California State Assembly

PUBLIC SAFETY

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CHAIR

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AGENDA

Tuesday, June 27, 2023
9 a.m. -- State Capitol, Room 126

PART II

SB 81 (Skinner) through SB 359 (Umberg)

Date of Hearing: June 27, 2023
Counsel: Liah Burnley

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

SB 81 (Skinner) – As Amended June 21, 2023

As Proposed to be Amended in Committee

SUMMARY: Prohibits the Board of Parole Hearings (BPH) from considering discriminatory factors in reaching a finding of unsuitability for parole, and changes the standard a reviewing court must use for reviewing a denial of parole from "some evidence" to "preponderance of the evidence. Specifically, **this bill**:

1) Prohibits BPH from considering any discriminatory factor in reaching a finding of unsuitability for parole, including, but not limited to, any of the following:

   a) The person's race, ethnicity, national origin, sexual orientation, gender identity or expression, or cultural or religious affiliation;

   b) The person's physical or mental disability, or cognitive, speech, or physical impairment;

   c) The person's current or prior history of mental illness or a substance use disorder unless there is clear and convincing evidence that the illness or disorder cannot be effectively managed in the community;

   d) The person's housing status at the time of conviction, current or prior employment history, socioeconomic status, English language proficiency, immigration history or status, or education level;

   e) The person's relations or prior association with a group of persons who share the person's race, ethnicity, national origin, neighborhood, or religion, unless there is clear and convincing evidence that the association is ongoing and currently relevant to a specific future risk of violence; and,

   f) Other factors which have been documented to be subject to bias, including, but not limited to, a parole candidate's prior experience as a victim of violence or abuse, verbal or nonverbal communication, tone of voice, volume of speech, facial expressions, body language, eye contact, or the candidate's ability to articulate complex or abstract concepts.

2) Requires BPH, when stating reasons for its decision to deny parole, to articulate the relationship between each reason for denial and the parole candidate's current risk of violence.

3) Provides that, upon denial of parole, BPH shall notify the parole candidate of their right to petition for habeas relief from a court, as follows:

    a) A parole candidate may have the petition heard in either the county of conviction or in the county in which the parole candidate is incarcerated; and,

    b) The parole candidate may request the assistance of counsel for this purpose. The court shall appoint counsel upon request.

4) Changes the processes for habeas review of parole decisions as follows:

    a) A parole candidate who has been denied parole after reaching their minimum eligible parole date, youth parole eligible date, or their elderly parole eligible date, has made a prima facie case for relief and the reviewing court may not summarily deny a petition for writ of habeas corpus;

    b) A court shall exercise its independent judgment on the decision;

    c) The court shall uphold a decision to deny parole only if the court finds, by a preponderance of the evidence, that the person presents a current, unreasonable risk of danger to public safety; and,

    d) The court may order whatever relief as the case may require, including an order for a new parole hearing, with or without limitations on what evidence BPH may consider.

5) Requires Judicial Council to track and publish data on the above-described habeas petitions, including, but not limited to:

    a) The number of petitions filed;

    b) The number of petitions granted; and,

    c) The number of petitions denied.

EXISTING LAW:

1) Provides that in the case of any incarcerated person sentenced pursuant to any law, except as specified, the BPH must meet with each incarcerated individual during the sixth year before the individual's minimum eligible parole date (MEPD) for the purposes of reviewing and documenting the individual's activities and conduct pertinent to parole eligibility. (Pen. Code, § 3041, subd. (a)(1).)

2) Requires a panel of two or more commissioners or deputy commissioners to meet with the incarcerated person one year before the person's MEPD and provides that the panel shall normally grant parole. (Pen. Code, § 3041, subd. (a)(2).)

3) Provides that the panel or the board, sitting en banc, shall grant parole to an incarcerated individual unless it determines that the gravity of the current convicted offense or offenses,

or the timing and gravity of current or past convicted offense or offenses, is such that consideration of the public safety requires a more lengthy period of incarceration for this individual. (Pen. Code, § 3041, subd. (b)(1).)

4) Requires BPH, within 20 days following any decision denying parole, to send the incarcerated individual a written statement setting forth the reason or reasons for denying parole, and suggest activities in which he or she might participate that will benefit him or her while he or she is incarcerated. (Pen. Code, § 3041.5, subd. (b)(2).)

5) Establishes the youth offender parole hearing process for eligible individuals who were convicted of a controlling offense that was committed when the person was 25 years of age or younger and after serving a minimum amount of time, as specified. Defines "youth parole eligible date" as the earliest date upon which a youth offender is eligible for release on parole at a youth offender parole hearing. (Pen. Code, § 3051, subds. (a) & (b).)

6) Requires BPH, when considering the release of an individual via the youth offender parole process, to give great weight to the diminished culpability of youth as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the individual in accordance with relevant case law. (Pen. Code, § 4801, subd. (c).)

7) Establishes the Elderly Parole Program to be administered by BPH for purposes of reviewing the parole suitability of any incarcerated person who is 50 years of age or older and has served a minimum of 20 years of continuous incarceration on the individual's current sentence, serving either a determinate or indeterminate sentence. Defines "elderly parole eligible date" as the date on which an incarcerated individual who qualifies as an elderly offender is eligible for release from prison. (Pen. Code, § 3055, subds. (a) & (b).)

8) Requires BPH, when considering the release of an individual via the Elderly Parole Program, to give special consideration to whether age, time served, and diminished physical condition, if any, have reduced the elderly inmate's risk for future violence. (Pen. Code, § 3055, subd. (c).)

9) Defines "unreasonable risk of danger to public safety" to mean an unreasonable risk that the individual will commit a new violent felony, as defined. (Pen. Code, § 1170.18, subd. (c).)

10) Provides that habeas corpus relief is available to incarcerated persons to ensure that parole decisions are supported by at least "some evidence." (*In re Powell* (1988) 45 Cal.3d 894; *In re Lawrence* (2008) 44 Cal.4th 1181.)

FISCAL EFFECT:

COMMENTS:

1) **Author's Statement**: According to Senator Skinner, "California's parole system needs more safeguards to improve fairness and eliminate possible bias and discrimination in parole hearings. SB 81 will ensure that candidates who qualify for parole based on an objective set of standards are granted release from prison — and not unfairly kept locked up because of subjective factors that may be tainted by bias. In addition, SB 81 will raise the bar on standards to allow the release of people who have demonstrated they're suitable for parole

and ready to reenter society and live productive lives."

2) **Parole Suitability Hearings:** "Parole applicants in this state have an expectation that they will be granted parole unless [BPH] finds, in the exercise of its discretion, that they are unsuitable for parole in light of the circumstances specified by statute and by regulation." (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 654.) In determining suitability for parole, "the Penal Code and corresponding regulations establish that the fundamental consideration in parole decisions is public safety." (*In re Lawrence* (2008) 44 Cal.4th 1181,1205.) The Penal Code provides that the parole board "shall grant parole to an inmate unless it determines that the gravity of the current convicted offense or offenses, or the timing and gravity of current or past convicted offense or offenses, is such that consideration of the public safety requires a more lengthy period of incarceration for this individual." (Pen. Code, § 3041, subd. (b).)

   The fundamental consideration when making a determination about an individual's suitability for parole is whether the individual currently poses an unreasonable risk of danger to society if released from prison. (*In re Shaputis* (2008) 44 Cal.4th 1241.) The decision whether to grant parole is an inherently subjective determination. (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 655.)

   Title 15 parole regulations direct BPH to consider all available relevant and reliable information to determine parole suitability. (Cal. Code Regs., tit. 15 § 2281, subd. (b).) Factors the BPH must consider include the nature of the commitment offense, including the circumstances of the person's social history; past and present mental state; past criminal history, including involvement in other criminal misconduct which is reliably documented; the base and other commitment offenses, including behavior before, during, and after the crime; past and present attitude toward the crime; any conditions of treatment or control, including the use of special conditions under which the individual may safely be released to the community; and any other information which bears on the individual's suitability for release. (Cal. Code Regs., tit. 15, §§ 2281, subd. (b).) The regulations further state that "[c]ircumstances which taken alone may not firmly establish unsuitability for parole may contribute to a pattern which results in a finding of unsuitability." (*Ibid.*)

   This bill would narrow BPH's discretion by prohibiting consideration of discriminatory factors in parole suitability hearings, including but not limited to: the person's race, ethnicity, national origin, sexual orientation, gender identity or expression, or cultural or religious affiliation, mental disability, cognitive speech or physical impairment, mental illness or a substance use disorder, housing status, employment history, socioeconomic status, English language proficiency, immigration history or status, education level, and other factors which have been documented to be subject to bias, including, but not limited to, prior experience as a victim of violence or abuse, verbal or nonverbal communication, tone of voice, volume of speech, facial expressions, body language, eye contact, or the candidate's ability to articulate complex or abstract concepts.

   Opponents of this bill have expressed concern that consideration of "a parole candidate's prior experience as a victim of violence or abuse, verbal or nonverbal communication, tone of voice, volume of speech, facial expressions, body language, eye contact, or the candidate's ability to articulate complex or abstract concepts" is information used by BPH and is race agnostic.

However, given the research on implicit biases, there are serious doubts as to whether consideration of such factors are truly agnostic to an individual's race, gender, culture, disability (diagnosed or undiagnosed) and ethnic background. For example, avoidance of eye contact is a characteristic hallmark of autism spectrum disorder. (Senju A. Johnson MH, *Atypical Eye Contact In Autism: Models, Mechanisms and Development*, Neurosci Biobehal Rev. 2009; 33(8): 1204–14.) Implicit biases could disadvantage candidates who truly have been impacted by situational factors, such as trauma and people who face a high risk of victimization in prison. (LAO, *Promoting Equity in the Parole Hearing Process* (Jan. 2023) at p. 10 <https://lao.ca.gov/reports/2023/4658/Promoting-Equity-in-Parole-Hearing-Process-010523.pdf> [June 18, 2023].) And, body language, demeanor, speech, and facial expressions are largely cultural and are not reliable determinations of a person's credibility. (O'Regan, Daphne, *Eying the Body: The Impact of Classical Rules for Demeanor Credibility, Bias, and the Need to Blind Legal Decision Makers* (June 5, 2016). Pace L. Rev. 37.2, 2017.) "Even if universal bodily expressions of emotion exist, a strong cultural overlay influences both the physical expressions themselves and the ability to read them, particularly in individuals from other cultures." (*Ibid.*) Contentions that BPH relies on these factors in its decision-making, and considers them "race agnostic," illuminates the very problem that this bill attempts to solve.

3) **LAO Recommendations:** In January 2023, the Legislative Analyst's Office (LAO) issued a report with recommendations to promote equity in the parole hearing process. (LAO, *Promoting Equity in the Parole Hearing Process*, *supra,* at p. 1.) The LAO report found that the current level of discretion afforded to BPH commissioners and other key actors could allow implicit, cognitive, and institutional biases to affect parole decisions. (*Ibid.*) This happens, in large part, because "commissioners retain full discretion in how to weight the various factors that they choose to consider to produce a decision on whether to grant release. Discretion allows decisions to be influenced by the idiosyncrasies, values, or conscious or unconscious biases of decision makers. (*Id.*, at p. 9.) This creates the potential for decisions to be arbitrary or biased. In other words, even if most information suggests that a candidate is not dangerous, as long as one piece of information provides some evidence of possible of dangerousness, commissioners have the discretion to deny release. (*Id.*, at p. 8.)

   To the extent that the parole hearing process could inequitably disadvantage certain candidates, it means that the State is paying to continue to incarcerate people without a public safety need to do so. Conversely, to the extent that some inequities could work in favor of certain candidates, it means that BPH could be release a person despite the potentially high risk they may represent to public safety. (LAO, *Promoting Equity in the Parole Hearing Process, supra,* at p. 7.)

   Ultimately, the report recommends, among other things, that the Legislature consider changing parole statutes to reduce this discretion somewhat, such as by increasing the standard that commissioners must meet to deny parole. (LAO, *Promoting Equity in the Parole Hearing Process, supra,* at. p. 8.) "We recommend that the Legislature consider changing statute to somewhat reduce commissioners' discretion to deny parole, particularly based on subjective factors. (*Id.*, at p. 14.)

   This bill incorporates some of the LAO's recommendations by limiting discretion of BPH to consider certain discriminatory factors in reaching a finding of unsuitability for parole.

4) **Habeas Remedy:** The California and federal Constitutions bar the infliction of punishment that is grossly disproportionate to the offender's individual culpability. (U.S. Const., 8th Amend.; Cal. Const., art. I, § 17.) The courts, "as coequal guardian[s] of the Constitution, are to condemn any violation of that prohibition." (*In re Lynch* (1972) 8 Cal.3d 410, 414.) Thus, habeas corpus relief is available to incarcerated persons who have been denied release by BPH. (*In re Streeter* (1967) 66 Cal. 2d 47, 49.)

   This bill codifies the well-established right of incarcerated persons to seek habeas review in court of parole board denials and provides petitioners the assistance of counsel. It also changes the standards used to evaluate these habeas petitions.

   Currently, courts require habeas petitioners, in their plea for relief, to allege with particularity the circumstances constituting the State's claimed wrongful conduct and demonstrate how they are prejudiced thereby. (*In re Swain* (1949) 34 Cal.2d 300.) A habeas petition will not receive judicial consideration, and will be summarily denied, unless this prima facie requirement is met. (*Ibid.*) This bill provides that a person who, after reaching their minimum eligible parole date, youth parole eligible date, or their elderly parole eligible date, has been denied parole has made a prima facie case for relief and the reviewing court may not summarily deny their petition for writ of habeas corpus.

   This bill further provides that the court shall uphold a decision to deny parole only if the court finds, by a "preponderance of the evidence," that the person presents a current, unreasonable risk of danger to public safety.

   Although BPH exercises broad discretion in determining whether to grant or deny parole, such decisions are subject to a form of limited judicial review to ensure that they are supported by at least "some evidence." (*In re Powell* (1988) 45 Cal.3d 894, 904.) In *Lawrence*, the California Supreme Court observed, "consideration of the specified factors requires more than rote recitation of the relevant factors with no reasoning establishing a rational nexus between those factors and the necessary basis for the ultimate decision—the determination of current dangerousness." (*In re Lawrence* (2008) 44 Cal.4th 1181, 1210.) "Accordingly, when a court reviews a decision of [BPH], the relevant inquiry is whether some evidence supports the decision of [BPH] that the inmate constitutes a current threat to public safety." (*Id.* at p. 1212.) Such review simply ensures that parole decisions are supported by a modicum of evidence and are not arbitrary and capricious. (*Ibid.*)

   In its report, the LAO suggested that the Legislature increase the standard that must be met—which is currently established through case law as "some evidence"—to "a preponderance of evidence" or "clear and convincing evidence" that a candidate poses a current risk. For example, if the Legislature were to require decisions to be supported by a preponderance of evidence, decisions to deny release would need to be backed by evidence showing that candidates are more likely than not to be an unreasonable risk to public safety. (LAO, *Promoting Equity in the Parole Hearing Process, supra*, at p. 14.)

   This bill would change the standard of review for habeas petitions from "some evidence" to "preponderance of the evidence."

5) **Argument in Support**: According to *Attorney General Rob Bonta*, "The Correctional Writs and Appeals Section (CWA) of the Criminal Division at the California Department of Justice

(DOJ) represents the Governor's Office and California Department of Corrections and Rehabilitation in state and federal courts against constitutional challenges raised in petitions for writ of habeas corpus. CWA also responds to petitions seeking extraordinary writ relief from DOJ's clients, such as writs of mandate or writs of prohibition. Currently, CWA handles, approximately 85 parole-related petitions each year.

"In 2019, 20% of people eligible for parole were granted release, however given the LAO's recent analysis and findings, the process can benefit from additional transparency and objective standards to ensure justice for parole candidates and safety for the community. SB 81 addresses recommendations from the LAO, which found that the broad discretion provided to Board commissioners "allows decisions to be influenced by the idiosyncrasies, values, or conscious or unconscious biases of decision makers," and that data on parole outcomes by race, ethnicity, or other subgroups is also lacking. The court has also held that the decision whether to grant parole is an inherently subjective determination.

"This legislation will require the Board ensure that a denial is based on objective reasons that a parole candidate is a public safety risk; help reduce parole decisions that may rely on factors that are subject to bias, including race, gender, and disability, among others; clarify that reviewing courts should apply a "preponderance of the evidence" standard when reviewing parole denials; and provide that parole candidates who are denied parole are informed of the right – which they already have - to seek judicial review of a denial and have an attorney for this process."

6) **Argument in Opposition**: According to the *California District Attorneys Association* (CDAA), "CDAA continues to oppose inclusion of Penal Code § 3041(b)(2)(F), which would prohibit consideration of "a parole candidate's prior experience as a victim of violence or abuse, verbal or nonverbal communication, tone of voice, volume of speech, facial expressions, body language, eye contact, or the candidate's ability to articulate complex or abstract concepts." This information has previously been utilized as a basis for evaluation for parole hearings and is race agnostic. As such, we see its inclusion NOT as a bias-reducing strategy to prevent discriminatory factors, but rather, as an elimination of a factor that has been appropriately used.

   "We also remain opposed to the proposed Penal Code section § 3041.8 in its entirety for the following reasons:

   - Habeas corpus is already a remedy for discriminatory parole denial decisions. (*In re Roberts* (2005) 36 Cal.4th 575, 584.) Habeas corpus already provides an adequate remedy, and the proposed alterations are unnecessary and likely to cause numerous negative, unintended consequences.

   - The prime facie case language in subdivision (d) would deny courts their traditional gatekeeper role in habeas matters and most likely drown worthy petitions in a sea of the meritless, ultimately wasting scarce resources."

7) **Related Legislation**: AB 1177 (McKinnor) would have required BPH to send a transcript and audio recording of the parole hearing to the incarcerated person. AB 1117 was held under submission in the Assembly Appropriations Committee.

8) **Prior Legislation**: SB 875 (Skinner), of the 2021-2022 Legislative Session, would have prohibited BPH from considering specified factors when reaching a finding of unsuitability for parole, including, the person's race, ethnicity, national origin, gender, sexual orientation, gender identity, disability, cultural or religious affiliation, and cognitive, speech, or physical impairment. SB 875 was never heard by Senate Public Safety Committee.

REGISTERED SUPPORT / OPPOSITION:

Support

ACLU California Action
Alliance for Boys and Men of Color
American Friends Service Committee
Attorney General Rob Bonta
California Alliance for Youth and Community Justice
California Attorneys for Criminal Justice
California Coalition for Women Prisoners
California Families Against Solitary Confinement
California for Safety and Justice
California Innocence Coalition: Northern California Innocence Project, California Innocence Project, Loyola Project for The Innocent
California Public Defenders Association
Californians United for A Responsible Budget
Center on Juvenile and Criminal Justice
Communities United for Restorative Youth Justice (CURYJ)
Cure California
Ella Baker Center for Human Rights
Felony Murder Elimination Project
Friends Committee on Legislation of California
Initiate Justice (UNREG)
Initiate Justice Action
Legal Services for Prisoners With Children
Milpa (motivating Individual Leadership for Public Advancement)
Root & Rebound
Safe Return Project
San Francisco Public Defender
Showing Up for Racial Justice (SURJ) Bay Area
Sister Warriors Freedom Coalition
Smart Justice California
Survived & Punished
Uncommon Law
W. Haywood Burns Institute
Young Women's Freedom Center
Youth Leadership Institute

Oppose

California District Attorneys Association
Monterey County District Attorney's Office - ODA - Salinas, CA
Riverside County District Attorney
San Diegans Against Crime
San Diego Deputy District Attorneys Association
Yolo County District Attorney

Analysis Prepared by: Liah Burnley / PUB. S. / (916) 319-3744

Amended Mock-up for 2023-2024 SB-81 (Skinner (S) , Becker (S))

Mock-up based on Version Number 97 - Amended Senate 5/23/23
Submitted by: Staff Name, Office Name

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

SECTION 1. Section 3041 of the Penal Code is amended to read:

3041. (a) (1) In the case of a parole candidate sentenced pursuant to any law, other than Chapter 4.5 (commencing with Section 1170) of Title 7 of Part 2, the Board of Parole Hearings shall meet with each parole candidate during the sixth year before the parole candidate's minimum eligible parole date for the purposes of reviewing and documenting the parole candidate's activities and conduct pertinent to parole eligibility. During this consultation, the board shall provide the parole candidate information about the parole hearing process, legal factors relevant to their suitability or unsuitability for parole, and individualized recommendations for the parole candidate regarding their work assignments, rehabilitative programs, and institutional behavior. Within 30 days following the consultation, the board shall issue its positive and negative findings and recommendations to the parole candidate in writing.

(2) One year before the parole candidate's minimum eligible parole date a panel of two or more commissioners or deputy commissioners shall again meet with the parole candidate and shall normally grant parole as provided in Section 3041.5. No more than one member of the panel shall be a deputy commissioner.

(3) In the event of a tie vote, the matter shall be referred for an en banc review of the record that was before the panel that rendered the tie vote. Upon en banc review, the board shall vote to either grant or deny parole and render a statement of decision. The en banc review shall be conducted pursuant to subdivision (e).

(4) Upon a grant of parole, the parole candidate shall be released subject to all applicable review periods. However, an inmate shall not be released before reaching their minimum eligible parole date as set pursuant to Section 3046 unless the parole candidate is eligible for earlier release pursuant to their youth offender parole eligibility date or elderly parole eligible date.

