug and alcohol education.

16) Provides that all of the following acts involving mescaline are lawful for a natural person 21 years of age or older, except as otherwise specified by the provisions of this bill:

    a) The possession, processing, obtaining, or transportation of mescaline for personal use or for social sharing;

    b) The ingesting of mescaline;

    c) The social sharing of mescaline; and,

    d) The possession, planting, cultivating, harvesting, or processing of plants capable of producing mescaline, on property owned or controlled by a person, for personal use or social sharing by that person, and possession of any product produced by those plants.

17) Provides that the following conduct involving mescaline is unlawful and subject to the following penalties:

    a) Possession of mescaline by a person 21 years of age or older on the grounds of any school during hours that the school is open for classes or school-related programs, or at any time when minors are using the facility is a misdemeanor punishable by up to six

months in the county jail;

b) Knowingly give away or administer mescaline to a person who is under 18 years of age is a misdemeanor punishable by imprisonment in a county jail for a period of not more than six months or by a fine of not more than $500, or by both that fine and imprisonment, or as a felony punishable by imprisonment in the county jail for up to three years;

c) A person 18 years of age or over who knowingly gives away or administers mescaline to a minor under 14 years of age in violation of law guilty of a felony, punishable in the state prison for a period of three, five, or seven years;

d) Knowingly give away or administer mescaline to a person who is at least 18 years of age, but under 21 years of age is guilty of an infraction;

e) Possession of mescaline by a person under 18 years of age is punishable as an infraction and requires the minor to either: (1) complete four hours of drug education or counseling and up to 10 hours of community service over a period not to exceed 60 days, commencing when the drug education or counseling services are made available to them for a first offense; or (2) complete six hours of drug education or counseling and up to 20 hours of community service over a period not to exceed 90 days, commencing when the drug education or counseling services are made available to them for a second or subsequent offense; and,

f) Possession of mescaline by a person at least 18 years of age but less than 21 years of age is punishable as an infraction.

18) Provides that mescaline or related products involved in any way with conduct deemed lawful are not contraband nor subject to seizure. Prohibits lawful conduct from constituting the basis for detention, search, or arrest, or the basis for the seizure or forfeiture of assets.

19) Defines "financial gain" as "the receipt of money or other valuable consideration in exchange for the item being shared. Does not include reasonable fees for counseling, spiritual guidance, or related services that are provided in conjunction with administering or use of mescaline under the guidance and supervision, and on the premises, of the person providing those services."

20) Defines "personal use" as "for the personal ingestion or other personal and noncommercial use by the person in possession."

21) Defines "social sharing" as "the giving away or consensual administering of specified hallucinogens by a person 21 years of age or older, to another person 21 years of age or older, not for financial gain, including in the context of group counseling, spiritual guidance, community-based healing, or related services."

22) Specifies that all of the following acts involving DMT, ibogaine, LSD, psilocybin, psilocin, and MDMA are lawful for a person 21 years of age or older, except as otherwise specified by the provisions of this bill:

a) The possession, processing, obtaining, or transportation of DMT, ibogaine, LSD, psilocybin, psilocyn, and MDMA for personal use or for social sharing;

b) The ingesting of DMT, ibogaine, LSD, psilocybin, psilocyn, and MDMA;

c) The social sharing of DMT, ibogaine, LSD, psilocybin, psilocyn, and MDMA; and,

d) The possession, planting, cultivating, harvesting, or processing of plants capable of producing of DMT, ibogaine, LSD, psilocybin, and psilocin on property owned or controlled by a person, for personal use or social sharing by that person, and possession of any product produced by those plants including spores or mycelium capable of producing mushrooms or other material which contain psilocybin or psilocyn for that purpose.

23) Includes all of the same criminal penalties with respect to DMT, ibogaine, LSD, psilocybin, psilocyn, and MDMA by a person as apply to mescaline under the provisions of this bill. Specifically:

a) Possession one of these substances on the grounds of any school is a misdemeanor;

b) Giving away or administering one of these substances to a person under 18 is an alternate felony/misdemeanor;

c) Giving away or administering one of these substances to a person under 14 is a felony;

d) Giving away or administering one of these substances to a person at least 18 years old but under 21 is an infraction;

e) Possession of one of these substances by a person under 18 years of age is an infraction; and,

f) Possession of one of these substances by a person at least 18 years of age but under 21 is an infraction.