(5) At least one commissioner of the panel shall have been present at the last preceding meeting, unless it is not feasible to do so or where the last preceding meeting was the initial meeting. A person on the hearing panel may request review of any decision regarding parole for an en banc

hearing by the board. In case of a review, a majority vote in favor of parole by the board members participating in an en banc review is required to grant parole to any inmate.

(b) (1) The panel or the board, sitting en banc, shall grant parole to a parole candidate unless it determines that the gravity of the current convicted offense or offenses, or the timing and gravity of current or past convicted offense or offenses, is such that consideration of the public safety requires a more lengthy period of incarceration for this individual.

(2) The board shall not consider any discriminatory factor in reaching a finding of unsuitability for parole, including, but not limited to, any of the following:

(A) The person's race, ethnicity, national origin, sexual orientation, gender identity or expression, or cultural or religious affiliation.

(B) The person's physical or mental disability, or cognitive, speech, or physical impairment.

(C) The person's current or prior history of mental illness or a substance use disorder unless there is clear and convincing evidence that the illness or disorder cannot be effectively managed in the community.

(D) The person's housing status at the time of conviction, current or prior employment history, socioeconomic status, English language proficiency, immigration history or status, or education level.

(E) The person's relations or prior association with a group of persons who share the person's race, ethnicity, national origin, neighborhood, or religion, unless there is clear and convincing evidence that the association is ongoing and currently relevant to a specific future risk of violence.

(F) Other factors which have been documented to be subject to bias, including, but not limited to, a parole candidate's prior experience as a victim of violence or abuse, verbal or nonverbal communication, tone of voice, volume of speech, facial expressions, body language, eye contact, or the candidate's ability to articulate complex or abstract concepts.

(3) When stating reasons for its decision to deny parole, the board shall articulate the relationship between each reason for denial and the parole candidate's current risk of violence.

(4) After July 30, 2001, a decision of the parole panel finding a parole candidate suitable for parole shall become final within 120 days of the date of the hearing. During that period, the board may review the panel's decision. The panel's decision shall become final pursuant to this subdivision unless the board finds that the panel made an error of law, or that the panel's decision was based on an error of fact, or that new information should be presented to the board, any of which when corrected or considered by the board has a substantial likelihood of resulting in a substantially different decision upon a rehearing. In making this determination, the board shall consult with the commissioners who conducted the parole consideration hearing.

(5) A decision of a panel shall not be disapproved and referred for rehearing except by a majority vote of the board, sitting en banc, following a public meeting.

(c) For the purpose of reviewing the suitability for parole of those parole candidates eligible for parole under prior law at a date earlier than that calculated under Section 1170.2, the board shall appoint panels of at least two persons to meet annually with each parole candidate until the time the person is released pursuant to proceedings or reaches the expiration of their term as calculated under Section 1170.2.

(d) It is the intent of the Legislature that, during times when there is no backlog of parole candidates awaiting parole hearings, life parole consideration hearings, or life rescission hearings, hearings will be conducted by a panel of three or more members, the majority of whom shall be commissioners. The board shall report monthly on the number of cases where a parole candidate has not received a completed initial or subsequent parole consideration hearing within 30 days of the hearing date required by subdivision (a) of Section 3041.5 or paragraph (2) of subdivision (b) of Section 3041.5, unless the parole candidate has waived the right to those timeframes. That report shall be considered the backlog of cases for purposes of this section, and shall include information on the progress toward eliminating the backlog, and on the number of parole candidates who have waived their right to the above timeframes. The report shall be made public at a regularly scheduled meeting of the board and a written report shall be made available to the public and transmitted to the Legislature quarterly.

(e) For purposes of this section, an en banc review by the board means a review conducted by a majority of commissioners holding office on the date the matter is heard by the board. An en banc review shall be conducted in compliance with the following:

(1) The commissioners conducting the review shall consider the entire record of the hearing that resulted in the tie vote.

(2) The review shall be limited to the record of the hearing. The record shall consist of the transcript or audiotape of the hearing, written or electronically recorded statements actually considered by the panel that produced the tie vote, and any other material actually considered by the panel. New evidence or comments shall not be considered in the en banc proceeding.

(3) The board shall separately state reasons for its decision to grant or deny parole.

(4) A commissioner who was involved in the tie vote shall be recused from consideration of the matter in the en banc review.

SEC. 2. Section 3041.8 is added to the Penal Code, to read:

3041.8. (a) Upon denial of parole, the Board of Parole Hearings shall notify the parole candidate of their right to petition for habeas relief from a court. A parole candidate may have the petition heard in either the county of conviction or in the county in which the parole candidate is incarcerated.

(b) A parole candidate may petition a court for relief after a denial of parole by petition for writ of habeas corpus. The parole candidate may request the assistance of counsel for this purpose. The court shall appoint counsel upon request, whether the request is made upon the submission of a petition or upon a request for assistance to prepare the petition.

(c) A parole candidate who has been denied parole after reaching their minimum eligible parole date as described in Section 3041, their youth parole eligible date as defined in Section 3051, or their elderly parole eligible date as defined in Section 3055 has made a prima facie case for relief and the reviewing court may not summarily deny a petition for writ of habeas corpus filed pursuant to this section.

(d) A court reviewing a decision to deny parole or to reverse the grant of parole shall exercise its independent judgment on the decision. The court shall uphold a decision to deny parole only if the court finds, by a preponderance of the evidence, that the person presents a current, unreasonable risk of danger to public safety as defined in subdivision (c) of Section 1170.18. The court may order whatever relief as the case may require, including an order for a new parole hearing, with or without limitations on what evidence the Board of Parole Hearings may consider.

(e) The court shall transmit its decision to the Board of Parole Hearings.

(f) The ~~Board of Parole Hearings~~ **Judicial Council** shall **annually** track and publish data on **habeas petitions** ~~the outcomes of court decisions~~ **pursuant to this Section** ~~to subdivision (d)~~, including, but not limited to:

(1) The number of ~~candidates seeking court relief~~ **petitions filed**.

(2) The number of ~~court affirmations~~ **petitions granted**.

(3) The number of ~~reversals~~ **petitions denied**.

~~(4) The length of commitment for each parole candidate seeking relief.~~

Date of Hearing: June 27, 2023
Chief Counsel: Sandy Uribe

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

SB 89 (Ochoa Bogh) – As Amended April 13, 2023

SUMMARY: Expands the crime of stalking to include making a credible threat with the intent to place a person in reasonable fear for the safety of their pet, service animal, emotional support animal, or horse.

EXISTING LAW:

1) States that any person who willfully, maliciously, and repeatedly follows or willfully and maliciously harasses another person and who makes a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of their immediate family is guilty of stalking. (Pen. Code, § 646.9, subd. (a).)

2) Punishes stalking by imprisonment in county jail for not more than one year, or by imprisonment in the state prison. (Pen. Code, § 646.9, subd. (a.).)

3) Provides that a person who commits stalking while there is a temporary restraining order, injunction, or any other court order in effect prohibiting stalking behavior against the same party shall be punished by imprisonment in the state prison for 2, 3, or 4 years. (Pen. Code, § 646.9, subd. (b).)

4) Provides that a person who commits stalking after having been convicted of domestic violence, violation of a protective order, or of criminal threats shall be punished by imprisonment in the state prison for 2, 3 or 5 years. (Pen. Code, § 646.9, subd. (c)(1).)

5) Provides that a person who commits stalking after previously having been convicted of felony stalking shall be punished by imprisonment in the state prison for 2, 3, or 5 years. (Pen. Code, § 646.9, subd. (c)(2).)

6) Authorizes the sentencing court to order a person convicted of felony stalking to register as a sex offender. (Pen. Code, § 646.9, subd. (d).)

7) Requires the sentencing court to consider issuing a restraining order valid for up to 10 years when a defendant is convicted of stalking, regardless of whether the defendant is placed on probation or sentenced to state prison or county jail. (Pen. Code, § 646.9, subd. (k).)

8) Defines the following terms as it relates to the elements of the crime of stalking:

   a) "Harass" means "engages in a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, torments, or terrorizes the person, and that

serves no legitimate purpose." (Pen. Code, § 646.9, subd. (e).)

b) "Course of conduct" means "two or more acts occurring over a period of time, however short, evidencing a continuity of purpose." Constitutionally protected activity is not included within the meaning of "course of conduct." (Pen. Code, § 646.9, subd. (f).)

c) "Credible threat" means "a verbal or written threat, including that performed through the use of an electronic communication device, or a threat implied by a pattern of conduct or a combination of verbal, written, or electronically communicated statements and conduct, made with the intent to place the person that is the target of the threat in reasonable fear for his or her safety or the safety of his or her family, and made with the apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for his or her safety or the safety of his or her family. It is not necessary to prove that the defendant had the intent to actually carry out the threat. The present incarceration of a person making the threat shall not be a bar to prosecution under this section." Constitutionally protected activity is not included within the meaning of "credible threat." (Pen. Code, § 646.9, subd. (g).)

d) "Immediate family" means "any spouse, parent, child, any person related by consanguinity or affinity within the second degree, or any other person who regularly resides in the household, or who, within the prior six months, regularly resided in the household." (Pen. Code, § 646.9, subd. (l).)

9) Provides that a person who maliciously and intentionally maims, mutilates, tortures, or wounds a living animal, or maliciously and intentionally kills an animal, is guilty of animal cruelty. (Pen. Code, § 597, subd. (a).)

10) Punishes a violation of animal cruelty as a felony with imprisonment in the county jail under realignment, or by a fine of not more than $20,000, or by both; or alternatively, as a misdemeanor with imprisonment in a county jail for not more than one year, or by a fine of not more than $20,000, or by both. (Pen. Code, § 597, subd. (d).)

FISCAL EFFECT:

COMMENTS:

1) **Author's Statement**: According to the author, "According to the Bureau of Justice Statistics Special Report: Stalking Victimization in the US, perpetrators of stalking tend to damage their victim's property, even going as far as to target the victim's loved ones, including pets. One National Crime Victimization Survey estimated that four in 10 stalkers threaten a "victim or the victim's family, friends, co-workers, or family pet," with 87,020 threats to harm a pet being reported.

"Humans and animals form strong bonds that induce strong feelings of affection and connection, which can make a pet an easy target for threats and physical harm. California's law ignores how powerful a threat or injury to a beloved pet can be. Not updating state statute to conform to federal anti-stalking law leaves victims and their pets vulnerable to threats and attacks by a stalker. It is critical that California's anti-stalking law is updated in

order to better protect victims and their pets."

2) **Elements Required for Stalking Prosecutions**: Stalking is generally understood as repeated threatening behavior that is intended to place the subject of the stalking in reasonable fear for their safety or the safety of their family. In order to convict a person under the current stalking statute, Penal Code section 646.9, the prosecutor must prove the following:

   a) The defendant willfully and maliciously harassed or willfully, maliciously, and repeatedly followed another person; and

   b) The defendant made a credible threat with the intent to place the other person in reasonable fear for their safety, or for the safety of their immediate family. (See CALCRIM No. 1301; see also *People v. Falck* (1997) 52 Cal.App.4th 287, 297-298.)

   Stalking requires either repeated following or harassment which necessarily includes multiple acts. (*People v. Jantz* (2006) 137 Cal.App.4th 1283, 1292-1293; *People v. Heilman* (1994) 25 Cal.App.4th 391, 400) "Repeated . . . simply means the perpetrator must follow the victim more than one time. The word adds to the restraint police officers must exercise, since it is not until a perpetrator follows a victim more than once that the conduct rises to a criminal level." (*People v. Heilman, supra*, 25 Cal.App.4th at 400.)

   This bill would expand the offense stalking to include situations where the person threatens the safety of another's pet, service animal, emotional support animal, or horse. The background provided by the author notes that the federal stalking statute protects the pet, service animal, emotional support animal, or horse of that person. (18 USCS § 2261A.)

   There are many instances where California law is not coextensive with federal law. Moreover, existing state law does provide protections to animals under animal cruelty laws. Expanding the stalking statute to pets and other animals creates a slippery slope for significant expansion of other crimes such as criminal threats and domestic violence.

   Finally, as noted above, the crime of stalking is based on a continuous course of conduct involving multiple acts, not a single incident. (See also *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1198; *People v. Jantz* (2006) 137 Cal.App.4th 1283, 1292-1293.) A prosecutor can already argue that any person would reasonably fear for their *own safety* (as opposed to that just of their pet) if the perpetrator was threating a person's pet in addition to committing other harassing or threatening behavior against that person. As such, this bill is unnecessary.

3) **Argument in Support**: According to *Crime Victims United of California*, "Stalking is a crime of power and control. Victims of stalking live in fear. The victim endures unspeakable harassment, threats, and is literally terrorized. Perpetrators of this crime often threaten their loved ones, including their pets. This leaves the victim to live in fear, not only for their safety but the safety of loved ones and precious pets.

   "Unfortunately, California law does not recognize terrorizing a victim about their pet as a crime or form of stalking. Federal law does and brings the ability of victims who are threatened with harm to their animals to be able to hold their preparators accountable.

"It is critical to the safety and security of stalking victims that penal code section 646.9 be amended to include victims' pets. SB 89 would do that providing much need protection to the victims of stalking. It is widely known that animal cruelty is "the link" to more violent behavior. By adding this critical section and conforming state law to Federal law, broader protection for crime victims can be provided."

4) **Argument in Opposition**: Opposition letters on file are not relevant to this version of the bill.

5) **Related Legislation**:

   a) AB 56 (Lackey), would expand eligibility for victim compensation to include emotional injuries from specified felony crimes including stalking. AB 56 is pending hearing in the Senate Appropriations Committee.

   b) AB 829 (Waldron), would require a court to consider ordering a defendant who has been granted probation after conviction of specified animal abuse crimes to undergo a mental health evaluation, and requires the defendant to complete mandatory counseling as directed by the court, if the evaluator deems it necessary. AB 829 is pending in the Senate Appropriations Committee.

6) **Prior Legislation**:

   a) AB 1982 (Ting), of the 2013-2014 Legislative Session, would have modified the crime of stalking from one requiring specific intent on the part of the perpetrator to one of general intent and would have included a domesticated pet within the definition of immediate family for purposes of the crime of stalking. AB 1982 was held in the Assembly Appropriations Committee.

   b) SB 1320 (Kuehl), Chapter 832, Statutes of 2002, revised California's stalking statute to, among other things, specify that constitutionally protected activities are not included with the meaning of "credible threat."

   c) SB 2184 (Royce), Chapter 1527, Statutes of 1990, enacted California's stalking statute.

REGISTERED SUPPORT / OPPOSITION:

Support

American Association of University Women - San Jose
American Association of University Women - California
American Kennel Club, INC.
American Society for the Prevention of Cruelty to Animals
California District Attorneys Association
California Police Chiefs Association
Crime Victims Alliance
Crime Victims United
Peace Officers Research Association of California
Riverside County District Attorney

Social Compassion in Legislation

Opposition

California Attorneys for Criminal Justice
San Francisco Public Defender

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

Date of Hearing: June 27, 2023
Counsel: Cheryl Anderson

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

SB 94 (Cortese) – As Amended June 20, 2023

SUMMARY: Creates a process for a person who has been sentenced to life imprisonment without the possibility of parole (LWOP) before June 5, 1990, and has served at least 25 years in custody, to seek a recall of their sentence and be resentenced to a lesser sentence. Specifically, **this bill**:

1) Provides that, except as specified, an individual serving LWOP for a conviction in which one or more special circumstances has been found true, may petition the court to recall the sentence and resentence to a lesser sentence if:

   a) The offense occurred before June 5, 1990; and,

   b) The individual has served at least 25 years in custody.

2) Specifies that an individual is not eligible for recall and resentencing if any of the following circumstances apply:

   a) The individual was convicted of first degree murder of a peace officer engaged in performance of their duties or of a peace officer or former peace officer in retaliation for the performance of their official duties;

   b) The individual was convicted of first-degree murder as the actual killer of three or more people; or

   c) The individual was convicted of a sexual offense committed in conjunction with the homicide for which the petitioner is serving an LWOP sentence. Defines "sexual offense" as rape, sodomy, lewd and lascivious acts on a child under 14 years of age, rape by instrument; and oral copulation.

3) Requires the petition to be filed with the court that sentenced the petitioner and served on the district attorney, or on the agency that prosecuted the petitioner. The presiding judge shall designate a judge to rule on the petition.

4) Requires the petition to include all of the following:

   a) A declaration by the petitioner that they are eligible for relief;

   b) The superior court case number and date of the petitioner's offense and conviction; and,

c) Whether the petitioner currently has counsel and, if not, whether the petitioner is indigent.

5) Requires the court to review the petition and determine if it alleges the eligibility elements. Allows the court to deny the petition without prejudice to the filing of another petition if any of the required information is missing and cannot be readily ascertained and to advise the petitioner that the matter cannot be considered without the missing information.

6) Requires the court to appoint the State Public Defender or other qualified counsel to represent the individual, if the petitioner does not have counsel and is indigent.

7) Provides that if counsel is newly appointed, they may file a supplementary petition within 60 days. The prosecutor may file and serve a response within 60 days of service of the petition or supplementary petition and the petitioner may file and serve a reply within 30 days after the prosecutor response is served. These deadlines shall be extended for good cause.

8) Requires the court to hold a hearing to determine whether to recall the sentence and resentence the petitioner within 60 days after the reply is filed. This deadline may be extended for good cause.

9) Allows the resentencing court, in the interest of justice and regardless of whether the original sentence was imposed after a trial or plea agreement, to do the following:

   a) Modify the petitioner's sentence to impose a lesser sentence, and apply any changes in law that reduce sentences or provide for judicial discretion; or

   b) Vacate the petitioner's conviction and impose judgment on any necessarily included lesser offense, whether or not that offense was charged in the original pleading, and then resentence the petitioner to a lesser sentence.

10) Allows the parties to waive a resentencing hearing and stipulate that the petitioner is eligible for recall and resentencing.

11) Provides that a petitioner who is resentenced shall be given credit for time served.

12) States that resentencing shall only result in a sentence of 25 years to life with the possibility of parole, followed by review by the Board of Parole Hearings, as specified.

13) Requires the court to state on the record the reasons for its decision to grant or deny recall and resentencing.

14) Provides that in considering a petition, the court shall consider and afford great weight to evidence offered by the petitioner to prove that any of the following mitigating circumstances are present:

   a) The petitioner was a victim of intimate partner violence, sexual violence, or human trafficking;

b) The petitioner experienced childhood trauma, including abuse, neglect, exploitation, or sexual violence;

c) The petitioner is a veteran and the conduct involved in the offense related to trauma experienced in the military;

d) The petitioner has been diagnosed with cognitive impairment, intellectual disability, or mental illness;

e) The petitioner was under 26 years of age at the time of offense;

f) The sentence violates the California Racial Justice Act; or,

g) The petitioner's age, time served, or diminished physical condition reduces the petitioner's risk for future violence.

15) Provides that proof of the presence of one or more of these circumstances weighs greatly in favor of dismissing the special circumstance, unless the court finds that the petitioner is currently an unreasonable risk of danger to public safety – i.e., unreasonable risk that the petitioner will commit a new violent offense, as specified.

16) Requires the court to consider postconviction factors, including, but not limited to, the disciplinary record and record of rehabilitation of the petitioner while incarcerated, and evidence that reflects that circumstances have changed since the original sentencing so that the sentence originally imposed is no longer in the interest of justice.

17) States that this process does not diminish or abrogate any rights or remedies otherwise available to the subject of the petition.

18) Provides that if the judge declines to impose a reduced sentence, two subsequent petitions may be filed if at least three years have passed from the denial of the prior application.

19) Allows the petitioner to appear remotely, and the court to conduct the hearing through the use of remote technology, unless counsel requests their physical presence in court and if not otherwise prohibited by state law.

20) States that a resentencing hearing constitutes a "post-conviction release proceeding" under Marsy's Law and consistent with that law requires the prosecutor to provide notice of the hearing to the victim, if the victim has requested to be notified, and the court to provide the victim an opportunity to be heard regarding sentencing, if requested by the victim.

21) Makes findings and declarations.

EXISTING LAW:

1) Defines murder as the unlawful killing of a human being, or a fetus, with malice aforethought. (Pen. Code, § 187, subd. (a).)

2) Defines malice for this purpose as either express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow person. It is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart. (Pen. Code, § 188, subd. (a)(1) & (2).)

3) Provides that for a conviction of murder generally, a participant in a crime must have the mental state described as malice, unless specified criteria are met. (Pen. Code, § 188, subd. (a)(3).)

4) States that malice shall not be imputed to a person based solely on their participation in a crime. (Pen. Code, § 188, subd. (a)(3).)

5) Provides that when it is shown that the killing resulted from an act with express or implied malice, no other mental state need be shown to establish the mental state of malice aforethought. Neither an awareness of the obligation to act within the general body of laws regulating society nor acting despite such awareness is included within the definition of malice. (Pen. Code, § 188, subd. (b).)

6) Defines first degree murder, in part, as all murder that is committed in the perpetration of, or attempt to perpetrate, specified felonies. (Pen. Code, § 189, subd. (a).)

7) States that a participant in one of the specified felonies is liable for first degree murder only if one of the following is proven:

    a) The person was the actual killer;

    b) The person was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree; or,

    c) The person was a major participant in the underlying felony and acted with reckless indifference to human life, as specified. (Pen. Code, § 189, subd. (e).)

8) Allows a defendant to be convicted of first degree murder if the victim is a peace officer who was killed in the course of duty, where the defendant was a participant in one of the specified felonies and the defendant knew, or reasonably should have known, that the victim was a peace officer engaged in the performance of their duty. (Pen. Code, § 189, subd. (f).)

9) Prescribes the penalty for first degree murder as death, LWOP, or imprisonment in the state prison for a term of 25 years to life, as provided. (Pen. Code, § 190, subd. (a).)

10) Provides that when a prosecutor charges a special circumstance and it is found true, a person found guilty of first degree murder shall be punished by death or LWOP. (Pen. Code, §§ 190.2, 190.4.)

11) Enumerates the special circumstances, as follows:

    a) The murder was intentional and carried out for financial gain;

b) The defendant was convicted previously of first or second-degree murder;

c) The defendant has been convicted of more than one offense of first or second-degree murder in the currentproceeding;

d) The murder was committed by means of a destructive device planted, hidden or concealed in any place, area, dwelling, building or structure and the defendant knew or should have known that their act(s) would create a great risk of death;

e) The murder was committed to avoid a lawful arrest or make an escape from lawful custody;

f) The murder was committed by means of a destructive device that the defendant mailed or delivered, or attempted to mail or deliver and the defendant knew or reasonably should have known that their act(s) would create a great risk of death;

g) The victim was a peace officer who was intentionally killed while performing their duties and the defendant knew or should have known that; or the peace officer/former peace officer was intentionally killed in retaliation for performing their duties;

h) The victim was a federal law enforcement officer who was intentionally killed while performing their duties and the defendant knew or should have known that; or the federal law enforcement officer was intentionally killed in retaliation for performing their duties;

i) The victim was a firefighter who was intentionally killed while performing their duties and the defendant knew or should have known that;

j) The victim was a witness to a crime and was intentionally killed to prevent their testimony, or killed in retaliation for testifying;

k) The victim was a local, state or federal prosecutor/former prosecutor intentionally murdered in retaliation for, or to prevent the performance of, official duties;

l) The victim was a local, state, or federal judge/former judge intentionally murdered in retaliation for, or to prevent the performance of, official duties;

m) The victim was an elected or appointed official/former official of local, state or federal government intentionally murdered in retaliation for, or to prevent the performance of, official duties;

n) The murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity, meaning a conscious or pitiless crime that is unnecessarily torturous to the victim.

o) The defendant intentionally killed the victim while lying in wait;

p) The victim was intentionally killed because of their race, color, religion, nationality, or country of origin;

q) The murder was committed while the defendant was engaged in, or was an accomplice to, the commission of, attempted commission of, or immediate flight after, committing or attempting to commit the following crimes: robbery; kidnapping; rape; sodomy; lewd or lascivious act on a child under the age of 14; oral copulation; burglary; arson; train wrecking; mayhem; rape by instrument; and, carjacking ("felony-murder special circumstance");

r) The murder was intentional and involved the infliction of torture;

s) The defendant intentionally killed the victim by the administration of poison;

t) The victim was a juror and the murder was intentionally carried out in retaliation for, or to prevent the performance of, the victim's duties as a juror;

u) The murder was intentional and committed by discharging a firearm from a motor vehicle; and,

v) The defendant intentionally killed the victim while actively participating in a criminal street gang, and the murder was carried out to further the activities of the gang. (Pen. Code, § 190.2.)

12) Specifies that a person convicted of first degree murder, who is not the actual killer and lacked the intent to kill, is liable under the felony-murder special circumstance only where they acted with reckless indifference to human life and as a major participant, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted in the commission of one of specified felonies which resulted in death. (Pen. Code, § 190.2, subd. (d).)

13) Provides that the penalty for a defendant found guilty of murder in the first degree, in any case in which one or more special circumstances has been found to be true, who was 16 years of age or older and under the age of 18 years at the time of the commission of the crime, shall be confinement in the state prison for LWOP or, at the discretion of the court, 25-years-to-life. (Pen. Code, § 190.5, subd. (b).)

14) 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).)

15) Prohibits courts from striking or dismissing special circumstance allegations once they have been admitted by plea or found true by a court or jury, if the murder occurred on or after June 6, 1990. (Pen. Code, § 1385.1.)

16) Entitles a victim to reasonable notice of all public proceedings, including delinquency proceedings, upon request, at which the defendant and the prosecutor are entitled to be present and of all parole or other post-conviction release proceedings, and to be present at all such proceedings. (Cal. Const., art. I, § 28, subd. (e) [Marsy's Law].)

FISCAL EFFECT: Unknown.

COMMENTS:

1) **Author's Statement**: According to the author, "The majority of people serving a life without parole sentence are classified as low risk according to California Department of Corrections and Rehabilitation (CDCR)'s own California Static Risk Assessment tool - 88% of people serving life without parole have been assessed with the lowest risk score on that scale. Research also conclusively demonstrates that there is little risk for elderly individuals to re-offend or recidivate upon release. For individuals previously sentenced to life without parole who were granted a commutation and released, the recidivism rate is zero percent. Based on CDCR data, an analysis from the Special Circumstances Conviction Project of UCLA Center for the Study of Women, estimates that this reform might qualify 600 LWOP cases for review. These cases represent a very narrow population that consists of the most elderly individuals behind bars. Many of these individuals have shown decades of exemplary behavior, participated in extensive positive programming and have devoted themselves to becoming positive members of society. This bill does not automatically let anyone out of prison. It does not guarantee resentencing. This bill simply creates a process for the judicial review of cases that have not been looked at in decades."

2) **Background: Criminal Justice Reforms:** Over the last several years, the Legislature has enacted several criminal justice reforms that allow judicial discretion and expressly provide for judges to consider certain mitigating factors at sentencing. The reforms include AB 124 (Kamlager), Chapter 695, Statutes of 2021, which required courts to consider whether specified trauma to a defendant and other factors, including whether the defendant was under 26 years of age at the time of the offense, contributed to the commission of the offense when making sentencing and resentencing determinations. SB 260 (Hancock), Chapter 312, Statutes of 2013, established a parole process for persons sentenced to prison for crimes committed before attaining 18 years of age (otherwise known as Youth Offender Parole hearings). SB 261 (Hancock), Chapter 471, Statutes 2015, expanded the youth offender parole process to include those who have committed their crimes before attaining the age of 23. AB 1308 (Stone), Chapter 675, Statutes of 2017, again expanded the youth offender parole process to include those who committed their crimes when they were 25 years of age or younger. Several bills required courts to consider a defendant's status as a veteran or related trauma in sentencing – e.g., AB 2098 (Levine), Chapter 163, Statutes of 2014; AB 865 (Levine), Chapter 523, Statutes of 2018; SB 1209 (Eggman), Chapter 721, Statutes of 2022. AB 2542 (Kalra), Chapter 317, Statutes of 2020, and AB 256 (Kalra), Chapter 739, Statutes of 2022, the California Racial Justice Act, allowed a defendant to seek relief because their case, including sentence, was impacted by racial bias. As a result of these changes, individuals who received extreme sentences decades ago may not have been sentenced the same way today.

3) **First Degree Murder with Special Circumstances**: Murder is the unlawful killing of a human being with malice aforethought. (Pen. Code, § 187, subd. (a).) Malice may be express or implied. (Pen. Code, § 188, subd. (a).) "Malice is express when there is manifested a deliberate intention to unlawfully take away the life of a fellow creature" – i.e., intent to kill. (Pen. Code, § 188, subd. (a)(1).) "Malice is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." (Pen. Code, § 188, subd. (a)(2).)

There are three categories of first degree murder in California: [1] where the killing is willful, deliberate, and premeditated; [2] where the killing is committed by means of a destructive or explosive device, ammunition designed to penetrate armor, poison, lying in wait, or torture; and [3] where the killing occurs during the commission of a specified felony offense (known as felony murder). (Pen. Code, § 189, subd. (a).) First degree murder is generally punishable by 25-years-to-life in state prison. (Pen. Code, § 189, subd. (a).) However, if one or more special circumstances are found to be true, the defendant becomes eligible for the death penalty and must be sentenced to either death or LWOP. (Pen. Code, § 190.2, subd. (a); *People v. Banks* (2015) 61 Cal.4th 788, 797.)

4) **Striking or Dismissing a Special Circumstance:** As adopted by voter initiative in Proposition 115, courts do not have the discretion to strike a special circumstance once admitted or found true by the court or a jury. (Pen. Code, § 1385.1; see Prop. 115, *supra*, § 26.) This is a restriction on the general discretion courts have to strike an enhancement or its punishment in the interest of justice. (Pen. Code, § 1385.) Prior to June 6, 1990, and for murders that took place prior to June 5, 1990, the judge had/has discretion to strike a special circumstance after it has been admitted or found true.

   This bill would create a process for an individual serving an LWOP sentence for a conviction in which one or more special circumstances were found to be true to petition for recall and resentencing if the offense occurred before June 5, 1990, and the individual has served at least 25 years in custody. However, this bill would exclude from this process convictions for murder of a peace officer, as specified, first-degree murder as the actual killer of three or more people, and murder involving specified sexual offenses.

   If the eligibility requirements are met, this bill would authorize a court to, in the interests of justice, [1] modify the petitioner's LWOP sentence to instead impose a lesser sentence and apply any changes in law that reduce sentences or provide for judicial discretion, or [2] to vacate the petitioner's conviction and impose judgment on a lesser included offense. The new sentence would have to be 25-to-life (the punishment for first degree murder in the absence of a special circumstance).

   In resentencing under this bill, the court would be required to consider and afford great weight to specified circumstances including whether the petitioner was a victim of intimate partner violence, or sexual violence, human trafficking, experienced various types of trauma or abuse, was diagnosed with a cognitive impairment or mental illness, was under 26 years of age at the time of the offense, as well as the petitioner's age, time served, or diminished physical condition reducing risk of future violence. Additionally, the court would be required to consider and give great weight to whether the petitioner's sentence violates the California Racial Justice Act. While proof of the presence of one or more of these circumstances would weigh greatly in favor of dismissing the special circumstance, a court finding that the petitioner is currently an unreasonable risk of danger to public safety would trump this. If relief is granted, the individual would not necessarily be released, but would proceed to a hearing to determine if they are suitable for release on parole.

5) **Plea Agreements:** "Plea negotiations and agreements are an accepted and 'integral component of the criminal justice system and essential to the expeditious and fair administration of our courts.' [Citations.] Plea agreements benefit that system by promoting speed, economy, and the finality of judgments." (*People v. Segura* (2008) 44 Cal.4th 921,

929.) "Because a 'negotiated plea agreement is a form of contract,' it is interpreted according to general contract principles," and "[a]cceptance of the agreement binds the court and the parties to the agreement." (*Id.* at p. 930.)

> Where the plea is accepted by the prosecuting attorney in open court and is approved by the court, … *the court may not proceed as to the plea other than as specified in the plea.*" (§ 1192.5, italics added.) When a court accepts a plea bargain, the court must impose a sentence within the limits of that bargain. Thus, a court may not modify the terms of a plea agreement while otherwise leaving the agreement intact, nor may the court effectively withdraw its approval by later modifying the terms of the agreement it had approved. Should the court consider the plea bargain to be unacceptable, its remedy is to reject it, not to violate it, directly or indirectly. It follows that unless the Legislature intended otherwise, a retroactive resentencing statute incorporates long-standing law that a court cannot unilaterally modify an agreed-upon term by striking portions of it … .

(*People v. Brooks* (2020) 58 Cal.App.5th 1099, 1106-1107 [citations and quotations omitted].)

The provisions of this bill would apply *regardless of whether the original sentence was imposed after a trial or plea.*

6) **Remote Court Appearance:** Under Penal Code section 977, effective January 1, 2024, a criminal defendant convicted of a felony is required to be present at sentencing. Penal Code section 977.2, however, provides: "Notwithstanding Section 977 or any other law, in any case in which the defendant is charged with a misdemeanor or a felony and is currently incarcerated in the state prison, the Department of Corrections and Rehabilitation may arrange for all court appearances in superior court, except for the preliminary hearing and trial, to be conducted by two-way electronic audiovideo communication between the defendant and the courtroom in lieu of the physical presence of the defendant in the courtroom. If the defendant agrees, the preliminary hearing and trial may be held by two-way electronic audiovideo communication." Section 977.2 further provides: "For those court appearances that are conducted by two-way electronic audiovideo communication, the department shall arrange for two-way electronic audiovideo communication between the superior court and any state prison facility. The department shall provide properly maintained equipment, adequately trained staff at the prison, and appropriate training for court staff to ensure that consistently effective two-way electronic audiovideo communication is provided between the prison facility and the courtroom for all appearances conducted by two-way electronic audiovideo communication."

Because a petitioner under this bill would be serving an LWOP sentence, they necessarily would be incarcerated in state prison. Arguably, the provisions of Penal Code section 977.2 would apply to a recall and resentencing procedure. Nonetheless, this bill would expressly state that a petitioner may appear remotely, and the court conduct the hearing through the use of remote technology, unless counsel requests the petitioner's physical presence in court and if not otherwise prohibited by state law.

7) **Argument in Support**: According to *Ella Baker Center for Human Rights*, a co-sponsor of this bill, "There are people languishing in state prisons that if they were in court today, would receive a more just sentence. In the last ten years, the Legislature has enacted several reforms to restore judicial discretion and to allow judges to consider mitigating factors at sentencing, including whether the person was a victim of intimate partner violence or human trafficking or had experienced childhood trauma, exploitation or sexual abuse.

"Although individuals sentenced to LWOP have no path to parole today, many have exhibited decades of exemplary behavior, participated in extensive positive programming, have come to understand the contributing factors which led to their incarceration, and have devoted themselves to becoming positive members of society. The majority of people serving a life without parole sentence are classified as low risk according to California Department of Corrections and Rehabilitation's risk assessment tool - 88% of people serving life without parole have been assessed with the lowest risk score on that scale. Research also conclusively demonstrates that there is little risk for elderly individuals to re-offend or recidivate upon release. For individuals previously sentenced to life without parole in California who were granted a commutation and released, the recidivism rate is zero percent.

"This bill does not guarantee resentencing or release. Any individual who is granted resentencing by a judge will then need to go before the parole board, who will make a determination about their suitability for release.

"This bill allows courts to consider old cases in light of changes in law, thereby applying the law more fairly. This will mean that individuals that deserve a second chance won't have to die behind bars. For these reasons, the Ella Baker Center for Human Rights supports SB 94 and urges the legislature to pass this important bill."

8) **Argument in Opposition**: According to the *San Diego Deputy District Attorneys Association*, "By enacting Proposition 115, the voters of this state have told us they want to keep the worst of the worst in prison where they belong. If they feel differently, Penal Code section 1385.1 should be amended by them in a future initiative or legislatively referred ballot proposition. Dragging these murderers back into court will be prohibitively expensive, tie up judicial resources, and inflict further pain upon their victims. By creating presumptions favoring the release of these murderers, SB 94 will create unjustifiable risks to public safety.

"We strongly urge you to consider the unintended consequences to the families of victims and the public who potentially will lose faith in the judicial process and the finality of judgments."

9) **Related Legislation**:

a) AB 97 (Wiener), as relevant here, would provide that if the court holds an evidentiary hearing in a habeas corpus proceeding, a petitioner incarcerated in state prison may choose not to appear for the hearing with a signed or oral waiver on record, or they may appear remotely, and the court may conduct the hearing through the use of remote technology, unless counsel indicates that the defendant's presence in court is needed. AB 97 is being heard in this committee today.

b) AB 1214 (Maienschein), would allow defendants to appear by remote technology for certain criminal proceedings that do not involve the presentation of testimonial evidence and provides procedural and technological guidelines for the use of remote technology. Specifies this does not authorize the use of remote technology in court or jury trials. AB 1214 is pending hearing in the Senate Judiciary Committee.

c) SB 99 (Umberg), would extend the sunset on provisions related to remote criminal proceedings that were enacted in response to the Covid-19 pandemic from January 1, 2024 to January 1, 2028. SB 99 is pending hearing in this committee.

10) **Prior Legislation**:

a) SB 300 (Cortese), of the 2020-2021 Legislative Session, would have repealed the felony-murder special circumstance requiring punishment by death or LWOP for a person convicted of first degree murder who is not the actual killer and did not intend to kill. SB 300 was not heard on the Assembly floor.

b) SB 1437 (Skinner), Chapter 1015, Statutes of 2018, limited liability for individuals based on a theory of first or second degree felony murder, and allowed individuals previously sentenced on a theory of felony murder to petition for resentencing if they meet specified qualifications.

c) SCR 48 (Skinner), Chapter 175, Statutes of 2017, recognized the need for statutory changes to the felony-murder rule to more equitably sentence offenders in accordance with their involvement in the crime.

d) SB 878 (Hayden), of the 1999-2000 Legislative Session, would have required the court in a case involving felony murder with a defendant who did not physically or directly commit the murder, to determine whether imposition of a sentence of first degree murder is proportionate to the offense committed and to the defendant's culpability in committing that offense by considering specified criteria and to state its reasons on the record. SB 878 failed passage on the Senate Floor.

REGISTERED SUPPORT / OPPOSITION:

Support

8th Amendment Project
A New Way of Life Reentry Project
ACLU California Action
Alliance for Boys and Men of Color
American Friends Service Committee
Amnesty International USA
Anti-recidivism Coalition (UNREG)
Asian Americans Advancing Justice-southern California
Asian Pacific Islander Re-entry and Inclusion Through Support and Empowerment
Asian Prisoner Support Committee
Bend the Arc California

Bend the Arc San Luis Obispo
Bend the Arc: Jewish Action California
Black Women Organized for Political Action (BWOPA)
Blameless and Forever Free Ministries
California Attorneys for Criminal Justice
California Calls
California Catholic Conference
California Coalition for Women Prisoners
California Families against Solitary Confinement
California Federation of Teachers Afl-cio
California Immigrant Policy Center
California Native Vote Project
California Public Defenders Association
California State Council of Service Employees International Union (seiu California)
Californians for Safety and Justice
Californians United for a Responsible Budget
Center for Employment Opportunities
Center on Juvenile and Criminal Justice
City of Oakland Mayor Sheng Thao
Communities United for Restorative Youth Justice (CURYJ)
Community Agency for Resources, Advocacy and Services
Community Legal Services in East Palo Alto
Courage California
Cure California
Death Penalty Focus
Decarcerate Sacramento
Democrats of Rossmoor
Drop Lwop Coalition
Drug Policy Alliance
Ella Baker Center for Human Rights
Empowering Pacific Islander Communities (EPIC) Fiscally Sponsored by Community Partners
Empowering Women Impacted by Incarceration
End Solitary Santa Cruz County
Equality California
F.u.e.l.- Families United to End Lwop
Fair Chance Project
Faith in Action East Bay
Families against Mandatory Minimums Foundation
Felony Murder Elimination Project
Foundation Aussergewöhnlich Berlin
Friends Committee on Legislation of California
Ground Game LA
Group 137 of Amnesty International
Holy Cross Lutheran Church, Livermore, CA
Housing and Economic Rights Advocates
Human Rights Watch
If/when/how: Lawyering for Reproductive Justice
Immigrant Legal Resource Center (UNREG)
Indivisible CA Statestrong

Indivisible Sacramento
Indivisible San Francisco
Indivisible Yolo
Initiate Justice
Inland Equity Partnership
Interfaith Movement for Human Integrity
Islamic Shura Council of Southern California
John Burton Advocates for Youth
Justice2jobs Coalition
LA Defensa
Latinojustice Prldef
Law Enforcement Action Partnership
Lawyers' Committee for Civil Rights of The San Francisco Bay Area
League of Women Voters of California
Legal Services for Prisoners With Children
Long Beach Immigrant Rights Coalition
Milpa (motivating Individual Leadership for Public Advancement)
Naral Pro-choice California
National Association of Social Workers, California Chapter
National Center for Lesbian Rights
National Harm Reduction Coalition
North Bay Jobs With Justice
Peninsula Multifaith Coalition
Prosecutors Alliance California
Restore Oakland, INC.
Root & Rebound
Safe Return Project
San Francisco Public Defender
Santa Cruz Barrios Unidos INC.
Secure Justice
Showing Up for Racial Justice (SURJ) At Sacred Heart in San Jose
Showing Up for Racial Justice (SURJ) Bay Area
Showing Up for Racial Justice Santa Cruz County
Silicon Valley De-bug
Sister Warriors Freedom Coalition
Smart Justice California
Social Change
South Asian Network
Starting Over, INC.
Surj Marin - Showing Up for Racial Justice
Survived & Punished
Techequity Collaborative
The Place4grace
The Resistance Northridge-indivisible
The San Diego Lgbt Community Center
The Transformative In-prison Workgroup
Together We Will/indivisible - Los Gatos
Unapologetically Hers
Uncommon Law

Underground Grit
Underground Scholars Initiative At the University of California, Irvine
United Core Alliance
Universidad Popular
Urban Peace Movement
Voices for Progress
Vt CitizenS United for The Rehabilitation of Errant (S)
White People 4 Black Lives
Witness to Innocence
Women's Foundation California
Young Women's Freedom Center

167 Private Individuals

Opposition

Arcadia Police Officers' Association
Burbank Police Officers' Association
California Association of Highway Patrolmen
California Coalition of School Safety Professionals
California District Attorneys Association
California Police Chiefs Association
California Reserve Peace Officers Association
California State Sheriffs' Association
Claremont Police Officers Association
Corona Police Officers Association
Crime Victims United
Culver City Police Officers' Association
Deputy Sheriffs' Association of Monterey County
Fullerton Police Officers' Association
Inglewood Police Officers Association
Los Angeles School Police Officers Association
Monterey County District Attorney's Office - ODA - Salinas, CA
Murrieta Police Officers' Association
Newport Beach Police Association
Novato Police Officers Association
Orange County District Attorney
Palos Verdes Police Officers Association
Peace Officers Research Association of California (PORAC)
Placer County Deputy Sheriffs' Association
Pomona Police Officers' Association
Riverside Police Officers Association
Riverside Sheriffs' Association
San Diegans against Crime
San Diego County District Attorney's Office
San Diego Deputy District Attorneys Association
Santa Ana Police Officers Association

Upland Police Officers Association

1 Private Individual

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

Date of Hearing: June 27, 2023
Counsel: Cheryl Anderson

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

SB 97 (Wiener) – As Amended June 20, 2023

SUMMARY: Authorizes broader bases for the prosecution of a writ of habeas corpus when new evidence is discovered after plea or trial, creates a presumption in favor of granting relief if the prosecution stipulates to a factual or legal basis for the relief, and provides for continuity of counsel on retrial. Specifically, **this bill**:

1) Provides that a habeas petition may be prosecuted based on the introduction of material false evidence, rather than false evidence that is substantially material or probative on the issue of guilt or punishment.