24) Requires the State Department of Public Health to convene a working group, as specified, to research and make recommendations to the Legislature regarding, among other things, the regulation and the substances made lawful by this bill, as specified.

25) Makes technical and conforming changes.

26) Makes Legislative findings and declarations.

EXISTING LAW:

1) Lists controlled substances in five "schedules" - intended to list drugs in decreasing order of harm and increasing medical utility or safety - and provides penalties for possession of and commerce in controlled substances. Schedule I includes the most serious and heavily controlled substances, with Schedule V being the least serious and most lightly controlled

substances. (Health & Saf. Code §§ 11054-11058.)

2) Classifies several hallucinogenic substances including DMT, ibogaine, LSD, mescaline, psilocybin, and psilocyn as Schedule I substances. (Health & Saf. Code, § 11054, subd. (d).)

3) Provides that, upon change in federal law permitting the prescription, furnishing, or dispensing of a cannabidiol product, a physician, pharmacist, or other authorized healing arts licensee acting within his or her scope of practice who prescribes, furnishes, or dispenses a cannabidiol product in accordance with federal law, shall be deemed to be in compliance with state law. (Health & Saf. Code, § 11150.2, subd. (a).)

4) Prohibits the possession of several specified controlled substances. (Health & Saf. Code, § 11350, subd. (a).)

5) Makes it is unlawful to possess any device, instrument, or paraphernalia used for unlawfully injecting or smoking specified controlled substances, except as specified. (Health & Saf. Code, § 11364, subd. (a).)

6) Makes it unlawful for any person to deliver, furnish, or transfer, possess with intent to deliver, furnish, or transfer, or manufacture with the intent to deliver, furnish, or transfer, drug paraphernalia, knowing that it will be used to plant, propagate, cultivate, grow, harvest, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance. (Health & Saf. § 11364.7.)

7) Provides that it is unlawful to visit or to be in any room or place where specified controlled substances are being unlawfully smoked or used with knowledge that such activity is occurring. (Health & Saf. Code, § 11365, subd. (a).)

8) Provides that the possession of methamphetamine and other specified controlled substances is unlawful. (Health & Saf. Code, § 11377, subd. (a).)

9) Makes it unlawful for a person to transport, import into this state, sell, furnish, administer, or give away, or offer to transport, import into this state, sell, furnish, administer, or give away, or attempt to import into this state or transport specified controlled substances. (Health & Saf. Code, § 11379.)

10) Makes it unlawful for a person to agree, consent, or in any manner offer to unlawfully sell, furnish, transport, administer, or give specified controlled substances. (Health & Saf. Code, § 11382.)

11) Provides that it is unlawful to be under the influence of specified controlled substances. (Health & Saf. Code, § 11550, subd. (a).)

12) Makes it unlawful for a person who, with the intent to produce psilocybin or psilocyn, cultivates any spores or mycelium capable of producing mushrooms or other material which contains such a controlled substance. (Health & Saf. Code, § 11390.)

13) Makes it unlawful to transport, import into this state, sell, furnish, gives away, or offer to transport, import into this state, sell, furnish, or give away any spores or mycelium capable of producing mushrooms or other material which contain psilocybin or psilocyn. (Health & Saf. Code, § 11391.)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "Senate Bill 519 decriminalizes the possession and personal use of certain psychedelic drugs, specifically, psilocybin, psilocyn, MDMA, LSD, DMT, mescaline and ibogaine, for people 21 years and older. Growing scientific evidence shows that these substances have therapeutic benefits. Criminalizing people for the possession or use of controlled substances is a failed policy approach, as it does not improve public safety, deter use, or help people who may be experiencing substance use disorder. In recent years, various California cities including Santa Cruz and Oakland as well as Washington, D.C. and Somerville, Massachusetts have all decriminalized psychedelic plants and fungi. Last November, Oregon voters decriminalized the personal use of all substances and authorized the creation of a state-licensed, psilocybin-assisted therapy program over the next two years. Other countries have also successfully decriminalized the possession and personal use of all controlled substances. With mental health issues on the rise, it is time that California take an incremental and measured step to dismantle failed war on drugs policies by ending the criminalization of people that possess and use substances with immense healing potential. In light of ongoing clinical trials and research, SB 519 will establish a working group to provide recommendations for the Legislature on how California can regulate the legal use of these substances.