2) Revises the grounds for prosecuting a habeas petition based on new evidence to include evidence that would have changed the outcome of a case, not just a trial.

3) Redefines "new evidence" as evidence discovered after a plea or trial that has not previously been presented or heard, making it applicable to pleas and removing the requirement that it could not have been discovered prior to trial by the exercise of due diligence and is not merely cumulative, corroborative, collateral, or impeaching.

4) Revises the grounds for prosecuting a habeas petition based on a significant dispute having emerged or further developed in the petitioner's favor regarding expert medical, scientific, or forensic evidence, making it applicable to hearings as well as trials and where it would have affected the outcome of the case, not just a trial.

5) Provides that if the court holds an evidentiary hearing and the petitioner is incarcerated in state prison, the petitioner may choose not to appear for the hearing with a signed or oral waiver on record, or they may appear remotely through the use of remote technology, unless counsel indicates that the defendant's presence in court is needed.

6) Creates a presumption in favor of granting relief if the district attorney in the county of conviction or the Attorney General concedes or stipulates to a factual or legal basis for habeas relief. This presumption may be overcome only if the record before the court contradicts the concession or stipulation or it would lead to the court issuing an order contrary to law.

7) Provides that if after the court grants postconviction relief and the prosecuting agency elects to retry the petitioner, the petitioner's postconviction counsel may be appointed as counsel or cocounsel to represent the petitioner on the retrial if both of the following requirements are met:

a) The petitioner and postconviction counsel both agree for postconviction counsel to be appointed; and,

b) Postconviction counsel is qualified to handle trials.

8) Requires postconviction counsel be paid under the applicable pay scale for appointed counsel. Otherwise, the court shall appoint other appropriate counsel.

9) Makes other technical and clarifying changes.

EXISTING LAW:

1) Provides that a person unlawfully imprisoned or restrained of their liberty, under any pretense, may prosecute a writ of habeas corpus to inquire into the cause of the imprisonment or restraint. (Pen. Code, § 1473, subd. (a).)

2) States that a writ of habeas corpus may be prosecuted for, but not limited to, the following reasons:

a) False evidence that is substantially material or probative on the issue of guilt or punishment was introduced against a person at any hearing or trial relating to the person's incarceration;

b) False physical evidence, believed by a person to be factual, material or probative on the issue of guilt, which was known by the person at the time of entering a plea of guilty and which was a material factor directly related to the plea of guilty by the person;

c) New evidence exists that is credible, material, presented without substantial delay, and of such decisive force and value that it would have more likely than not changed the outcome of the trial. "New evidence" is evidence that was discovered after trial that could not have been discovered before trial by exercise of due diligence and is admissible and not merely cumulative, corroborative, collateral, or impeaching; or,

d) A significant dispute has emerged or further developed in the petitioner's favor regarding expert medical, scientific, or forensic testimony that was introduced at trial and contributed to the conviction, such that it would have more likely than not changed the outcome at trial, as specified. (Pen. Code, § 1473, subd. (b).)

3) Provides that any allegation that the prosecution knew or should have known of the false nature of the evidence is immaterial to the prosecution of a writ of habeas corpus. (Pen. Code § 1473, subd. (c).)

4) Provides that these provisions do not limit the grounds for which a writ of habeas corpus may be prosecuted or preclude the use of any other remedies. (Pen. Code, § 1473, subd. (d).)

5) Provides that "false evidence" includes opinions of experts that have either been repudiated by the expert who originally provided the opinion at a hearing or trial or have been undermined by the state of scientific knowledge or later scientific research or technological

advances. (Pen. Code, § 1473, subd. (e)(1).)

6) Provides that these provisions do not create additional liabilities, beyond these already recognized, for an expert who repudiates the original opinion provided at a hearing or trial or whose opinion has been undermined by scientific research, technological advancements or because of a reasonable dispute within the expert's relevant scientific community as to the validity of the methods, theories, research, or studies upon which the expert based their opinion. (Pen. Code, § 1473, subd. (e)(2).)

FISCAL EFFECT: Unknown.

COMMENTS:

1) **Author's Statement**: According to the author, "Senate Bill 97 refines the process by which those who are wrongfully convicted can prove their innocence and have their convictions reversed. This legislation will serve the twin aims of saving both time in unnecessary litigation and taxpayer resources, as well as ensuring justice for the innocent, victims, and survivors of crime. Putting innocent people in prison for crimes they didn't commit is a miscarriage of justice and undermines public safety. These clarifications in the law are necessary for California to ensure that the wrongfully convicted are given a fair and equitable process to prove their innocence. All Californians—but particularly those who are wrongly incarcerated—deserve a penal system that can evolve and recognize its mistakes accordingly."

2) **Writ of Habeas Corpus as a Mechanism for Challenging Convictions**: A writ of habeas corpus is a mechanism that can be used to challenge a conviction that is based on false or undermined scientific evidence. Habeas corpus, also known as "the Great Writ," is a process guaranteed by both the federal and state constitutions to obtain prompt judicial relief from illegal restraint. The function of the writ is set forth in Penal Code section 1473, subdivision (a): "Every person unlawfully imprisoned or restrained of his or her liberty, under any pretense whatever, may prosecute a writ of habeas corpus, to inquire into the cause of such imprisonment or restraint."

   A writ of habeas corpus may be prosecuted for, but not limited to, the following reasons: false evidence that is substantially material or probative on the issue of guilt or punishment was introduced against a person at any hearing or trial relating to their incarceration; false physical evidence believed by a person to be factual, material or probative on the issue of guilt, which was known by the person at the time of entering a plea of guilty, and which was a material factor directly related to the plea of guilty by the person; new evidence exists that is credible, material, presented without substantial delay, and of such decisive force and value that it would have more likely than not changed the outcome at trial; or a significant dispute has emerged or further developed in the petitioner's favor regarding expert medical, scientific, or forensic testimony that was introduced at trial and contributed to the conviction, such that it would have more likely than not changed the outcome at trial. (Pen. Code, § 1473, subd. (b).)

   This bill would refine and broaden the bases on which a habeas petition may be filed under the foregoing circumstances. It would authorize a habeas petition to be prosecuted based on the introduction of material false evidence, rather than false evidence that is substantially

material or probative on the issue of guilt of punishment.[1] It would also revise the grounds for prosecuting a habeas petition based on new evidence to include evidence that would have changed the outcome of a case, not just a trial. It would redefine "new evidence" as evidence discovered after a plea or trial that has not previously been presented or heard – i.e., making it applicable to pleas and removing the requirement that it could not have been discovered prior to trial by the exercise of due diligence and that it not be merely cumulative, corroborative, collateral, or impeaching. Additionally, the bill would revise the grounds for prosecuting a habeas petition based on a significant dispute having emerged or further developed in the petitioner's favor regarding expert medical, scientific, or forensic evidence, making it applicable to hearings as well as trials and where it would have affected the outcome of the case not just the trial. The bill would make other technical and clarifying changes to the current grounds for relief.

3) **Stipulation to a Factual or Legal Basis for Habeas Relief**: Under current law, if the authority confining the individual does not contest the habeas petition and stipulates to the allegations and requested relief, the court may grant the relief without issuing a writ or an order to show cause. (*People v. Romero* (1994) 8 Cal.4th728, 740, fn. 7.)

   This bill would create a presumption in favor of granting relief if the district attorney in the county of conviction or the Attorney General concedes or stipulates to a factual or legal basis for habeas relief. This presumption may be overcome only if the record before the court contradicts the concession or stipulation or it would lead to the court issuing an order contrary to law.

4) **Waiver of Physical Presence and Remote Court Appearance:** If a habeas petitioner makes a prima facie showing that they are entitled to relief – i.e., establishes facts that if true would entitle them to relief – the court must issue an order to show cause why relief should not be granted. (Pen. Code, § 1473, subd. (b)(4)(F).) After pleadings are filed, if facts are in dispute, the court may order an evidentiary hearing. (See *In re Lawler* (1979) 23 Cal.3d 190, 194.) Where the petition is being heard in the trial court, and there is a reasonable likelihood that the petitioner is entitled to relief depending on the resolution of a factual issue, the court is required to hold an evidentiary hearing. (Cal. Rules of Court, rule 4.551(f); *In re Rhoades* (2017) 10 Cal.App.5th 896, 910.)

   Under Penal Code section 977, as effective January 1, 2024, a defendant in a misdemeanor case may appear by counsel only, except in certain abuse and driving under the influence cases. A defendant in a felony case is required to be physically present at the arraignment, at the time of plea, during the preliminary hearing, during those portions of the trial when evidence is taken before the trier of fact, and at the time of the imposition of sentence. The defendant must be personally present at all other proceedings, unless they waive their right to be personally present. (See Pen. Code, § 977, subds. (a) & (b).) A defendant who does not wish to be personally present for noncritical portions of the trial when no testimonial evidence is taken may make an oral waiver or submit a written request to the court, which the court may grant. (See Pen. Code, § 977, subd. (c)(2).)

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[1] "'The fundamental due process principle . . . is that the prosecution may not deprive an accused of the opportunity [original italics] to present material evidence which might prove his innocence [italics supplied].'" (*People v. Mejia* (1976) 57 Cal.App.3d 574, 579, quoting *Bellizzi v. Superior Court* (1974) 12 Cal. 33, 36.)

Penal Code section 977.2 provides that notwithstanding any other law, the California Department of Corrections (CDCR) may arrange for an incarcerated defendant who is *charged with a misdemeanor or felony* to make court appearances via remote technology. However, this only applies to preliminary hearings and trials if the defendant agrees. And the court may order the defendant to be physically present where it finds the circumstances require physical presence. Additionally, CDCR must "provide properly maintained equipment, adequately trained staff at the prison, and appropriate training for court staff to ensure that consistently effective two-way electronic audiovideo communication is provided between the prison facility and the courtroom for all appearances conducted by two-way electronic audiovideo communication." (Pen. Code, § 977.2, subd. (a).)

This bill would allow a state habeas petitioner who is incarcerated in state prison to choose not to appear for an evidentiary hearing with a signed or oral waiver on record, or to appear through the use of remote technology, unless counsel indicates that the defendant's presence in court is needed. It is unclear whether these proceedings are within the scope of Penal Code section 977.2 because that section applies to a state prisoner charged with an offense and this bill pertains to a post-conviction proceeding – i.e., the individual has already been convicted.

5) **Appointment of Counsel:** California provides for appointment of counsel in capital habeas proceedings. (Cal. Rules of Court, rule 4.561.) In a noncapital case, if the court issues an order to show cause and the petitioner is indigent, it must then appoint counsel. (Cal. Rules of Court, rule 4.551(c)(2).)

   If habeas relief is granted and there is a retrial, this bill would authorize the court to appoint habeas counsel to continue representing the petitioner/defendant on retrial. Two requirements would have to be met, however. First, the petitioner/defendant and habeas counsel would both have to agree to the appointment of counsel. Second, habeas counsel would have to be qualified to handle trials. If both of these requirements are met, reappointing the same attorney to handle the retrial provides for continuity of representation.

6) **Argument in Support**: According to the *California Innocence Coalition*, a co-sponsor of this bill, "Though California's habeas corpus law is more comprehensive than most states', decades of revisions and amendments have created unintended obstacles and barriers to cases warranting relief, even when both the prosecution and the defense agree that the person is innocent. One example is when Courts order that investigations and hearings be carried out even after prosecutors determine a person has been wrongfully convicted, citing that existing law was not clear enough to allow them to grant relief or reverse the conviction. As a result, innocent people lose years to unnecessary litigation.

   "SB 97 aims to eliminate confusion and unnecessary litigation surrounding technical requirements within California's habeas laws to ensure Courts are given the discretion to scrutinize the integrity of a conviction and grant relief. …SB 97 additionally guarantees the wrongfully convicted are provided the opportunity for continuous counsel in their cases."

7) **Argument in Opposition**: None on file.

8) **Related Legislation**:

a) AB 94 (Cortese), among other things, allows a habeas petitioner to appear remotely unless counsel requests their presence in court and if not otherwise prohibited by law. AB 94 is being heard in this committee today.

b) AB 1214 (Maienschein) allows defendants to appear by remote technology for certain criminal proceedings that do not involve the presentation of testimonial evidence and provides procedural and technological guidelines for the use of remote technology. Specifies this does not authorize the use of remote technology in court or jury trials. AB 1214 is pending hearing in the Senate Public Safety Committee.

c) SB 99 (Umberg) extends the sunset on statutes authorizing remote appearances in criminal cases from January 1, 2024, to January 1, 2028. SB 99 is pending hearing in the Assembly Judiciary Committee.

9) **Prior Legislation**:

a) SB 467 (Wiener), Chapter 982, Statutes of 2022, permitted a person to bring a habeas writ where a significant dispute has developed regarding expert medical, scientific, or forensic testimony that would have more likely than not changed the outcome of their trial, and expands the definition of false evidence for the purpose of a habeas writ.

b) SB 243 (Wiener), of the 2021-2022 Legislative Session, would have expanded the definition of "false evidence" for the purpose of habeas corpus relief and required the court to make specified determinations when considering the admission of expert testimony in criminal proceedings. SB 243 was held on the Senate Appropriations suspense file.

c) SB 938 (Wiener), of the 2019-2020 Legislative Session, would have expanded the definition of "false evidence" for the purpose of habeas corpus relief and specified that expert opinion based on circular reasoning is not the type of matter on which expert testimony may reasonably be based. SB 938 was not heard in the Senate due to the shortened 2020 Legislative Calendar.

d) SB 1134 (Leno), Chapter 785, Statutes of 2016, codified a standard for habeas corpus petitions filed on the basis of new evidence.

e) SB 694 (Leno), of the 2015-2016 Legislative Session, would have codified a standard for habeas corpus petitions filed on the basis of new evidence. SB 694 was held in Assembly Appropriations Committee.

f) SB 1058 (Leno), Chapter 623, Statutes of 2014, allowed a writ of habeas corpus to be prosecuted when evidence given at trial has subsequently been repudiated by the expert that testified or undermined by later scientific research or technological advances.

REGISTERED SUPPORT / OPPOSITION:

Support

California Innocence Coalition: Northern California Innocence Project, California Innocence Project, Loyola Project for The Innocent (Co-Sponsor)
California Public Defenders Association
Californians United for a Responsible Budget
Communities United for Restorative Youth Justice (CURYJ)
Ella Baker Center for Human Rights
Initiate Justice (UNREG)
Legal Services for Prisoners with Children
National Association of Social Workers, California Chapter
Prosecutors Alliance California
Secure Justice
Smart Justice California
University of San Francisco School of Law | Racial Justice Clinic

Opposition

None on file

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

Date of Hearing: June 27, 2023
Counsel: Cheryl Anderson

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

SB 226 (Alvarado-Gil) – As Amended June 13, 2023

SUMMARY: Adds a substance containing fentanyl to the list of controlled substances for which possession of those substances while armed with a loaded and operable firearm is a felony punishable in state prison by two, three, or four years. Specifically, **this bill**:

1) Adds a substance containing fentanyl to the list of controlled substances for which possession of those substances while armed with a loaded and operable firearm is a felony punishable in state prison by two, three, or four years.

2) States that this prohibition does not apply to any person lawfully possessing fentanyl, including with a valid prescription.

EXISTING LAW:

1) Makes it unlawful to possess several specified controlled substances, including heroin, cocaine, cocaine base, opium, hydrocodone, and fentanyl. Provides that the punishment is imprisonment in the county jail for not more than one year unless the person has one or more prior convictions for a serious or violent felony, as specified, or for an offense requiring sex offender registration, in which case it is punishable as a felony. (Health & Saf. Code, § 11350, subd. (a).)

2) Makes it unlawful to possess several specified controlled substances, including methamphetamine, amphetamine, phencyclidine (PCP), and gamma hydroxybutyric acid (GHB). Provides that the punishment is imprisonment in the county jail for not more than one year unless the person has one or more prior convictions for a serious or violent felony, as specified, or for an offense requiring sex offender registration, in which case it is punishable as a felony. (Health & Saf. Code, § 11377, subd. (a).)

3) Makes it unlawful for a person to possess for sale, or purchase for purpose of sale, several specified controlled substances, including heroin, cocaine, cocaine base, opium, and fentanyl. Provides that the punishment is imprisonment in the county jail for two, three, or four years. (Health & Saf. Code, §§ 11351, 11351.5.)

4) Makes it unlawful for a person to transport, import, sell, furnish, administer, or give away, or offer or attempt to transport, import, sell, furnish, administer, or give away several specified controlled substances, including cocaine, cocaine base, heroin, and fentanyl. Provides that the punishment is imprisonment in the county jail for three, four, or five years. Provides that the punishment for transporting those specified controlled substances within the state between noncontiguous counties is imprisonment in the county jail for three, six, or nine years.

(Health & Saf. Code, § 11352.)

5) Makes it unlawful to possess for sale several specified controlled substances, including methamphetamine, amphetamine, and GHB. Provides that the punishment is imprisonment in the county jail for 16 months, two years, or three years. (Health & Saf. Code, § 11378.)

6) Makes it unlawful to possess for sale PCP. Provides that the punishment is imprisonment in the county jail for three, four, or five years. (Health & Saf. Code, § 11378.5.)

7) 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, including methamphetamine, amphetamine, and GHB. Provides that the punishment is imprisonment in the county jail for two, three, or four years. Provides that the punishment for transporting those specified controlled substances within the state between noncontiguous counties is imprisonment in the county jail for three, six, or nine years. (Health & Saf. Code, § 11379.)

8) 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 PCP. Provides that the punishment is imprisonment in the county jail for three, four, or five years. Provides that the punishment for transporting those specified controlled substances within the state between noncontiguous counties is imprisonment in the county jail for three, six, or nine years. (Health & Saf. Code, § 11379.5.)

9) Provides, notwithstanding any other provision of law, that every person who unlawfully possesses any amount of a substance containing cocaine base, a substance containing cocaine, a substance containing heroin, a substance containing methamphetamine, a crystalline substance containing phencyclidine, a liquid substance containing phencyclidine, plant material containing phencyclidine, or a hand-rolled cigarette treated with phencyclidine while armed with a loaded, operable firearm is guilty of a felony punishable by imprisonment in the state prison for two, three, or four years. (Health & Saf. Code, § 11370.1, subd. (a).)

10) Defines "armed with" to mean having available for immediate offensive or defensive use. (Health & Saf. Code, § 11370.1, subd. (a).)

11) Provides that any person who is convicted of the above offense is ineligible for diversion or deferred entry of judgment, as described. (Health & Saf. Code, § 11370.1, subd. (b).)

12) Provides that, except as specified, the term "controlled substance analog" means either of the following:

    (a) A substance the chemical structure of which is substantially similar to the chemical structure of specified controlled substances; or

    (b) A substance which has, is represented as having, or is intended to have a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to, or greater than, the stimulant, depressant, or hallucinogenic effect on the central nervous system of specified controlled substances. (Health & Saf. Code, § 11401,

subd. (b)(1) & (2).)

13) Specifies that the term "controlled substance analog" does not mean "any substance for which there is an approved new drug application as specified under the federal Food, Drug, and Cosmetic Act or which is generally recognized as safe and effective as specified by the federal Food, Drug, and Cosmetic Act." (Health & Saf. Code, § 11401, subd. (c)(1).)

14) Regulates firearms, the possession of firearms, and the carrying of firearms. (Pen. Code §§ 23500 et seq.)

15) Provides for an additional year of punishment for a person who is armed with a firearm in the commission or attempted commission of a felony, unless being armed is an element of the offense. (Pen. Code, § 12022, subd. (a)(1).)

FISCAL EFFECT: Unknown.

COMMENTS:

1) **Author's Statement**: According to the author, "Existing law currently outlaws the possession of certain controlled substances such as fentanyl, heroin, and methamphetamine as a misdemeanor. Existing law (HS 11370.1) also outlaws the simple possession of certain drugs while also possessing a loaded, operable firearm and classifies this conduct as a felony.

   "However, the drugs mentioned in HS 11370.1 (cocaine, crack cocaine, heroin, methamphetamine, and PCP) do not include fentanyl by name. Therefore, questions have arisen among law enforcement and the courts as to whether possession of fentanyl while simultaneously possessing a loaded, operable firearm is punishable by law under HS 11370.1 in California.

   "Treating fentanyl possession with a gun differently under the law from those possessing methamphetamine, PCP, cocaine, crack cocaine, and heroin with a gun does not serve public safety, nor does it make sense given the potency and danger of fentanyl as compared with heroin in particular.

   "SB 226 would clarify that possession of a loaded, operable firearm while simultaneously possessing fentanyl is indeed a felony punishable to the same extent as the same conduct involving methamphetamine, heroin, PCP, cocaine, and crack cocaine."