2) **California and Federal Drug Schedule:** The California and Federal schedules mirror each other closely. Both have five schedules intended to list drugs in decreasing order of harm and increasing medical utility or safety - and provides penalties for possession of and commerce in controlled substances. Schedule I includes the most serious and heavily controlled substances, with Schedule V being the least serious and most lightly controlled substances. (Health & Saf. Code §§ 11054-11058.) The drugs on each schedule are largely consistent.

   Schedule I – The drug has a high potential for abuse; the drug has no currently accepted medical use in treatment in the United States; there is a lack of accepted safety for use of the drug under medical supervision.

   Schedule II – The drug has a high potential for abuse; the drug has a currently accepted medical use in treatment in the United States or a currently accepted medical use with severe restrictions; abuse of the drug may lead to severe psychological or physical dependence.

   Schedule III – The drug has potential for abuse less than the drugs or other substances in Schedule I and II; the drug has a currently accepted medical use in treatment in the United States; abuse of the drug or other substance may lead to moderate or low physical dependence or high psychological dependence.

   Schedule IV – The drug has a low potential for abuse relative to the drugs in Schedule III; the

drug has a currently accepted medical use in the United States; abuse of the drug may lead to limited physical dependence or psychological dependence relative to the drugs or other substances in Schedule III.

Schedule V – The drug has a low potential for abuse relative to the drugs or other substances in IV; the drug has a currently accepted medical use in treatment in the United States; abuse of the drug may lead to limited physical dependence of psychological dependence relative to the drugs or other substances in Schedule IV.

3) **Hallucinogens:** Hallucinogens are a diverse group of drugs that alter a person's perception or awareness of their surroundings. Some hallucinogens are found in plants and fungi and some are synthetically produced. According to the National Institute on Drug Abuse, hallucinogens are commonly split into two categories: classic hallucinogens and dissociative drugs. Both types can cause hallucinations, and dissociative drugs can cause the user to feel disconnected from their body or environment. Hallucinogens can be consumed in a variety of ways, including swallowed as tablets, pills, or liquid, consumed raw or dried, snorted, injected, inhaled, vaporized, smoked, or absorbed through the lining of the mouth using drug-soaked pieces of paper. Common hallucinogens include LSD, DMT, psilocybin, peyote, mescaline, and ketamine.

Many hallucinogenic substances, including LSD, DMT, mescaline, and psilocybin are classified as Schedule I substances under the state's Uniform Controlled Substances Act. Schedule I substances are defined as those controlled substances having no medical utility and that have a high potential for abuse. There is research, however, that indicates that many of these substances have therapeutic benefits. An article from *Psychology Today*, published May 2, 2017, discussed promising clinical research on the use of psychedelics to curb addiction. A study at the University of New Mexico looked at the use of psilocybin to assist with alcohol dependence. Researchers at Johns Hopkins University found positive outcomes in the ability of psilocybin to halt nicotine addiction. A team of researchers affiliated with Boston University and Harvard Medical School, among other institutions, published a study in the *Journal of Psychopharmacology* reporting that illicit opioid users were at markedly less risk of becoming dependent on opioids if they also had experience with psychedelic drugs, suggesting a protective effect. (https://www.psychologytoday.com/us/articles/201705/radical-new-approach-beating-addiction)

In recent years, the U.S. Federal Drug Administration (FDA) has designated psilocybin as a "breakthrough therapy" to treat severe depression. (https://www.livescience.com/psilocybin-depression-breakthrough-therapy.html) In addition, the FDA recently granted "breakthrough therapy" status to MDMA-assisted psychotherapy to treat post-traumatic stress disorder. (https://www.washingtonpost.com/magazine/2020/09/21/psychedelic-medicine-will-it-be-accessible-to-all/?arc404=true) The "breakthrough therapy" designation is "a process designed to expedite the development and review of drugs that are intended to treat a serious condition and preliminary clinical evidence indicates that the drug may demonstrate substantial improvement over available therapy on a clinically significant endpoint." (https://www.fda.gov/patients/fast-track-breakthrough-therapy-accelerated-approval-priority-review/breakthrough-therapy)

4) **Oregon Propositions 109 and 110:** In November 2020, Oregon passed two propositions related to controlled substances. Proposition 109 legalized the provision and use of psilocybin in a regulated setting and Proposition 110 decriminalized possession of drugs for personal use.