2) **Possession of a Controlled Substance While Armed**: Under current law, possession of specified controlled substances, including heroin and fentanyl, is generally a misdemeanor. (See Health & Saf. Code, §§ 11377 & 11350.) However, possession of any amount of a substance containing cocaine base, cocaine, heroin, methamphetamine, or PCP while armed with a loaded, operable firearm is a felony punishable by imprisonment in the state prison for two, three, or four years. (Health & Saf. Code, § 11370.1, subd. (a).)

   Notably, this law does not require that the firearm be unlawfully possessed or that the person otherwise be engaged in unlawful activity related to the firearm. In other words, a person in lawful possession of a loaded, operable firearm who is also in possession of one of the specified controlled substances can be charged with a felony. Moreover, the person is

considered armed with the firearm even if it is not on their person. They do not even need to know that it is loaded and operable, just that it is in a readily accessible place. (See CALCRIM No. 2303; *People v. White* (2016) 243 Cal.App.4th 1354, 1362.)

The controlled substance need only be a "usable amount." A "usable amount" is defined as "a quantity that is enough to be used by someone as a controlled substance. Useless traces [or debris] are not usable amounts. On the other hand, a usable amount does not have to be enough, in either amount or strength, to affect the user." (See CALCRIM No. 2303.)

Though these specific controlled substances are singled out in statute for enhanced punishment if the person has an accessible firearm that may be lawfully possessed, there is no requirement that the person know which specific controlled substance they actually possess. They need only know the substance's nature or character as a controlled substance. (*People v. Palaschak* (1995) 9 Cal.4th 1236, 1242; *People v. Horn* (1960) 187 Cal.App.2d 68, 74-75; CALCRIM No. 2303.)

This bill would add a substance containing fentanyl to the list of controlled substances in this statute. What this bill does is punish the personal possession of fentanyl if there is a firearm accessible. Possession for sales, sales, and distribution of fentanyl is already a felony under current law. A person who possesses these substances for purposes of sales is guilty of a felony punishable in the county jail by two, three, or four years. (Health & Saf. Code, § 11351.) If the person is armed with a firearm, an additional year may be added. (Pen. Code, § 12022, subd. (a)(1).) If a person transports, sells, furnishes, administers, or gives away, fentanyl, the punishment is three, six, or nine years in state prison. (Health & Saf. Code, § 11352.) Again, if the person is armed, an additional year may be added. (Pen. Code, § 12022, subd. (a)(1).)

Moreover, because fentanyl is frequently mixed with other drugs without the knowledge of the user, the person may not even know they possess fentanyl. (https://www.npr.org/sections/health-shots/2018/03/29/597717402/fentanyl-laced-cocaine-becoming-a-deadly-problem-among-drug-users.) And unless fentanyl is the only drug possessed, possession of a controlled substance is covered by other laws – e.g., possession of cocaine, heroin, methamphetamine, etc. (Health & Saf. Code, §§ 11370.1 [possession while armed with a firearm] 11350 [possession of cocaine or heroin] & 11377 [possession of methamphetamine].)

3) **Harsher Sentences Unlikely to Reduce Drug Use or Deter Criminal Conduct:** Ample research on the impact of increasing penalties for drug offenses on criminal behavior has called into question the effectiveness of such measures. In a report examining the relationship between prison terms and drug misuse, PEW Charitable Trusts found "[n]o relationship between drug imprisonment rates and states' drug problems," finding that "higher rates of drug imprisonment did not translate into lower rates of drug use, arrests, or overdose deaths." (https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2018/03/more-imprisonment-does-not-reduce-state-drug-problems; see https://www.ccjrc.org/wp-content/uploads/2016/02/Correctional_and_Sentencing_Reform_for_Drug_Offenders.pdf)

This may be because of the limited deterrent effect of harsher sentences generally. According the U.S. Department of Justice, "Laws and policies designed to deter crime by focusing mainly on increasing the severity of punishment are ineffective partly because

criminals know little about the sanctions for specific crimes. More severe punishments do not 'chasten' individuals convicted of crimes, and prisons may exacerbate recidivism." (https://nij.ojp.gov/topics/articles/five-things-about-deterrence)

According to PEW, "[A] large body of prior research…cast[s] doubt on the theory that stiffer prison terms deter drug misuse, distribution, and other drug-law violations." (PEW, *supra.*) PEW concludes:

> Putting more drug-law violators behind bars for longer periods of time has generated enormous costs for taxpayers, but it has not yielded a convincing public safety return on those investments. Instead, more imprisonment for drug offenders has meant limited funds are siphoned away from programs, practices, and policies that have been proved to reduce drug use and crime. (*Ibid.*)

Will applying enhanced punishment to a person who possess this controlled substance for personal use, while having access to what may be a lawfully possessed firearm, reduce the amount drugs on California streets or reduce the threat of injury from a firearm? The evidence to date suggests that it will not.

3) **Practical Considerations:** The criminal offense this bill would amend currently applies only to *unlawful* possession of specified controlled substances. Under current law, it is unlawful to possess these specified controlled substances "unless upon the written prescription of a physician, dentist, podiatrist, or veterinarian licensed to practice in this state," as specified. (See Health & Saf. Code, §§ 11377 & 11350.) In other words, it is not a criminal offense to possess any of the specified controlled substances if possession is pursuant to a valid prescription.

   This bill would add fentanyl to this list of specified controlled substances subject to increased punishment. It would also state that it is not a crime to lawfully possess fentanyl, including with a valid prescription. This language is both confusing and unnecessary because it restates what the law already is but only as to fentanyl.

4) **Argument in Support**: According to the *California District Attorneys Association*, the sponsor of this bill, "While fentanyl has occasionally been seen on the streets since the 1970s, the use of this illicit substance has exploded since 2016, resulting in untold numbers of deaths and contributing to the opioid crisis, which has increased homelessness, destroyed families, and wrecked the futures of many of our young people. Because the drug is so highly addictive, a user might need multiple pills per day to avoid experiencing the excruciating symptoms of withdrawal.

   "As a valuable commodity on the streets fetching up to $20 per pill, a possessor of fentanyl who also carries a loaded, operable firearm to protect their 'stash' presents a significant public safety threat. Gun violence is a large concern in this state generally, but coupling the opioid epidemic with firearms presents a powder keg of risk.

   "SB 226 remedies the inconsistency in treatment between heroin, which is already explicitly listed in HS 11370.1 as a drug for which simultaneous firearm possession is outlawed, and fentanyl, which is up to 50 times stronger than heroin and yet is not explicitly mentioned in that statute. SB 226 thereby protects California's public in a tangible way, while providing

the courts with clarity on this important issue."

5) **Argument in Opposition**: According to the *California Public Defenders Association*: "Much like SB 1070 from last session, SB 226 relies on outdated War on Drugs mentality and would end up creating more harm than it would prevent. Relying on ever increasing penalties for drug offenses has been extensively researched, and we can therefore make some educated predictions about the outcome of bills like SB 226: it would not reduce the distribution of fentanyl, nor would it prevent overdoses; it would reduce neither the supply of drugs or the demand for them; and worse, it could actually discourage effective methods of dealing with the opioid crisis. One study found that states that increase their incarceration rates do not experience a decrease in drug use. When a drug seller is incarcerated, the supply of drugs is not reduced nor is the drug market impacted. Because the drug market is driven by demand rather than supply, research indicates that an incarcerated seller will simply be replaced by another individual to fill the market demand.

   "Importantly, the code section that SB 226 seeks to broaden does not require that a firearm be used in any way. Mere presence of the firearm is enough for a conviction, even if the firearm is legally owned and properly and safely stored.

   "Many of the people who will be incarcerated by this bill will be addicts themselves. A Bureau of Justice report found that 70% of people incarcerated for drug trafficking in state prisons used drugs prior to the offense. These individuals often distribute drugs, not for profit, but as a way to support their own substance use disorder. Often, these "traffickers" are not high-level members of any organized drug distribution scheme but are rather furnishing narcotics to friends and family members.

   "The imposition of harsh penalties for distribution could undermine California's Good Samaritan law, which encourages people to contact emergency services in case of an overdose. The threat of police involvement and harsh prison sentences may make an individual hesitant to call emergency services or run from the scene rather than help the victim.

   "The War on Drugs has had a devastating impact on communities across California. The unintended consequences of using jails and prisons to deal with a public health issue will take decades to unravel. Rather than diminishing the harms of drug misuse, criminalizing people who sell and use drugs amplifies the risk of fatal overdoses and diseases, increases stigma and marginalization, and drives people away from needed treatment, health, and harm reduction services. Why should California now apply that sort of ineffective and outmoded strategy to yet another controlled substance?

   "California voters have signaled, again and again, their preference for using a health approach to drug offenses, and their desire to unwind the failed War on Drugs. Reversing course and increasing criminal penalties not only flies in the face of multiple statewide elections, but it is also simply bad policy. Societal harms associated with drugs are not alleviated by ever longer prison sentences. Rather, these increased penalties impose their own harm, devastating vulnerable communities, particularly communities of color. For of these reasons, SB 226 would take California in the wrong direction. (Footnotes omitted.)"

6) **Related Legislation**: AB 675 (Soria) would have added a substance containing a heroin analog, a substance containing fentanyl, and a substance containing a fentanyl analog to the list of controlled substances for which possession of those substances while armed with a loaded and operable firearm is a felony punishable in state prison by two, three, or four years. As to fentanyl, AB 675 would have also required knowledge that the specific controlled substance possessed was fentanyl. AB 675 was held in the Assembly Appropriations Committee.

7) **Prior Legislation**: SB 1070 (Melendez), of the 2021-2022 Legislative Session, would have added oxycodone and fentanyl to the list of controlled substances for which possession of those substances while armed with a loaded and operable firearm is a felony. Hearing on SB 1070 in the Senate Public Safety Committee was canceled at the request of the author.

REGISTERED SUPPORT / OPPOSITION:

Support

Arcadia Police Officers' Association
Brooke Jenkins, San Francisco District Attorney
Burbank Police Officers' Association
California Association of Highway Patrolmen
California Coalition of School Safety Professionals
California District Attorneys Association
California Police Chiefs Association
California Reserve Peace Officers Association
California State Sheriffs' Association
City of Laguna Niguel
City of Turlock
Claremont Police Officers Association
Corona Police Officers Association
Crime Victims Alliance
Culver City Police Officers' Association
Deputy Sheriffs' Association of Monterey County
Fullerton Police Officers' Association
Los Angeles School Police Officers Association
Murrieta Police Officers' Association
Newport Beach Police Association
Novato Police Officers Association
Palos Verdes Police Officers Association
Peace Officers Research Association of California (PORAC)
Placer County Deputy Sheriffs' Association
Pomona Police Officers' Association
Riverside Police Officers Association
Riverside Sheriffs' Association
San Bernardino County
San Diegans against Crime
San Diego Deputy District Attorneys Association
San Joaquin County District Attorney's Office
Santa Ana Police Officers Association

Take a Stand Stanislaus
Upland Police Officers Association
Ventura County Office of the District Attorney

Opposition

ACLU California Action
California Attorneys for Criminal Justice
California Public Defenders Association
Drug Policy Alliance
Ella Baker Center for Human Rights

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

Date of Hearing: June 27, 2023
Consultant: Elizabeth Potter

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

SB 236 (Jones) – As Amended April 11, 2023

SUMMARY: Establishes within the Office of Emergency Services (OES) a pilot program to fund up to 11 district attorney offices to employ vertical prosecution for human trafficking crimes. Specifically, **this bill**:

1) Creates the Human Trafficking Prevention Vertical Prosecution Program within the OES and directs the Director of Emergency Services award funds for up to 11 district attorney offices for vertical prosecution of human trafficking crimes.

2) States that each county selected for funding must meet the following minimum requirements:

   a) Employ a vertical prosecution methodology for human trafficking crimes;

   b) Dedicate at least half the working time of one deputy district attorney and one district attorney investigator solely to the investigation and prosecution of human trafficking;

   c) Provide annual data on the number of human trafficking cases filed, convictions obtained, and sentences imposed for human trafficking offenses in that county;

   d) Enter into an agreement with an OES-funded human trafficking advocacy agency to ensure victims and witnesses of human trafficking receive appropriate services; and,

   e) Mandate that district attorney offices shall use grant funds to supplement and not supplant existing financial resources.

3) States that the OES must use a competitive process in selecting grantees and may establish selection criteria which, at minimum, requires prospective grantees demonstrate an ability to comply with the requirements of the program and provide an estimate of human trafficking crimes occurring in their county.

4) Requires OES, on or before January 1, 2026, to submit to the Legislature and Governor's office a report describing which counties were funded, the number of human trafficking cases filed by each county, the number of convictions obtained by each county, and the sentences imposed in each county.

5) Defines human trafficking as a violation of either California's human trafficking statute, or the solicitation of a minor statute.

6) States that not more than 10% of funds appropriated for this program shall be retained by the office of administrative costs, including technical assistance, training, and the cost of

producing the report required.

7) Sunsets the program on January 1, 2029.

EXISTING LAW:

1) Establishes the OES within the office of the Governor. (Gov. Code, § 8585, subd. (a).)

2) Vests the OES with all the duties and powers of the Office of Homeland Security. (Gov. Code, § 8585, subd. (b).)

3) States that a person who deprives or violates the personal liberty of another with the intent to obtain forced labor or services, intent to commit a specified commercial sex offense, or causes, induces, or persuades a minor to engage in a commercial sex act, is guilty of human trafficking. (Pen. Code, § 236.1.)

4) States that a person who deprives or violates the personal liberty of another with the intent to commit specified crimes including pimping, pandering, or child pornography, is guilty of human trafficking and shall be punished by imprisonment in the state prison for 8, 14, or 20 years and a fine of not more than $500,000. (Pen. Code, § 236.1, subd. (b).)

5) Provides that any person who solicits a minor for an act of prostitution is guilty of disorderly conduct. (Pen. Code, § 647 subd. (l).)

6) Establishes a vertical prosecution program for spousal abuse within the Department of Justice (DOJ) and finds that "the concept of vertical prosecution, in which a specially trained deputy district attorney, deputy city attorney, or prosecution unit is assigned to a case after arraignment and continuing to its completion, is a proven way of demonstrably increasing the likelihood of convicting spousal abusers and ensuring appropriate sentences for those offenders." (Pen. Code, §§ 273.8 *et seq.*)

7) Establishes a vertical prosecution program for repeat sex offenders within the OES and finds that "the concept of vertical prosecution, in which a specially trained deputy district attorney, deputy city attorney, or prosecution unit is assigned to a case after arraignment and continuing to its completion, is a proven way of demonstrably increasing the likelihood of convicting repeat sex offenders and ensuring appropriate sentences for those offenders." (Pen. Code, §§ 999i *et seq.*)

8) Establishes a vertical prosecution program for child abuse within the OES and finds that "the concept of vertical prosecution, in which a specially trained deputy district attorney, deputy city attorney, or prosecution unit is assigned to a case after arraignment and continuing to its completion, is a proven way of demonstrably increasing the likelihood of convicting child abusers and ensuring appropriate sentences for those offenders." (Pen. Code, §§ 999q *et seq.*)

9) Establishes a vertical prosecution pilot program for hate crimes within the DOJ. (Pen. Code, § 422.94.)

10) Establishes a vertical prosecution program within the OES for major narcotic vendors. (Pen. Code, §§ 13880 *et seq.*)

FISCAL EFFECT: Unknown.

COMMENTS:

1) **Author's Statement**: According to the author, "SB 236 requires the Office of Emergency Services to provide up to 11 county District Attorneys with funding for the development or maintenance of vertical prosecution teams responsible for the handling of human trafficking cases. Human trafficking is a modern form of slavery that exploits thousands of individuals each year within the United States. Vertical prosecution involves the use of specialized attorneys who follow the whole case, from inception to conclusion, instead of the standard practice of different attorneys handling individual stages of the case. The implementation of vertical prosecution has been highly successful and has contributed to increased conviction rates. Additionally, these programs ease strain on victims, as they are able to develop and maintain a relationship with a single prosecutor throughout the process as opposed to repeatedly redeveloping their relationship with a new attorney at each step of the way. This program will help get criminals off our streets and compassionately deliver justice to the victims that so deeply deserve it."

2) **Human Trafficking**: According to the DOJ, human trafficking, also known as modern-day slavery, is a crime involving the coercion or compelling of a person to provide labor or services, or to engage in commercial sex acts. The coercion can be physical or psychological, and may involve the use of violence, threats, lies, or debt bondage. It is among the world's fastest growing criminal enterprises and is estimated to be a $150 billion-a-year worldwide industry. The International Labor Organization estimates that there are approximately 24.9 million human trafficking victims globally at any given time. (DOJ. *What is Human Trafficking?* <https://oag.ca.gov/human-trafficking/what-is#top> [as of Jun. 13, 2023]; DOJ. *Human Trafficking*. <https://oag.ca.gov/human-trafficking> [as of Jun. 13, 2023].)

   The U.S. is widely regarded as a destination country for human trafficking. At the federal level, it is estimated that 14,500 to 17,500 victims are trafficked into the U.S. annually. At the state level, California is one of the nation's top destination states for human trafficking. Human trafficking victims do not necessarily fit into any one profile. (*Id.*) Victims of human trafficking include men, women, and children from diverse backgrounds in terms of race, color, national origin, religion, sexual orientation, socioeconomic status, and education level. (*Id.*) Many domestic victims of sex trafficking are runaway or homeless youth with backgrounds of sexual and physical abuse, poverty, or addiction; these vulnerabilities are often exploited by traffickers. (*Id.*) (DOJ. *What is Human Trafficking?* <https://oag.ca.gov/human-trafficking/what-is#top> [as of Jun. 13, 2023]; DOJ. *Human Trafficking*. <https://oag.ca.gov/human-trafficking> [as of Jun. 13, 2023].)

   To help provide services to human trafficking victims in California, on April 26, 2022, OES announced $20 million in grants for local partners. These grants were distributed to 31 community-based organizations for purposes such as survivor-centered counseling, outreach and referral programs, and reentry back into society. Funding also would be used to assist with cell phones, relocations expenses, court/legal fees, and medical care. (OES. *Cal OES Announces $20 million in Grants to Protect and Empower Survivors of Human Trafficking.* (Apr. 26, 2022) <https://news.caloes.ca.gov/human-trafficking-grant/> [as of Jun. 13, 2023].)

3) **Vertical Prosecution**: Prosecutors generally prosecute offenses in two ways, horizontally or vertically. (Lori Mullins. *Prosecuting Cases Vertically: A More Victim-focused Approach.* (May 2015) <https://ggulawreview.com/wp-content/uploads/2015/04/mullins_digital_symposium.pdf> [as of Jun. 13, 2023] at p. 2.) Horizontal prosecution generally refers to a method in which a different prosecutor is in charge of a case depending on what stage of the legal process it is in. (*Ibid.*) For example, one prosecutor may charge a case, another may handle the case at arraignment, then pass it on to another prosecutor for a preliminary hearing, who may then pass it on to another prosecutor for the trial. (*Ibid.*) Vertical prosecution generally refers to a method where there is a designated prosecutor who handles a case from charging all the way through to sentencing or dismisal. (*Ibid.*)

   Many large jurisdictions combine horizontal and vertical prosecution. (Cassia Spohn. "Specialized Units and Vertical Prosecution Approaches." *The Oxford Handbook of Prosecutors and Prosecution.* (May 26, 2021) <https://books.google.com/books?hl=en&lr=&id=uzoqEAAAQBAJ&oi=fnd&pg=PA259&dq=vertical+prosecution+&ots=PDMTnhbBqE&sig=TTjXqo96scfci3IlXdz6YKi6N80#v=onepage&q=vertical%20prosecution&f=false> [as of Jun. 13, 2023] at p. 259.) They usually will prosecute routine misdemeanor and felony cases horizontally, and will select more severe or complex cases such as homicides, sex offenses, high-level drug trafficking offenses, or gang offenses, for vertical prosecution by specialized units. (*Ibid.*)

   Advocates of vertical prosecution contend that cases involving sexual assault or gang violence have reluctant or fearful victims and face potentially complex and difficult evidentiary issues. (*Id.* at 260.) Furthermore, advocates contend that as a result of continuous contact with a case, the prosecutor will be more informed of the evidentiary issues, will have greater time to develop a comprehensive legal strategy, and will be able to develop familiarity with victims and witnesses leading to securing testimony needed for a conviction. (*Ibid.*) For example, a prosecutor in a specialized vertical unit may develop the enhanced skill needed to confront the fact that a sexual assault victim may not have reported the crime immediately or may have engaged in supposed "risky behavior" before an incident; the fact that a domestic violence victim may not show up to a court appearance, or, if they do, minimize the defendant's behavior; and the fact that a victim or witness of gang violence may fear retaliation for testifying. (*Ibid.*) That said, these assumptions that drive the use of vertical prosecution and specialized units are largely untested as there is no research comparing the efficacy of vertical and horizontal prosecution and limited research examining specialized units. (*Id.* at 267.)

   This bill would fund 11 district attorney offices to address human trafficking offenses in their respective counties by establishing vertical prosecution units for such offenses as has been done for hate crimes, child abuse, domestic abuse, and repeat sex offenders. In addition, this bill would require a report to the Legislature on the effectiveness of vertical prosecution in human trafficking cases.

4) **Argument in Support**: According to *The California District Attorney's Association*, "Human trafficking remains a lucrative criminal enterprise. The ability to sell a human body multiple times distinguishes it from the sale of other contraband, such as weapons and narcotics. Those who traffic in human flesh know very that they can inflict physical and mental terror upon their victims, making the crime difficult to prosecute. The traffickers also

move their enterprise across various jurisdictions seeking to avoid detection.

"The best way to attack these traffickers is through vertical prosecution units, supported by victim advocacy. Vertical units can better coordinate with other jurisdictions to track, apprehend, and prosecute offenders. Specially trained prosecution staff can focus on preventing and overcoming the physical and mental manipulation of trafficking victims. SB 236 encourages the continued use of the vertical prosecution model and helps to hold offenders accountable while also providing valuable victim services to the vulnerable victims of human trafficking."

5) **Argument in Opposition**: According to *According to the San Francisco Public Defender's Office*, "For 100 years, the San Francisco Public Defender's Office has provided dedicated and passionate legal representation to people who are charged with a crime and unable to afford an attorney. Our mission is to protect and defend the rights of our clients through effective, vigorous, compassionate, and creative legal advocacy.

"The San Francisco Public Defender's Office remains sympathetic to community members who survive human trafficking and the devastation that experience entails. Indeed, many of our clients have been trafficked, harmed, and abused before being funneled into our criminal legal system. However, we do not agree with the approach of SB 236.

"First, district attorneys can use existing resources to employ a vertical prosecution methodology. According to the California Legislative Analyst's Office, district attorneys receive nearly $1 billion more in funding than public defenders. District attorneys should be motivated on their own to employ what they deem as victim-centered methods, and should not be awarded additional funding for doing so.

"Secondly, this bill ignores the "abuse-to-prison" pipeline, which is a recurring pattern in which trafficked individuals, particularly youth of color, are arrested on suspicion of prostitution or charged as traffickers themselves.

> The abuse-to-prison pipeline disproportionately affects girls of color, who are subject to gender and racial bias. But in virtually all cases, police, prosecutors and judges fail or refuse to consider — and prohibit juries from considering — the full context of abuse behind girls' actions. And sometimes, in a perverse form of paternalism, authorities lock survivors up, citing a dearth of safe alternatives — as if detention is safe for young people who have endured sexual trauma.

"Lastly, we can all agree on the goal of ending human trafficking. We support giving survivors the support and resources necessary to leave abusive and coercive relationships and situations. To do so, we must invest in community-based resources and services — beds in appropriate facilities, mental health counselors and treatment — so that survivors of human trafficking have a place to heal and are not incarcerated." (citations omitted)

6) **Related Legislation**:

a) AB 1602 (Alvarez), would add to the definition of disorderly conduct the attempt to engage in the crime of soliciting prostitution, the attempt to agree to engage in

prostitution, or the attempt to engage in prostitution and requires the punishment for a victim of human trafficking to be an education class on the dangers of human trafficking and a referral to human trafficking support services. AB 1602 is pending hearing in this committee

b) AB 1739 (Sanchez), is substantially similar to this bill. AB 1739 was held in the Assembly Committee on Appropriations.

7) **Prior Legislation**:

a) AB 178 (Budget Act) Chapter 45, Statutes of 2022, established within the Board of State and Community Corrections a grant program for the vertical prosecution of organized retail theft.

b) AB 557 (Muratsuchi) Chapter 853, Statutes of 2022, established a vertical prosecution pilot program within the DOJ for the purpose of prosecuting hate crimes until July 1, 2029.

c) AB 959 (Melendez), of the 2019-2020 Legislative Session, was substantially similar to this bill. AB 959 was held in the Assembly Appropriations Committee.

d) AB 2124 (Rubio), of the 2017-2018 Legislative Session, was substantially similar to this bill. AB 2124 was held in the Senate Appropriations Committee.

e) AB 229 (Baker), of the 2017-2018 Legislative Session, was substantially similar to this bill. AB 229 was held in Senate Appropriations Committee.

f) AB 2202 (Baker), of the 2015-2016 Legislative Session, was substantially similar to this bill. AB 2202 was held in the Assembly Appropriations Committee.

REGISTERED SUPPORT / OPPOSITION:

Support

California District Attorneys Association
City of San Marcos
Peace Officers Research Association of California (PORAC)
San Diegans Against Crime
San Diego County District Attorney's Office
San Diego Deputy District Attorneys Association

Oppose

San Francisco Public Defender

Analysis Prepared by: Elizabeth Potter / PUB. S. / (916) 319-3744

Date of Hearing: June 27, 2023
Counsel: Mureed Rasool

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

SB 241 (Min) – As Amended May 18, 2023

As Proposed to be Amended in Committee

SUMMARY: Requires the Department of Justice (DOJ) to create a firearm-sales training course and certification that firearm dealers, and their employees must complete annually. Specifically, **this bill**:

1) Requires the DOJ to develop and implement a training course by January 1, 2025, for firearm dealers and their employees.

2) Requires, commencing, July 1, 2025, that firearm dealers and their employees who regularly process the sale, loan, or transfer of a firearm or ammunition, to annually complete the DOJ's firearm-sales training course.

3) States that firearm dealers must maintain records of their firearm-sales course certification on their business premise and make such records available for inspection.

4) Provides that the firearm-sales training course must include, at minimum, training on the following subjects:

   a) Applicable state and federal laws governing firearm and ammunition transfers;

   b) Identifying straw purchasers and fraudulent activity;

   c) Indicators a person is attempting to illegally purchase a firearm;

   d) Indicators a person intends to use the firearm for unlawful purposes or self-harm;

   e) Preventing burglaries or theft of firearms and ammunition;

   f) Reporting requirements and how to otherwise respond to the above-mentioned circumstances;

   g) How to teach purchasers firearm safety rules; and,

   h) Other reasonable business practices the DOJ determines suitable to further deter the unlawful use of firearms.

5) States that the training course shall include an examination of no less than 20 questions to test the participant's understanding of the material, and provides answering 70% or more of

the questions correctly shall result in receiving a one-year certificate of completion.

6) Requires the DOJ to also prepare supplemental written materials to be made available to participants.

7) States that the supplemental written materials must include, at minimum, the following indicators of firearm trafficking or straw purchasing:

   a) A purchaser buying multiple firearms;

   b) A purchaser being accompanied by another person;

   c) A purchaser communicating with others via phone or other means;

   d) A purchaser being the subject of a crime gun trace;

   e) A purchaser having purchased another firearm in the preceding 30 days;

   f) A purchaser indicating the firearm is for another person;

   g) How to determine the firearm is being legally purchased, including by asking the purchaser questions; and,

   h) How to report suspected fraud.

8) Requires the DOJ to regularly review and update the training materials as needed.

9) States that local authorities are not preempted from imposing more stringent requirements regarding the training.

10) Authorizes the DOJ to adopt regulations to implement these provisions.

EXISTING LAW:

1) Requires a person to have a firearms dealer license before they can sell, lease, or transfer a firearm, with specified exemptions. (Pen. Code, § 26500 *et seq.*)

2) Provides that a firearm dealer must have a valid federal firearms license, appropriate local business licenses, and a certificate of eligibility from the DOJ, among other things. (Pen. Code, § 26700.)

3) Provides that a license to sell firearms is subject to forfeiture for any violation of a number of specified prohibitions and requirements, with limited exceptions. (Pen. Code, § 26800.)

4) Prohibits a dealer from delivering a firearm unless the person receiving the firearm presents to the dealer a valid firearm safety certificate, or, in the case of a handgun, an unexpired handgun safety certificate, and requires the dealer to retain a photocopy of the certificate as proof of compliance with this section. (Pen. Code, § 26840, subd. (a).)

5) Provides that a firearm dealer shall require every agent or employee who handles, sells or delivers firearms to obtain and provide to the dealer, a certificate of eligibility from the DOJ verifying that the agent or employee is not prohibited from acquiring or possessing firearms. (Penal Code §26915(a).)

6) States that a firearm dealer must prohibit any agent who they know, or reasonably should know, is a person prohibited from possessing a firearm, from coming into contact with a firearm, as specified. (Pen. Code, § 26915, subd. (e).)

7) Prohibits anyone, including firearm dealers, from giving a firearm to a person who they have cause to believe is a person prohibited from possessing a firearm. (Pen. Code, § 27500.)

8) Prohibits anyone, including firearm dealers, from giving a firearm to a person who they know, or have cause to believe, is not the actual purchaser or transferee of the firearm, or who may subsequently transfer the firearm in order to circumvent firearm transfer laws. (Pen. Code, § 27515.)

9) Prohibits anyone from acquiring a firearm for the purpose of giving it to a person under 21 years of age or to evade conducting the transfer through a firearm dealer. (Pen. Code, § 27520.)

10) Requires, with exception, that any time when the licensee is not open for business, all inventory firearms must be stored in the licensed location. All firearms must be secured using one of the following methods as to each particular firearm:

    a) Store the firearm in a secure facility that is a part of, or that constitutes, the licensees business premises;

    b) Secure the firearm with a hardened steel rod or cable of at least one-eighth inch in diameter through the trigger guard of the firearm. The steel rod or cable shall be secured with a hardened steel lock that has a shackle. The lock and shackle shall be protected or shielded from the use of a bolt cutter and the rod or cable shall be anchored in a manner that prevents the removal of the firearm from the premises; or,

    c) Store the firearm in a locked fireproof safe or vault in the licensees business premises. (Pen. Code, § 26890, subd. (a).)

11) Defines a "secure facility," for the purposes of firearms dealers, as a building that satisfies the certain requirements, such as having steel perimeter doorways, steel-barred windows, and other specified structural security features. (Pen. Code, § 17110.)

12) Requires, commencing January 1, 2024, firearms dealers to have digital video surveillance systems that record for 24 hours a day, have audio, and keep recordings for a minimum of one year, among other things. (Pen. Code, § 26806.)

13) States that no permit or license to purchase, own, possess, or carry, shall be required of any adult citizen unless they are prohibited from possessing a firearm. (Pen. Code, § 25605.)

FISCAL EFFECT: Unknown.

COMMENTS:

1) **Author's Statement**: According to the author, "To aid the state's efforts to end gun violence, this bill will help to reduce the proliferation of guns in communities across California by requiring federally licensed gun dealers to undergo mandatory training to prevent theft, fraud, and illegal purchases. Many other industries require training to reduce harm to the public, and the firearm industry should be no exception. This training would enhance protections against illegal firearm purchases and put in place responsible sales practices to ensure that every legal gun sale is thoroughly scrutinized by the person processing the transaction. Giving firearm dealers the tools to spot theft or fraudulent purchases, dealers can bolster our ability to prevent illegal firearm sales that too often lead to gun violence and other nefarious activities."

2) **Gun Store Thefts and Straw Purchases**: Thefts from licensed gun retailers have been a persistent problem in California. In 2015, according to data compiled by the ATF and California DOJ, more than 400 guns were reported stolen from gun stores. The following year, the Sacramento area alone saw five gun store thefts in a period of less than three months, during which more than 200 guns were stolen. *("Gun Stores in Northern California Getting Hit Harder by Thieves."* NBC Bay Area. 1 November 2016. <https://www.nbcbayarea.com/news/local/gun-stores-in-northern-california-getting-hit-harder-by-thieves/2010754/#ixzz4aandO02M> [as of Jun. 16, 2023].) Many of these thefts involved the perpetrators ramming vehicles through storefronts, bypassing any security measures. Between 2012 and 2019, 1,937 guns were reported stolen from federally licensed gun dealers in California, the 7th highest rate of theft for any state during that period. (The Center for American Progress. *"Gun theft in the United States: A state-by-state analysis."* (hereafter *Center for American Progress*) (Mar. 4, 2020.) <https://www.americanprogress.org/article/gun-theft-united-states-state-state-analysis/> [as of Jun. 16, 2023].) However, the rate of gun store thefts seems to have tapered slightly in recent years since peaking in 2016 (690), with 208 reported thefts in 2021. (*"Federal Firearms Licensee Theft/Loss Report."* Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF). January 1, 2021 – December 31, 2021. <https://www.atf.gov/resource-center/federal-firearms-licensee-theftloss-report-2021> [as of Jun. 16, 2023]; *Center for American Progress*.)

   Another practice contributing to the illicit gun market is "straw purchasing," the illegal purchase of a firearm by one person for another. Data compiled by Giffords Law Center to Prevent Gun Violence illustrates the problem:

   > "Data from a national survey of firearm licensees suggests that there are more than 30,000 attempted straw purchases each year. A representative survey found that more than two-thirds of dealers experienced at least one attempted straw purchase in the year preceding the survey. Researchers have also found that gun dealers are willing to make gun sales under conditions that suggest straw purchases. In one investigation, one in five gun sellers were willing to sell guns to people explicitly asking to buy firearms on behalf of someone else." (*Trafficking & Straw Purchasing*. Giffords Law Center. <https://giffords.org/lawcenter/gun-laws/policy-areas/crime-guns/trafficking-straw-

purchasing/#:~:text=Data%20from%20a%20national%20survey,the%20year%20preceding%20the%20survey> [as of Jun. 16, 2023].)

Existing California law makes it illegal for any corporation, person or dealer to sell, loan or transfer a firearm to anyone they know or have cause to believe is not the actual purchaser or the person actually being loaned the firearm, if they know that the firearm is to be subsequently sold or transferred in violation of various requirements. (Pen. Code, § 27515.) Existing law also prohibits a person from acquiring a firearm with the intention of selling, loaning, or transferring it in violation of the requirement that private sales or transfers be conducted through a licensed dealer. (Pen. Code, § 27520(b).) While existing law does impose certain requirements on firearm dealers, it does not require firearm dealers to take trainings that would assist them in further securing inventory or determining when a prospective purchaser may intend to break the law.

Although a great deal of guns used in crimes nationwide are stolen from private citizens (approximately 1 million out of 1.4 million crime guns successfully traced were stolen from a private citizen in 2017-2021) this bill would focus on the less frequent, but just as pernicious, thefts and straw purchases from firearm dealers. (ATF. *National Firearms Commerce and Trafficking Assessment (NFCTA): Crime Guns – Volume Two*. (Jan. 11, 2023) <https://www.atf.gov/firearms/national-firearms-commerce-and-trafficking-assessment-nfcta-crime-guns-volume-two> [as of Jun. 19, 2023] at Part III p. 1-2, and Part V p. 2.) This bill seeks to curb gun store theft and straw purchasing proactively via mandatory training for licensees and their employees on these practices and how to identify them among potential buyers.

3) **Preemption and Firearm Dealer Licensing Requirements**: Preemption occurs when a higher level of government removes regulatory power from a lower level of government. Under article XI, section 7 of the California Constitution, a county or city is allowed to create and enforce all local, police, sanitary, and other ordinances within its jurisdictional limits so long as it does not conflict with state laws. A conflict can occur if the local legislation if it duplicates, contradicts, or enters an area fully occupied by general law. (*Sherwin-Williams Co. v. City of Los Angeles* (hereafter *Sherwin-Williams*) (1993) 4 Cal.4th 893, 897-898.)

Relevant to this bill, preemption is where the state has expressly manifested its intent to "fully occupy" an area of law. (*Sherwin-Williams* 4 Cal.4th at 898.) This is because, in 1969, California created a statute stating that the Legislature intended,

> "to occupy the whole field of regulation of the registration or licensing of commercially manufactured firearms as encompassed by the provisions of the Penal Code, and such provisions shall be exclusive of all local regulations, relating to the registration or licensing of commercially manufactured firearms…"
>
> (Gov. Code, § 53071.)

Case law reviewing gun law preemption cases have indicated that the Legislature preempted discrete areas of gun regulation rather than the entire field of gun control. (*Great Western Shows v. County of Los Angeles* (hereafter *Great Western*) (2002) 27 Cal.4th 853, 861.)

Previous case law regarding county ordinances and firearm dealers seem to indicate when it comes to licensing, counties are preempted for the most part, depending on whether state laws already cover the topic. (*Fiscal v. City and County of San Francisco* (2008) 158 Cal.App.4th 895, 911; *Suter v. City of Lafayette* (herafter *Suter*) (1997) 57 Cal.App.4th 1109, 1124-25.) For example, a city may have the ability to confine firearm dealers to certain commercially zoned areas, but may not regulate firearm storage requirements already covered by state law. (*Great Western, supra,* 27 Cal.4th at 863 [citing *Suter, supra,* 57 Cal.App.4th at 1118-1119].)

This bill would require the DOJ to create a training and certification framework for firearm dealers, and would also allow local authorities to make more stringent requirements regarding the training. By allowing local authorities to make more stringent requirements, this bill would create an exception from preemption language in Government Code Section 53071.

One important question is whether allowing local authorities to come up with an additional licensing training course is a prudent choice. First, would the course created by the DOJ not be enough to properly train firearm dealers? Furthermore, would this allow for a local authority to require too stringent of a course that ultimately drives out firearm dealers in their jurisdiction? Similar tactics have been used before and led to case law unfavorable to gun control measures. (*Teixeira v. City of Alameda* (2017) 873 F.3d 670.)

4) **Argument in Support**: According to the bill's sponsor, *Brady United Against Gun Violence*, "Gun dealers play the critical role of gatekeepers, including using the Brady Background Check System to confirm the eligibility of potential gun purchasers, and their conduct has a direct bearing on whether guns are diverted to illegal markets through straw sales or theft, or are made available to individuals who would harm themselves or others. Almost all guns enter circulation through the legal market: built by licensed manufacturers and sold by gun dealers. Illegal guns begin as legal firearms, initially sold by dealers and subsequently funneled into an illegal market, often through straw purchases where a person buys a firearm on behalf of another while falsely representing that it is for themselves. Straw purchases, which undermine the background check system, make it more difficult for law enforcement to trace illegal guns, or guns or bullet casings found at crime scenes. Straw purchases are the most frequent type of trafficking channel identified in investigations carried out by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF). Shockingly, ATF inspection reports show that dealers that allow straw purchases are allowed to stay in business more often than not.

"Legal firearms also enter the illegal market through thefts from gun dealer premises that are not adequately secured. According to recent data from ATF, approximately 16,900 firearms are reported lost or stolen from gun dealers each year – with many of these firearms later traced to violent crime. Gun theft is on the rise across the country because stolen guns are easy for criminals to sell. As the chief of the ATF's Intelligence Unit noted: '[g]uns are the hottest commodity out there, except for . . . cold, hard cash.' The threat of stolen guns to public safety is substantial. Most stolen guns are recovered in connection with crime in cities near the location from where they were stolen. ATF expressed concerns about persistent theft from licensed dealers in 2018, calling it one of the agency's primary 'external challenges.' Without action to require dealers to implement safe business practices, this trend will continue.

"Despite these substantial risks and the fact that gun dealers can play a critical role in preventing violence in our communities, they are not sufficiently regulated. The ATF considers dealers to be "the first line in maintaining the security and lawful transfer of firearms" but it merely issues guidance on safe business practices that dealers can adopt on a voluntary basis and it provides almost no oversight of those business practices. For example, there are no federal laws or regulations that require gun dealers t or train their employees on recognizing signs of illegal activity..

"While most Americans have been touched by gun violence in some way, communities of color are disproportionately impacted by this epidemic. Negligent, irresponsible, and illegal conduct by gun dealers has immense consequences, especially for communities of color that bear the heaviest burden of gun violence. Every year, hundreds of thousands of guns used in crime are recovered and traced by law enforcement. Tens of thousands of guns are also trafficked across state lines, often from states with weak laws to states with much stronger laws. These guns do not just appear on America's streets. Appropriate conduct by gun dealers and their employees is critical to keeping guns out of impacted communities. According to CDC data, 89 percent of gun homicides take place in urban settings, and 78 percent of gun homicide victims are Black or Hispanic.

"The role that gun dealers and their employees can play in preventing gun violence cannot be overstated. This bill simply requires gun dealer training to ensure that dealers are trained on the tools they have to prevent gun trafficking and understand their obligation to engage in responsible business practices. Specifically, this bill will require firearm retailers and their employees to complete regular training created and overseen by the California Department of Justice to prevent illegal sales and enhance their business practices. This is not burdensome and it is common sense. In fact, a similar requirement passed last year in New York. This legislation is critical to curbing dangerous sales, preventing guns from being diverted into the criminal market and reducing the likelihood of straw purchases, theft, burglary, and loss of inventory."

5) **Argument in Opposition**: According to the *California Rifle & Pistol Association*, "The author is quoted as stating in a January 25, 2023, press release, 'We have got to do something to reduce the gun violence in this country. While this bill will not end gun violence, it will help to reduce it, by requiring gun dealers to undergo training to prevent theft, fraud, and illegal purchases.' This bill as stated will have no demonstrable impact on gun violence as numerous national studies have shown that criminals do not follow the law, and do not purchase firearms legally.

"Federal Firearms License dealers already take extensive training through the National Shooting Sports Foundation (NSSF) which provides annual Firearm Industry Compliance education at SHOT Show and online (https://www.nssf.org/articles/2022-firearm-industry-compliance-education/). NSSF also provides straw purchase avoidance training such as 'Strawman: The Customer You Do Not Want – Tactics to Help FFLs Avoid Straw Purchase Sales' which is written by industry experts and former ATF agents. The fact that this is the status quo, demonstrates that the purported significance of this proposed legislation is limited at best.

"The Department of Justice (CADOJ) has repeatedly fallen short of legislative expectations

in implementing laws passed by the legislature over several years. The lack of a stakeholder group providing real-world experience to training designed to protect all Californians is demonstrable. of a bill that is not well thought out. CADOJ has numerous current projects they seem to be unable to meet general performance standards to keep Californians safe.

"CRPA will continue to support sound legislation to reduce crime and get criminals off our streets and out of our communities. Our motto for 150 years has been 'Be Safe' and we will support sound legislation that does so. Making a law to advise FFLs to do what they are already doing does not keep firearms out of the hands of criminals and therefore SB 241 will not deliver on that promise. For the foregoing reasons, the California Rifle & Pistol Association strongly opposes SB 241."