   Proposition 109 permitted persons licensed, controlled, and regulated by this state to legally manufacture psilocybin products and provide psilocybin services to persons 21 years of age and older. Proposition 109 also established a comprehensive regulatory framework concerning psilocybin products and psilocybin services under state law. (http://oregonvotes.org/irr/2020/034text.pdf)

   Proposition 110 decriminalized the possession of a controlled substances in Schedule I-IV, such as heroin, cocaine, and methamphetamines, by reclassifying them from a Class A misdemeanor to a Class E violation, resulting in a $100 fine or a completed health assessment. Proposition 110 also created an entity to provide grants to existing agencies or organizations, whether government or community-based, to create Addiction Recovery Centers for the purposes of immediately triaging the acute needs of people who use drugs and assessing and addressing any on-going needs thorough intensive case management and linkage to care and services.

   Under existing California law, possession of the hallucinogenic substances that are the subject of this bill constitute a criminal offense. This bill would legalize the possession for personal use and the social sharing of specified hallucinogenic substances (DMT, ibogaine, LSD, psilocybin, psilocyn, MDMA, and mescaline) by persons 21 years of age or older.

   This bill seeks to also decriminalize cultivation of spores or mycelium capable of producing mushrooms containing psilocybin or psilocin and allow the use of paraphernalia to ingest the hallucinogens which are the subject of this bill.

   This bill would provide criminal penalties for the following acts involving DMT, ibogaine, LSD, psilocybin, psilocyn, MDMA, and mescaline:

   a) Possession by a person 21 years of older on the grounds of any school is a misdemeanor. Giving away or administering to a person under 18 is an alternate felony/misdemeanor;

   b) Giving away or administering to a person under 14 is a felony;

   c) Giving away or administering one of these substances to a person at least 18 years old but under 21 is an infraction;

   d) Possession of one of these substances by a person under 18 years of age is an infraction; and

   e) Possession by a person at least 18 years of age but under 21 is an infraction.

   This bill would not legalize or decriminalize the sale of the hallucinogenic substances which are the subject of this bill. Sale and possession for sale of hallucinogenic substances would still be punished as provided for under existing law. Although the bill would legalize possession for personal use, this bill would not establish a structure to allow these substances

to be regulated, taxed, and legally purchased, as California has done with marijuana. This bill would require the State Department of Public Health to convene a working group, as specified, to research and make recommendations to the Legislature regarding possible regulatory systems that California could adopt to promote safe and equitable access to hallucinogenic substances in permitted legal contexts. Among other subjects, the working group would make recommendations on policies for minimizing use-related risks related to product safety, appropriate use, and impacts of detrimental substance abuse and the regulation of controlled substances nontherapeutic use, including responsible marketing.

5) **If This Bill Becomes Law, the Conduct Allowed would Still be Criminal Under Federal Law:** State authorization does not nullify federal drug laws. As a result state authorization for drug consumption rooms would not prevent them from being shut down by federal law enforcement agencies. Likewise, state authorization does not provide immunity from federal criminal proceedings, if federal law enforcement was inclined to pursue them.

   21 U.S.C. 844 and 21 U.S.C. 856 are two federal laws which prohibit behavior related to activity at a drug consumption room.

   21 U.S.C. 844 prohibits possession of drugs.

   21 U.S.C 856 prohibits:

   a) knowingly open, lease, rent, use, or maintain any place, whether permanently or temporarily, for the purpose of manufacturing, distributing, or **using any controlled substance**;

   b) manage or control any place, whether permanently or temporarily, either as an owner, lessee, agent, employee, occupant, or mortgagee, and knowingly and intentionally rent, lease, profit from, or make available for use, with or without compensation, the place for the purpose of unlawfully manufacturing, storing, distributing, or **using a controlled substance**.

6) **Argument in Support**: According to the *California Association of Social Rehabilitation Agencies,* "The stigma behind psychedelic substances often overshadows its legitimate medicinal value and promise. In the 1960s, researchers were conducting promising studies on the effectiveness of psychedelic substances to treat ailments such as depression and PTSD, until the War on Drugs halted this work. Modern research clearly demonstrates that these psychedelic substances can be a tool for healing and have a promising future for mental health treatment. Beyond halting this promising research, the War on Drugs also enacted the policy of criminalizing people for the possession or personal use of controlled substances. Today, we know this is a failed policy approach as it does not improve public safety, deter personal use, or help people may be experiencing substance use disorder.