6) **Prior Legislation**: SB 1384 (Min), Chapter 995, Statutes of 2022, among other things, contained provisions substantially similar to this bill. Those provisions were removed in the Assembly Appropriations Committee.

REGISTERED SUPPORT / OPPOSITION:

Support

Brady California (Sponsor)
Brady United Against Gun Violence
City of Alameda
City of Alhambra
City of Monterey Park
County of Los Angeles Board of Supervisors
Everytown for Gun Safety Action Fund
Initiate Justice (UNREG)
Los Angeles County
Los Angeles County District Attorney's Office
Prosecutors Alliance California
Women for American Values and Ethics Action Fund

Opposition

California Rifle and Pistol Association, INC.
Gun Owners of California, INC.

Analysis Prepared by: Mureed Rasool / PUB. S. / (916) 319-3744

Amended Mock-up for 2023-2024 SB-241 (Min (S))

Mock-up based on Version Number 98 - Amended Senate 5/18/23
Submitted by: Mureed Rasool, Assembly Public Safety Committee

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

SECTION 1. Section 26920 is added to the Penal Code, to read:

26920. (a) Commencing July 1, 2025, every licensee, and every employee thereof who handles or processes the sale, loan, or transfer of firearms or ammunition in the course of their normal duties, shall annually complete the training and certification described in subdivision (c).

(b) Every licensee shall maintain records of certification for all employees on the business premises and shall make these records available to any agent of the department or a licensing authority conducting an inspection of the licensee's premises.

(c) (1) The department shall, by no later than January 1, 2025, develop and implement a course of training for licensees and their employees who handle or process the sale, loan, or transfer of firearms or ammunition in the course of their normal duties.

(2) The training described in paragraph (1) shall include, without limitation, all of the following:

(A) Federal and state laws governing sales and transfers of firearms and ammunition.

(B) How to recognize and identify straw purchasers and fraudulent activity.

(C) Indicators that a person is attempting to purchase a firearm illegally.

(D) How to recognize and identify indicators that an individual intends to use a firearm for unlawful purposes.

(E) How to recognize and identify indicators that an individual intends to use a firearm for self-harm.

(F) How to prevent theft or burglary of firearms and ammunition.

(G) How to respond to circumstances described in subparagraphs (A) to (F), inclusive, and any applicable reporting requirement.

(H) How to teach consumers rules of firearm safety, including, but not limited to, the safe handling and storage of firearms.

(I) Other reasonable business practices that the department determines will deter gun trafficking or the unlawful use of firearms.

(3) The training shall include an examination with not fewer than 20 questions derived from the course materials and intended to confirm that a course participant has learned the information covered by the course. A participant that answers at least 70 percent of the examination questions correctly shall receive a certificate of completion valid for one year from the date of completion.

(4) In addition to the training course, the department shall prepare supplemental written materials that shall be available to all course participants and shall include, without limitation, all of the following:

(A) An outline of indicators that a prospective firearm transferee may be involved in gun trafficking or straw purchasing, including all of the following:

(i) The person is accompanied by one or more individuals.

(ii) The person is communicating with other individuals by telephone or other means.

(iii) The person is buying multiple firearms.

(iv) The person has been the subject of a crime gun trace.

(v) The person has purchased a firearm in the preceding 30 days.

(vi) The person otherwise indicates that a firearm is being obtained for another person.

(B) How to ascertain whether a prospective firearm purchaser is lawfully purchasing a firearm, including by asking questions of the prospective firearm purchaser.

(C) How to report a suspected fraudulent firearm purchase to the federal Bureau of Alcohol, Tobacco, Firearms and Explosives and to the Department of Justice.

(5) The department shall regularly review the training materials and update them as necessary.

~~(d) This section does not preclude any local authority from requiring a more stringent requirement regarding the training.~~

~~(e)~~ **(d)** The department may adopt regulations for the purpose of implementing this section.

Date of Hearing: June 27, 2023
Counsel: Cheryl Anderson

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

SB 268 (Alvarado-Gil) – As Amended April 25, 2023

SUMMARY: Makes rape of an intoxicated person, as specified, a "violent" felony. Specifically, **this bill**: Makes rape of an intoxicated person a "violent" felony where it is pleaded and proved that the defendant caused the intoxication by administering a controlled substance to the victim without their consent and with the intent to sexually assault them.

EXISTING LAW:

1) Includes within the definition of rape an act of sexual intercourse with a person who is prevented from resisting by an intoxicating or anesthetic substance, or a controlled substance, and this condition was known, or reasonably should have been known by the accused. (Pen. Code, § 261, subd. (a)(3).)

2) Provides that the punishment for all forms of rape is imprisonment in the state prison for three, six or eight years. (Pen. Code § 264.)

3) Prohibits the court from granting probation for rape of an intoxicated person. (Pen. Code, § 1203.065, subd. (a).)

4) Provides that all rape is a "serious" felony. (Pen. Code, §1192.7, subd. (c)(3).)

5) Prohibits plea bargaining in any case in which the indictment or information charges a "serious" felony unless there is insufficient evidence to prove the charge, the testimony of a material witness cannot be obtained, or a reduction or dismissal would not result in a substantial change in sentence. (Pen. Code, § 1192.7, subd. (a)(2).)

6) Provides that any person convicted of a "serious" felony who has previously been convicted of a "serious" felony receives, in addition to the sentence imposed by the court, an additional and consecutive five-year enhancement for each such prior conviction. (Pen. Code, § 667, subd. (a)(1).)

7) States that a conviction of a "serious" or "violent" felony counts as a prior conviction for sentencing under the Three Strikes Law. (Pen. Code, § 667.)

8) Specifies all references to existing statutes in specified portions of the Three Strikes Law, are to statutes as they existed on November 7, 2012. (Pen. Code § 667, subd. (h).)

9) Provides that if a defendant is convicted of a felony offense and it is pled and proved that the defendant has been convicted of one prior "serious" or "violent" offense as defined, the term of imprisonment is twice the term otherwise imposed for the current offense. (Pen. Code §

667, subds. (e)(1); Pen. Code § 1170.12, subd. (c)(1).)

10) Provides that a defendant, who is convicted of a "serious" or "violent" felony offense or a specified sex offense including rape, and it is pled and proved that the defendant has been convicted of two or more prior "violent" or "serious" offenses, the term is life in prison with a minimum term of 25 years. (Pen. Code § 667, subds. (e)(2); Pen. Code § 1170.12, subd. (c)(2).)

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

a) Murder or voluntary manslaughter;

b) Mayhem;

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

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

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

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

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

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

i) Any robbery;

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

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

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

m) Attempted murder;

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

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

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

q) Kidnapping;

r) Assault with intent to commit mayhem or specified sex offenses;

s) Continuous sexual abuse of a child;

t) Carjacking, as defined;

u) Rape or sexual penetration in concert;

v) Felony extortion;

w) Threats to victims or witnesses, as specified;

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

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

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

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

13) Provides that where the new offense is any felony for which probation is not imposed, the court must impose a consecutive one-year term for each prior separate prison term for a sexually violent offense[1] provided that no additional term can be imposed for any prison term served prior to a period of five years in which the defendant remained free of both the commission of an offense which results in a felony conviction, and prison custody or the imposition of a term of jail custody imposed under realignment or any felony sentence that is not suspended. (Pen. Code, § 667.5, subd. (b).)

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

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[1] As defined, a "sexually violent offense" includes any rape committed by force, violence, duress, menace, fear of immediate and unlawful bodily injury on the victim or another person, or threatening to retaliate. (Pen. Code, § 667.5, subd. (b); Welf. & Inst. Code, § 6600.)

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

16) Authorizes the California Department of Corrections (CDCR) to award credits earned for good behavior and approved rehabilitative or educational achievements. (Cal. Const., Art. I, § 32.)

17) Limits the award of presentence conduct credits to 15 percent of actual confinement time on a prison term for a violent felony. (Pen. Code, § 2933.1.)

FISCAL EFFECT: Unknown.

COMMENTS:

1) **Author's Statement**: According to the author, "Senate Bill 268 brings parity to victims of sexual assault. Over the last several years, California has prioritized the rights of rape victims over their perpetrators by increasing sentence enhancements for those who rape their spouses, and by eliminating the code section defining spousal rape altogether. This bill makes rape of an unconscious person a violent felony if the defendant drugged the victim with the intent to sexually assault them. This change is needed because California currently considers rape of an unconscious person "non-violent" – which makes some rapists eligible for early release under Proposition 57."

2) **Current Penalties**: The offense of rape of an intoxicated person already carries very steep sentences. These punishments can often be further enhanced by any number of existing sentence enhancements.

   To begin, any rape conviction is a felony punishable by up to eight years in prison. (Pen. Code, § 261.) Applicable sentence enhancements could be added to that – e.g., if great bodily injury is inflicted, the underlying sentence can be enhanced by three years. (Pen. Code, § 12022.7, subd. (a).) If in committing rape or attempted rape a controlled substance is administered, an additional five years in prison applies. (Pen. Code, § 12022.75, subd. (b).) Further, any person who administers an intoxicating agent with the intent to commit a felony – e.g., rape – is guilty of a felony punishable by 16 months, two years, or three years in state prison. (Pen. Code, § 222.)

   Additionally, all forms of rape are currently a "serious" felony. (Pen. Code, § 1192.7, subd. (c)(3).) Rape accomplished by force, violence or duress, is already a "violent" felony. (Pen. Code, § 667.5, subd. (c)(3).) Moreover, if great bodily injury is inflicted on someone other than an accomplice, or a firearm is used in committing rape of an intoxicated person, it is already a "violent" felony. (Pen. Code, § 667.5, subd. (c)(8).)

   A person who has a conviction for a strike ("serious" or "violent" felony) faces increased prison time for any future felony conviction. Any future felony conviction when a person has a prior conviction for a single strike results in a doubling of the prison sentence. A person, with two prior convictions for strikes faces a minimum sentence of 25 years-to life for a felony conviction, if certain criteria are met. (Pen. Code § 667, subds. (a) and (d)(2)(i); Pen. Code § 1170.12, subd. (c)(2)(A).) Rape of an intoxicated person is already a strike because it

is a "serious" felony.

3) **Proposition 57**: In November 2016, California voters overwhelmingly approved Proposition 57. As relevant here, Proposition 57, authorized earlier parole consideration for people who are serving state prison terms for nonviolent offenses, and gave them more opportunities to earn sentence-reduction credits for good behavior. (https://ballotpedia.org/California_Proposition_20,_Criminal_Sentencing,_Parole,_and_DNA_Collection_Initiative_(2020); see Cal. Const, Art. I, § 32.) For purposes of Proposition 57, "violent" offenses are those specified in Penal Code section 667.5, subdivision (c). (Cal. Code Regs., tit. 15, §§ 3490, subd. (c) & 3495, subd. (c).)

   Importantly, Proposition 57 did not mandate early release for nonviolent offenders. Rather, it provided for early parole consideration.

   > The Amendment does not require that all inmates convicted of nonviolent felonies are subject to immediate release from custody. Rather, those inmates are permitted only early *consideration* by the Board of Parole Hearings, which is charged with determining whether an inmate is suitable for parole. (See, e.g., *In re Perez* (2016) 7 Cal.App.5th 65, 84 [212 Cal. Rptr. 3d 441] [Board of Parole Hearings' core determination is whether a prisoner remains a current threat to public safety].)

   (*Alliance for Constitutional Sex Offense Laws v. Department of Corrections & Rehabilitation* (2020) 45 Cal.App.5th 225, 235-236 [emphasis in original].) Thus, inmates considered for nonviolent parole will only be approved for release if they do not pose a current, unreasonable risk of violence or a current unreasonable risk of significant criminal activity if released.

   Since July 1, 2017, CDCR has made 34,772 referrals of determinately sentenced non-violent offenders to the Board of Parole Hearings (BPH) for this parole process. BPH has reviewed 31,076 referrals on the merits as of February 28, 2023, approving 4,646 incarcerated persons for release (roughly 15%) and denying 26,430. 3,331 referrals have been closed because BPH's jurisdictional review of the incarcerated persons' criminal history and central file revealed they were not eligible for parole consideration. Since July 2019, BPH has conducted 2,581 hearings for indeterminately sentenced nonviolent offenders resulting in 641 grants (roughly 25%), 1,679 denials, and 261 stipulations to unsuitability. (https://www.cdcr.ca.gov/3-judge-court-update/.)

   By adding rape of an intoxicated person to the list of "violent" felonies in Penal Code section 667.5, subdivision (c), this offense would be excluded from the CDCR's nonviolent parole consideration process under Proposition 57. A defendant convicted of this offense would be excluded from this early parole regardless of whether they had also been convicted of a nonviolent felony or currently pose a threat to public safety. (*In re Mohammad* (2022) 12 Cal.5th 518.)

4) **Credit Limitations for Violent Felonies with State Prison Sentences**: Under Penal Code section 2933.1, a defendant convicted of a "violent" felony as defined by Penal Code section 667.5, subdivision (c), has their presentence conduct credits limited to 15 percent of actual confinement time. (Cal. Code Regs., tit. 15, § 3043.1; *People v. Brown* (2012) 54 Cal.4th 314, 321.)

A violent felony conviction also affects post-sentence credits. As previously discussed, Proposition 57 gave incarcerated persons in state prison the ability to earn additional, nonstatutory credits for sustained good behavior and for approved rehabilitative or educational achievements. The increased credit-earning opportunities incentivizes incarcerated people to take responsibility for their own rehabilitation. (https://www.cdcr.ca.gov/proposition57/.) Under CDCR regulations, a "violent" felony limits good conduct credits (GCC) to 33.3 percent of the total incarceration time, as opposed to 50 percent for a non-violent felony. (*Ibid.*)

Additionally, under CDCR regulations, persons convicted of nonviolent crimes earn 66.6 percent GCC while housed in camp or Minimum Support Facility (MSF) settings. People convicted of "violent" crimes, however, earn 50 percent GCC in fire camp settings and 33.3 percent in MSF settings. (See (https://www.cdcr.ca.gov/proposition57/, *supra.*)

By adding this offense to the list of "violent" felonies in Penal Code section 667.5, subdivision (c), this offense would be subject to the "violent" felony credit limitations.

5) **Proposition 20**: Proposition 20 was a ballot initiative of the November 2020 election which, among other things, would have defined 51 crimes and sentence enhancements as violent in order to exclude them from Proposition 57's nonviolent offender parole program. The list included rape by intoxication. Californians voters overwhelming rejected Proposition 20, by almost 62 percent. (https://ballotpedia.org/California_Proposition_20,_Criminal_Sentencing,_Parole,_and_DNA_Collection_Initiative_(2020), *supra.*) Arguably, this bill would ignore the will of the voters.

6) **Increased Penalties and Lack of Deterrent Effect:** The National Institute of Justice (NIJ) has looked into the concept of improving public safety through increased penalties. (https://nij.ojp.gov/about-nij.) As early as 2016, the NIJ has been publishing its findings that increasing punishment for given offenses does little to deter criminals from engaging in that behavior. ("Five Things About Deterrence," NIJ, May 2016, available at: https://www.ojp.gov/pdffiles1/nij/247350.pdf].) The NIJ has found that increasing penalties are generally ineffective and may exacerbate recidivism and actually reduce public safety. (*Ibid.*) These findings are consistent with other research from national institutions of renown. (See Travis, *The Growth of Incarceration in the United States: Exploring Causes and Consequences*, National Research Council of the National Academies of Sciences, Engineering, and Medicine, April 2014, at pp. 130 -150 available at: https://academicworks.cuny.edu/cgi/viewcontent.cgi?article=1026&context=jj_pubs, [as of Feb. 25, 2022].) Rather than penalty increases, the NIJ, advocates for polices that "increase the perception that criminals will be caught and punished" because such perception is a vastly more powerful deterrent than increasing the punishment. ("Five Things About Deterrence," *supra.*)

7) **Argument in Support**: According to the *California District Attorneys Association*, "Under current law, a perpetrator at a college party who chooses to forcibly rape a conscious victim will be defined as a "violent" felony for purposes of sentencing. However, a different perpetrator at the same party who chooses to watch and wait for a victim to pass out from intoxication before sexually assaulting her is defined as "non-violent" for custody credits and for future crimes. Whether penetration is accomplished through physical aggression [force]

or predatory behavior is a distinction without a difference. Both perpetrators seek prey that are vulnerable - disadvantaged by his/her capacity to resist. Both perpetrators represent a danger to the community. Additionally, the aftermath suffered by an unconscious victim or a victim incapable of giving consent due to intoxication is not ameliorated by the absence of memory. Indeed, the fear and terror that accompanies the absence of memory of a known sexual assault should not be viewed as less serious than the fear and terror that a victim experiences during a recalled forcible sexual assault. Both sexual predators should be treated identically under the law."

8) **Argument in Opposition**: According to *American Civil Liberties Union California Action*, "We share your emotional outrage and desire to ensure healing for victims of sexual assault. However, this bill is not necessary as California law already provides significant punishments for these crimes, and these punishments are often already further enhanced by myriad existing sentence enhancements. Although people will serve longer prison sentences under SB 268, this will not increase deterrence nor meaningfully prevent crime by incapacitation. Instead, data show that enhancements increase racial disparities and drive over-incarceration, thus aggravating and exacerbating the root causes of crime.

"When reading what leaders in trauma treatment write, it is notable that punishment is not typically considered an essential element of recovery from sexual assault. In March 2017, UC- San Francisco Trauma Recovery Center (TRC) published its "Integrated, Evidence-Based Approach for Survivors of Violent Crime." In their Goals and Objective section, they wrote:

> "The overarching goal of TRC is to support the healing of the client's emotional and physical wounds along with restoration of their disrupted life circumstances. At the close of treatment, the client's health, broadly defined, will be stabilized and improving. Goals include working toward having safe housing; having an income sufficient to meet their needs; safety from further violence; the emotional health to cope with daily life, including a sense of hope for the future; access to needed physical or behavioral health treatments; incorporating healthy self-care strategies; employment or school, as appropriate; and being meaningfully engaged with others, such as family, church, and community."

"SB 268 takes the wrong approach to public safety as it would contribute to the expansion of the budgets and footprints of our police, jails, and courts, monopolizing resources that would be better used to invest in our communities in ways that would improve mental and physical health, and create economic stability."

9) **Related Legislation**: AB 32 (S. Nguyen) would add felony hate crimes to the list of violent felonies subject to enhanced penalties. AB 32 was not heard in this committee at the request of the author.

10) **Prior Legislation**:

a) AB 27 (Melendez), of the 2017-2018 Legislative Session, would have added specified sex offenses, including rape of an intoxicated person, to the list of violent felonies. AB 27 was held in the Assembly Appropriations Committee.

b) AB 67 (Rodriguez), of the 2017-2018 Legislative Session, would have added sex trafficking and specified sexual assault offenses, including rape of an intoxicated person, to the list of violent felonies. AB 67 was held in the Assembly Appropriations Committee.

c) SB 75 (Bates), of the 2017-2018 Legislative Session, would have created an additional "violent felony" list that includes 20 felonies that are not on the existing list, including rape of an intoxicated person, in order to exclude offenders from Proposition 57's parole provisions and to impose a three-year sentencing enhancement. SB 75 failed passage in the Senate Public Safety Committee.

d) SB 770 (Glazer), of the 2017-2018 Legislative Session, would have created an additional "violent felonies" list with 30 felonies not on the existing list, including rape of an intoxicated person, in order to exclude offenders from Proposition 57's parole provisions. SB 770 was held in the Senate Public Safety Committee.

REGISTERED SUPPORT / OPPOSITION:

Support

Arcadia Police Officers' Association
Association of Regional Center Agencies
Burbank Police Officers' Association
California Association of Highway Patrolmen
California Coalition of School Safety Professionals
California District Attorneys Association
California Police Chiefs Association
California Reserve Peace Officers Association
California State Sheriffs' Association
Chief Probation Officers' of California (CPOC)
City of Ceres Council District 2
City of San Jose
Claremont Police Officers Association
Concerned Women for America
Corona Police Officers Association
Crime Victims Alliance
Culver City Police Officers' Association
Deputy Sheriffs' Association of Monterey County
Fullerton Police Officers' Association
Healthy Alternatives to Violent Environments
Live Violence Free
Los Angeles School Police Officers Association
Murrieta Police Officers' Association
Newport Beach Police Association
Novato Police Officers Association
Orange County District Attorney
Palos Verdes Police Officers Association
Peace Officers Research Association of California (PORAC)
Placer County Deputy Sheriffs' Association

Pomona Police Officers' Association
Riverside Police Officers Association
Riverside Sheriffs' Association
San Diegans against Crime
San Diego Deputy District Attorneys Association
Santa Ana Police Officers Association
Upland Police Officers Association

3 Private Individuals

Opposition

ACLU California Action
California Public Defenders Association
Ella Baker Center for Human Rights
Initiate Justice (UNREG)
San Francisco Public Defender

1 Private Individual

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

Date of Hearing: June 27, 2023
Chief Counsel: Sandy Uribe

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

SB 281 (McGuire) – As Amended May 18, 2023

As Proposed to be Amended in Committee

SUMMARY: Increases the threshold property damage amount for aggravated arson from $8,300,000 to $10,100,000. Specifically, **this bill**:

1) Increases the threshold property damage amount for aggravated arson from $8,300,000 to $10,100,000.

2) Excludes inhabited dwellings from calculation of the threshold amount.

3) Extends the operation of this particular aggravating factor from January 1, 2024 to January 1, 2029.