   "It is time that California stops criminalizing people that possess and use substances that have immense medicinal potential and look towards how California should thoughtfully regulate legal use to these substances. SB 519 is an incremental measure that relies on a more modern understanding of these substances and provides space for California to start a more sensible conversation about how we really ought to treat people who are using psychedelic

substances for their own personal and medical purposes."

7) **Argument in Opposition**: According to the *California Police Chiefs Association*, "Current law recognizes the seriousness of sustained drug use, and prohibits their manufacture, transportation, sale, possession and ingestion. Drugs such as MDMA, LSD, DMT, ketamine, psilocybin and others can lead to serious impairment, and can cause adverse health outcomes for individuals abusing these compounds.

"This bill seeks to decriminalize the above-mentioned drugs, citing their medical benefits and therapeutic properties, but it does nothing to curtail their overuse and spread to the general population. SB 519 also decriminalizes the possession, planting, cultivating, harvesting, or processing of plants used to make certain controlled substances, and allows for the possession of drug paraphernalia needed to ingest these substances socially.

"By allowing "social sharing" of the cited schedule I drugs, communities will be forced to combat widespread proliferation, and individuals will be at an increased risk for abuse and overuse of these compounds."

8) **Related Legislation:**

a) AB 653 (Waldron), would establish the Medication-Assisted Treatment Grant Program, in order for the Board of State and Community Corrections (BSCC) to award grants to counties purposes relating to the treatment of substance use disorders and the provision of medication-assisted treatment. AB 653 is set for hearing in the Senate Public Safety Committee on June 29, 2021.

b) SB 57 (Wiener), would authorize the City and County of San Francisco, the County of Los Angeles, and the City of Oakland to approve entities to operate overdose prevention program for adults supervised by healthcare professionals or other trained staff where people who use drugs can safely consume drugs and get access or referrals substance use disorder treatment services, primary medical care, mental health services, and social services. SB 57 is in the Assembly Health Committee.

9) **Prior Legislation**:

a) AB 362 (Eggman), of the 2019-2020 Legislative Session, would have authorized the City and County of San Francisco to approve entities to operate an overdose prevention program for adults supervised by healthcare professionals or other trained staff where people who use drugs can safely consume drugs and get access to referrals to addiction treatment. AB 362 was never heard in the Senate Health Committee.

b) AB 186 (Eggman), of the 2017-2018 Legislative Session, contained similar provisions to AB 362 (Eggman). AB 186 was vetoed by Governor Brown.

c) AB 2495 (Eggman), of the 2015-2016 Legislative Session, would have decriminalized conduct connected to use and operation of an adult public health or medical intervention facility that is permitted by state or local health departments and intended to reduce death, disability, or injury due to the use of controlled substances. SB 294 was heard for

testimony and returned to the desk.

d) SB 41 (Yee), Chapter 738, Statutes of 2011, authorized a county or city to authorize a licensed pharmacist to sell or furnish 10 or fewer hypodermic needles or syringes to a person 18 or older for human use without a prescription.

e) SB 1159 (Vasconcellos), Chapter 608, Statutes of 2004, established a five-year pilot program to allow California pharmacies, when authorized by a local government, to sell up to 10 syringes to adults without a prescription.

REGISTERED SUPPORT / OPPOSITION:

Support

Vets: Veterans Exploring Treatment Solutions, INC. (Co-Sponsor)
Bend the Arc: Jewish Action
California Association of Social Rehabilitation Agencies
California Attorneys for Criminal Justice
California Public Defenders Association (CPDA)
Chacruna Institute
City of Berkeley
City of Oakland Councilmember Sheng Thao
Councilmember Noel Gallo, City of Oakland
Dc Marijuana Justice
Decriminalize Nature
Decriminalize Nature San Francisco
Dr. Bronner's
Entheogenic Research, Integration, and Education
Health in Justice Action Lab
Heroic Hearts Project, INC.
Initiate Justice
Law Enforcement Action Partnership
Legal Services for Prisoner With Children
Los Angeles County District Attorney's Office
Mcallister Garfield, P.c.
Mendocino Women's Political Coalition
Multidisciplinary Association for Psychedelic Studies
New Approach Advocacy
North STAR Project
Oakland; City of
Operation Evac
Pacific Neuroscience Institute
Plant Medicine Coalition
Sacred Garden Community Church
San Francisco Bay Area Hispanic Chamber of Commerce
San Francisco Psychedelic Society
San Francisco Public Defender
Students for Sensible Drug Policy
The Chacruna Institute for Psychedelic Plant Medicines

The Huichol Center for Cultural Survival and Traditional Arts
Unlimited Sciences
Veterans of War

27 private individuals

Oppose

California Coalition Against Drugs
California College and University Police Chiefs Association
California District Attorneys Association
California Family Council
California Narcotic Officers' Association
California Police Chiefs Association
California State Sheriffs' Association
California Statewide Law Enforcement Association
Capitol Resource Institute
Citrus Heights Police Department
Crime Victims United of California
International Faith Based Coalition
Keep California Safe
Orange County Sheriff's Department
Peace Officers Research Association of California (PORAC)

24 private individuals

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

AMENDMENTS TO SENATE BILL NO. 519
AS AMENDED IN SENATE MAY 20, 2021

Amendment 1
In the heading, in line 3, after "Members" insert:

Lee,

Amendment 2
In the title, in line 2, strike out "11379.2,"

Amendment 3
In the title, in line 3, strike out "11350.1, 11377.1, and 11402" and insert:

11350.1 and 11377.1

Amendment 4
On page 18, strike out line 34, in line 35, strike out "(H)" and insert:

(G)

Amendment 5
On page 20, in lines 19 and 20, strike out "except the substance specified in subdivision (g) of Section 11056,"

Amendment 6
On page 21, in lines 18 and 19, strike out "Sections 11377.5 and"

Amendment 7
On page 21, strike out lines 24 and 25, in line 26, strike out "of Section 11056," and insert:

any of the following substances

Amendment 8

On page 21, in line 26, strike out "sharing." and insert:

sharing:

(A) The controlled substance specified in paragraph (10) of subdivision (d) of Section 11054.

(B) The controlled substance specified in paragraph (11) of subdivision (d) of Section 11054.

(C) The controlled substance specified in paragraph (12) of subdivision (d) of Section 11054.

(D) The controlled substance specified in paragraph (18) of subdivision (d) of Section 11054.

(E) The controlled substance specified in paragraph (19) of subdivision (d) of Section 11054.

(F) 3,4-methylenedioxymethamphetamine, otherwise known as MDMA, an analog of the controlled substance specified in paragraph (6) of subdivision (d) of Section 11054.

Amendment 9

On page 21, strike out line 39, in line 40, strike out "or in subdivision (g) of Section 11056," and insert:

(1) of subdivision (a)

Amendment 10

On page 22, in line 6, strike out "(10), (11), (12), (18),", strike out line 7, in line 8, strike out "of Section 11056," and insert:

(1) of subdivision (a)

Amendment 11

On page 22, in line 23, strike out "(10), (11), (12), (18), or (19) of", strike out line 24, in line 25, strike out "11056," and insert:

(1) of subdivision (a)

Amendment 12

On page 22, in line 38, strike out "(10), (11), (12), (18), or (19) of", strike out line 39, on page 23, in line 1, strike out "11056," and insert:

(1) of subdivision (a)

Amendment 13
On page 24, strike out lines 21 to 29, inclusive, in line 31, strike out "SEC. 13." and insert:

SEC. 12.

Amendment 14
On page 28, in line 18, strike out "SEC. 14." and insert:

SEC. 13.

Amendment 15
On page 28, strike out lines 21 to 40, inclusive, strike out page 29, on page 30, strike out lines 1 to 9, inclusive, in line 11, strike out "SEC. 16." and insert:

SEC. 14.

Amendment 16
On page 32, in line 11, strike out "SEC. 17." and insert:

SEC. 15.

Amendment 17
On page 32, in line 14, strike out "SEC. 18." and insert:

SEC. 16.

Amendment 18
On page 32, in lines 25 and 26, strike out "or in subdivision (g) of Section 11056,"

Amendment 19
On page 33, in line 34, strike out "SEC. 19." and insert:

SEC. 17.

Amendment 20
On page 34, in line 9, strike out "SEC. 20." and insert:

SEC. 18.