EXISTING LAW:

1) States that a person who willfully, maliciously, deliberately, with premeditation, and with intent to cause injury to one or more persons, or to cause damage to property under circumstances likely to produce injury to one or more persons, or to cause damage to one or more structures or inhabited dwellings, sets fire to, burns, or causes to be burned, or aids, counsels, or procures the burning of any residence, structure, forest land, or property, is guilty of aggravated arson if one or more of the following aggravating factors exists:

   a) The defendant has been previously convicted of arson on one or more occasions within the past 10 years;

   b) The fire caused property damage and other losses in excess of $8,300,000; or,

   c) The fire caused damage, or the destruction of, five or more inhabited structures. (Pen. Code, § 451.5, subd. (a).)

2) Provides that the courts shall consider the cost of fire suppression in calculating the total amount of property damage and other losses. (Pen. Code, § 451.5, subd. (a)(2)(B).)

3) States the legislature's intent to review the monetary threshold amount within five years to consider the effects of inflation. (Pen. Code, § 451.5, subd. (a)(2)(B).)

4) Punishes a person who is convicted of aggravated arson by imprisonment in the state prison for 10 years to life. (Pen. Code, § 451.5, subd. (b).)

5) States that a person who is sentenced under the aggravating arson factors shall not be eligible for release on parole until 10 calendar years have elapsed. (Pen. Code, § 451.5, subd. (c).)

6) Repeals the monetary threshold factor on January 1, 2024. (Pen. Code, § 451.5, subd. (d).)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "The alarm couldn't be louder. Our state is facing unprecedented, destructive wildfires - 14 of the largest 20 wildfires in California history have occurred just in the last decade. Megafires have threatened the way of life for millions of Californians. Some of these horribly destructive wildfires have been set by arsonists. Such as:

   "The Clayton Fire in Lake County in 2016 burned tens of thousands of acres near Lower Lake and destroyed 300 structures, including 189 homes.

   "The massive five-alarm fire that destroyed a Home Depot in San Jose, causing more than $17 million in damages.

   "The July 2021 fire set by a Clearlake Oaks resident in Lake County that destroyed or damaged 11 buildings.

   "The Hopkins Fire in Mendocino County that destroyed 30 homes and burned 257 acres.

   "SB 281 will ensure law enforcement maintain a valuable deterrent and a necessary penalty to arson-caused fires."

2) **Aggravated Arson Monetary Threshold**: The aggravated arson statute, Penal Code section 451.5, became effective in 1995 through enactment of SB 1309 (Craven), Chapter 421, Statutes of 1994. The original statute contained a five-year sunset provision which stated that the purpose of the provision was to allow the Legislature to consider the effects of inflation on the property damage/losses threshold in the law. At the time of the aggravated arson offense's implementation in 1995, the total monetary amount of property damage and other losses was set at $5 million.

   Because of this, the cost of inflation is to be considered by the legislature within five years when extending the sunset on the statute and/or making changes to the monetary threshold. The statute's sunset and monetary threshold has increased several times since 1995. The most recent sunset extension saw the threshold increase in 2014 from $7 million to $8.3 million in 2018 to account for inflation. According to the U.S. Bureau of Labor Statistics, $5 million in 1994 equates to roughly $10.1 million in 2023. (See CPI Inflation Calculator, https://www.bls.gov/data/inflation_calculator.htm)

   This bill raises the dollar limits required to trigger the statute to account for inflation from $8.3 million to $10.1 million. Additionally, the bill establishes a sunset date of January 1, 2029 for this excessive damage factor.

It should be noted that the sunset date does not apply to the crime of aggravated arson generally; it only applies to the excessive damages/losses factor. If this bill were not enacted, effective January 1, 2024, a person could still be found guilty of aggravated arson based on the other two factors, namely that the defendant had suffered a prior conviction for arson within the past 10 years or that the current offense caused damage to five or more inhabited dwellings.

3) **Research on the Deterrent Effect and Impact on State Prisons**: The author contends the excessive damage factor for aggravated arson is an important law enforcement tool in the fight against arson. The punishment for aggravated arson is 10 years to life in state prison. A person sentenced under the statute is not eligible for parole until 10 calendar years have passed. (Pen. Code, § 451.5, subds. (b) & (c).)

According the U.S. Department of Justice, "Laws and policies designed to deter crime by focusing mainly on increasing the severity of punishment are ineffective partly because criminals know little about the sanctions for specific crimes. More severe punishments do not 'chasten' individuals convicted of crimes, and prisons may exacerbate recidivism." (National Institute of Justice, U.S. Department of Justice, Five Things About Deterrence (June 5, 2016) https://nij.ojp.gov/topics/articles/five-things-about-deterrence)

In a 2014 report, the Little Hoover Commission also addressed the disconnect between science and sentencing – that is, putting away offenders for increasingly longer periods of time, with no evidence that lengthy incarceration, for many, brings any additional public safety benefit. (Little Hoover Commission, Sensible Sentencing for a Safer California (2014) at p. 4 https://lhc.ca.gov/sites/lhc.ca.gov/files/Reports/219/Report219.pdf .) Additionally, the Commission also explained how California's sentencing structure and enhancements contributed to a 20-year state prison building boom: "California policymakers enacted hundreds of laws increasing sentence length, adding sentence enhancements and creating new sentencing laws. The end result was that every new prison the state built was quickly filled to capacity." (*Id.* at p. 9.)

CDCR has informed this committee that from 2013 through 2022 there were the following number of yearly admissions for aggravated arson convictions:

Admission Year	Number of Admissions
2013	2
2014	0
2015	0
2016	0
2017	2
2018	0
2019	0
2020	0
2021	1
2022	0
Total	**5**

It appears that given the few number of admissions to prison for aggravated arson, this law does not have much of a deterrent effect.

4) **Equity Impact of Existing Law**: The provision of law elevating the crime of arson to aggravated arson based on the value of damages and/or costs of fire suppression favors some victims of arson over others, namely wealthy homeowners. For example, a person need only set fire to the house of one person if that house is valued at over $10 million dollars to be charged with aggravated arson, but if the value of the home is less than that, then the offender would have to destroy or damage five or more houses. This has the practical effect of treating fire victims differently, even though loss of one's home is equally devastating no matter the value, and arguable more so for a less economically advantaged person who might not have sufficient fire insurance.

   To address this inequality, as proposed to be amended in committee, this bill would exclude inhabited dwellings from the monetary threshold aggravating factor. Inhabited dwellings would still be considered under the separate subdivision that can elevate an arson to aggravated arson if five or more dwellings are burned.

5) **Argument in Support**: According to CalFire Local 2881, "In 2022 there were more than 150 arson arrests made in the state according to Cal Fire. These crimes are deliberately dangerous to our communities and costly to our budget.

   "SB 281 would increase the dollar amount of property damages and other losses required to be an aggravating factor to $10,000,000. The bill would extend the operation of the former aggravated arson offense until January 1, 2029.

   "This bill is needed to hold arsonists accountable for their crimes. These are egregious and untenable actions. Extending the operation of the former aggravated arson offense until January 1, 2029, will do just that."

6) **Prior Legislation**:

   a) SB 896 (McGuire), Chapter 619, Statutes of 2018, extended the operation of the aggravated arson offense until January 1, 2024, and increased the threshold of property damage and other losses constituting an aggravating factor for aggravated arson to $8,300,000.

   b) SB 930 (Berryhill), Chapter 481, Statutes of 2014, extended the sunset on the threshold damage provisions of the aggravated arson statute until January 1, 2019 and increased the threshold amount of property damage to $6.5 million.

   c) AB 27 (Jeffries), Chapter 71, Statutes of 2009, extended the sunset on the threshold damage provisions of the aggravated arson statute until January 1, 2014 and increased the threshold amount of property damage to $7 million.

   d) AB 1907 (Pacheco), Chapter 135, Statutes of 2004, extended the sunset on the threshold damage provisions of the aggravated arson statute until January 1, 2010 and increased the

threshold amount of property damage from $5 million to $5.65 million.

e) SB 555 (Karnette), Chapter 518, Statutes of 1999, reinstated the $5 million damages provision for the crime of aggravated arson and extended the sunset date.

f) SB 1309 (Craven), Chapter 421, Statutes of 1994, enacted the aggravated arson statute.

REGISTERED SUPPORT / OPPOSITION:

Support

Cal Fire Local 2881
California District Attorneys Association
California State Sheriffs' Association
Lake County District Attorney's Office
Lake County Sheriff's Office
National Insurance Crime Bureau
Peace Officers Research Association of California (PORAC)
Sonoma County Board of Supervisors
Sonoma County District Attorney

Opposition

None submitted.

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

Amended Mock-up for 2023-2024 SB-281 (McGuire (S) , Stern (S))

Mock-up based on Version Number 98 - Amended Senate 5/18/23
Submitted by: Sandy Uribe, Assembly Public Safety Committee

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

SECTION 1. Section 451.5 of the Penal Code, as amended by Section 1 of Chapter 619 of the Statutes of 2018, is amended to read:

451.5. (a) A person who willfully, maliciously, deliberately, with premeditation, and with intent to cause injury to one or more persons, or to cause damage to property under circumstances likely to produce injury to one or more persons, or to cause damage to one or more structures or inhabited dwellings, sets fire to, burns, or causes to be burned, or aids, counsels, or procures the burning of any residence, structure, forest land, or property, is guilty of aggravated arson if one or more of the following aggravating factors exists:

(1) The defendant has been previously convicted of arson on one or more occasions within the past 10 years.

(2) (A) The fire caused property damage and other losses in excess of ten million **one hundred thousand** dollars ~~($10,000,000).~~**($10,100,000), exclusive of damage to, or destruction of, inhabited dwellings.**

(B) In calculating the total amount of property damage and other losses under subparagraph (A), the court shall consider the cost of fire suppression. It is the intent of the Legislature that this paragraph be reviewed within five years to consider the effects of inflation on the dollar amount stated herein.

(3) The fire caused damage to, or the destruction of, five or more inhabited ~~structures~~ **dwellings**.

(b) A person who is convicted under subdivision (a) shall be punished by imprisonment in the state prison for 10 years to life.

(c) A person who is sentenced under subdivision (b) shall not be eligible for release on parole until 10 calendar years have elapsed.

(d) This section shall remain in effect only until January 1, 2029, and as of that date is repealed.

SEC. 2. Section 451.5 of the Penal Code, as amended by Section 2 of Chapter 619 of the Statutes of 2018, is amended to read:

451.5. (a) A person who willfully, maliciously, deliberately, with premeditation, and with intent to cause injury to one or more persons, or to cause damage to property under circumstances likely to produce injury to one or more persons, or to cause damage to one or more structures or inhabited dwellings, sets fire to, burns, or causes to be burned, or aids, counsels, or procures the burning of any residence, structure, forest land, or property, is guilty of aggravated arson if either of the following aggravating factors exists:

(1) The defendant has been previously convicted of arson on one or more occasions within the past 10 years.

(2) The fire caused damage to, or the destruction of, five or more inhabited structures.

(b) A person who is convicted under subdivision (a) shall be punished by imprisonment in the state prison for 10 years to life.

(c) A person who is sentenced under subdivision (b) shall not be eligible for release on parole until 10 calendar years have elapsed.

(d) This section shall become operative on January 1, 2029.

SEC. 3. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.

Date of Hearing: June 27, 2023
Counsel: Liah Burnley

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

SB 309 (Cortese) – As Amended May 18, 2023

SUMMARY: Affords the right to exercise religious freedom to incarcerated persons, including accommodations for religious grooming, clothing, and headwear. Specifically, **this bill**:

1) Adds to the list of civil rights afforded to persons sentenced to imprisonment in a state prison or county jail for a felony the right to exercise religious freedom, including accommodations for religious grooming, clothing, and headwear. This includes the ability to access, or purchase, religious clothing and headwear, not exceeding the purchase price and normal taxes of the item.

2) States that an individual in custody of a state or local detention facility shall have the right to religious accommodation with respect to grooming, religious clothing, and headwear in observance of their sincerely held religious belief, at all times and throughout the facility, except if in furtherance of a compelling state interest in an immediate threat or specific demonstrable security risk to the facility, staff, or others in custody.

3) States that religious grooming, clothing, and headwear accommodations shall only be denied when doing so would be the least restrictive means of achieving these interests.

4) Requires state and local detention facilities to do all of the following:

    a) During the initial booking, intake, and classification process, facility staff shall ask each individual entering into their custody whether the individual practices a sincerely held religious belief that requires accommodation with respect to grooming, religious clothing, or religious headwear;

    b) The facility shall allow the individual in custody to purchase facility-issued religious clothing and headwear or provide access to facility-issued religious clothing and headwear, as follows:

        i. Access to facility-issued religious clothing and headwear includes, but is not limited to, making available items received by outside donations, or items already issued or provided facilities;

        ii. If unavailable, the facility shall allow the individual to retain their personal religious clothing and headwear until a facility-issued religious clothing and headwear can be accessed or purchased; and,

iii. If purchased by an individual in custody, the price of facility-issued religious clothing and headwear shall not exceed the purchase price and normal taxes of the items.

c) The facility shall not require an individual's hair or beard be trimmed or cut during the booking, intake, or classification process and shall allow the individual in custody to maintain their hair and beard length according to their sincerely held religious beliefs; and,

d) When an individual in custody wearing religious clothing or headwear is searched, the facility shall do all of the following:

i. Staff shall offer the individual in custody the opportunity to have the search conducted in a private space out of view of members of the opposite gender;

ii. The search shall, if requested, be conducted in a private area by staff of the same gender; and,

iii. Following the search, staff shall return the religious clothing or headwear to the individual in custody.

5) Requires, on or before January 1, 2025, each local detention facility to develop and implement a religious grooming, clothing, and headwear policy for individuals in the custody of a local detention facility in accordance with these provisions. This includes facilities operated under a contract with a private contractor.

6) Defines "religious grooming" to include all forms of head, facial, and body hair that are part of an individual religious observance.

7) Defines "religious clothing and headwear" to include, but is not limited to, a hijab, kufi, scarf, yarmulke, patka, turban, bandana, and modesty belief with regard to fully covering the arms and legs.

EXISTING FEDERAL LAW:

1) Provides that Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. (U.S. Const., 1st Amend.)

2) Guarantees the free exercise and enjoyment of religion without discrimination or preference. (Cal. Const., art. I, § 4.)

3) Establishes the *Religious Land Use and Institutionalized Persons Act* (RLUIPA) which prohibits state and local governments from imposing a substantial burden on the religious exercise of a person confined in a correctional institution, even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person is in furtherance of a compelling government interest and is the least restrictive means of furthering that compelling governmental interest. (42 U.S.C. § 2000cc–3(c).)

EXISTING STATE LAW:

1) States the intention of the Legislature that all prisoners confined in state and local detention facilities shall be afforded reasonable opportunities to exercise religious freedom. (Pen. Code, §§ 4027 & 5009.)

2) Provides that a person sentenced to imprisonment in a state prison or county jail for a felony may during that period of confinement be deprived of such rights, and only such rights, as is reasonably related to legitimate penological interests. (Pen. Code, § 2600, subd. (a).)

3) Provides that each person sentenced to imprisonment in a state prison or to imprisonment in a county jail for a felony has the following civil rights:

   a) To inherit, own, sell, or convey real or personal property;

   b) To correspond, confidentially, with any member of the State Bar or holder of public office;

   c) To purchase, receive, and read any and all newspapers, periodicals, and books accepted for distribution by the United States Post Office, except as specified;

   d) To initiate civil actions, as specified;

   e) To marry;

   f) To create a power of appointment;

   g) To make a will; and,

   h) To receive specified benefits. (Pen. Code, § 2601, subds. (a)-(h).)

4) Prohibits male correctional officers from conducting a pat down search of a female incarcerated person unless the person presents a risk of immediate harm to herself or others or risk of escape and there is not a female correctional officer available to conduct the search. (Pen. Code, § 2644.)

FISCAL EFFECT:

COMMENTS:

1) **Author's Statement**: According to the author, "We have an opportunity, with this bill, to stop incidents of religious persecution in prison. Californians still maintain their basic civil rights when they become incarcerated. We know from research that inmates who are allowed to freely exercise religious practice and dress are less likely to be involved in violent incidents while they are serving their sentence, and less likely to return to jail or prison after their term is completed. In five communities in California, correctional facilities have had to change their policies related to religious practice following lawsuits. Unfortunately, jail officials have forcibly removed religious headscarves after taking people into custody. Currently, each local detention facility in California is left to adopt its own policies and

procedures. SB 309 would create a uniform state policy providing clear guidelines on religious clothing, headwear, and grooming. Muslims, Sikhs, Jews and other religious minorities should preserve their right to religious dress and practice without harm or disruption. This is about preserving dignity and preserving civil rights. When a member of a religious minority is serving time, they should always have the protection to observe their religion."

2) **Codified Civil Rights**: Penal Code section 2601 provides that each person serving a sentence in state prison or county jail for a realigned felony has specified civil rights, including the right to inherit, own, sell, or convey real or personal property, the right to correspond confidentially with any member of the State Bar or public office, the right to marry, and the right to make a will, among others. Penal Code section 2600 provides that a person serving a sentence in state prison or county jail for a realigned felony may be deprived of such rights, and only such rights, as is reasonably related to legitimate penological interests.

   This bill would add the right to exercise religious freedom, including accommodations for grooming and prescribed religious clothing and headwear to the list of enumerated civil rights.

   In addition, Penal Code section 5009 declares the intent of the Legislature that all individuals incarcerated in the state's prisons be afforded reasonable opportunities to exercise religious freedom. Similar language is codified in Penal Code section 4027 which pertains to local detention facilities. This bill further specifies the intent of the Legislature that all individuals incarcerated in the state's prisons and local detention facilities be afforded religious grooming, clothing, and headwear accommodations.

3) **This Bill is Largely Declaratory of Existing Law:** Under federal law, the *Religious Land Use and Institutionalized Persons Act* (RLUIPA) protects the religious rights of all persons "residing in or confined to an institution" including state and local government mental health facilities, correctional facilities, pretrial detention facilities, and juvenile detention facilities, and private prisons and jails that operated on behalf of states or local governments. (42 U.S.C. § 2000cc–3(c).)

   Under RLUIPA, state and local governments are prohibited from imposing a substantial burden on the religious exercise of a person confined in a correctional institution, even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person is in furtherance of a compelling government interest and is the least restrictive means of furthering that compelling governmental interest. (42 U.S.C. § 2000cc–3(c).)

   In *Holt v. Hobbs* (2015) 574 U.S. 352, the first Supreme Court case directly interpreting RLUIPA's substantive provisions, the Supreme Court affirmed that the strict scrutiny analysis required by the statute is "exceptionally demanding" and that the protection it affords is "expansive." (*Id.* at p. 353.) The petitioner in *Holt* was a Muslim prisoner who challenged the Arkansas Department of Corrections' grooming policy, which prohibited beards and provided no exceptions for requests based on religion. (*Ibid.*) The Supreme Court found that the grooming policy violated RLUIPA because Arkansas failed to prove that prohibiting beards was the least restrictive means to further its interests in (1) preventing prisoners from hiding contraband and (2) quickly and reliably identifying prisoners. (*Ibid.*)

The Court found that there were less restrictive means to further these interests. *Holt* makes clear that courts should not accept prison administrators' broad statements about governmental interests as a basis for denying religious accommodations.

In large part, this bill is declaratory of existing law. This bill would prohibit state and local governments from depriving incarcerated persons of their right to religious grooming, religious clothing, and headwear unless there is a compelling state interest interests and such right shall only be denied when doing so would be the least restrictive means of achieving these interests. This is the same exacting standard already required of state and local correctional facilities pursuant to RLUIPA.

4) **Existing Regulations**: Current CDCR regulations outline the department's policies regarding religious property. (Cal. Code of Regs., tit. 15, § 3190.) Incarcerated individuals are generally permitted to possess in their quarters or living area, state-issued property items, and authorized personal and religious property items, based upon privilege group, assigned security level, and/or institution mission. (Cal. Code of Regs., tit. 15, § 3190, subd. (a).) The Religious Personal Property Matrix (RPPM) identifies a list of allowable personal religious property. (Cal. Code of Regs., tit. 15, § 3190, subd. (c).) Regulations specify that local exceptions to the RPPM shall also be identified. (*Ibid.*)

The RPPM applies to all incarcerated individuals. (CDCR, *Religious Personal Property Matrix* (Jan. 1, 2023) at p. 1 <https://www.cdcr.ca.gov/regulations/wp-content/uploads/sites/171/2022/12/Religious_Personal_Property_Matrix_11.28.22.pdf> [June 12, 2023].) The RPPM specifies that religious texts, including but not limited to the Torah, Bible, Quran, and Vedas are authorized for an individual to possess. (*Ibid.*) The RPPM indicates that incarcerated individuals are permitted to wear personal religious clothing, as specified, but includes several prohibitions, including from possessing, using, creating, or wearing personal religious clothing with hoods, pictures, zippers, inside pockets, wearing items with any design, sign, or symbol associated with a security threat group, and wearing obscene items. (*Ibid.*) All items are required to be gray or white, and multicolored items must have gray or white as the predominant color. (*Ibid.*)

While not an exhaustive list, incarcerated individuals in Privilege Group A, B, or C are each permitted to possess: two of an item of religious headgear such as a scarf, hijab, yarmulke, or kufi, among others; one altar cloth; two bowls, chalices, or handwashing cups; one prayer shawl; four ounces of prayer oils; one prayer rug or mat; and one set of a religious medallion and chain. (*Id.* at pp. 3-5.)

Individuals incarcerated in specialized housing units at CDCR, such as Administrative Segregation, face additional restrictions with respect to which religious items they may possess and the number of items they may possess. (*Ibid.*) However, determinations concerning religious personal property for these individuals may be made on a case-by-case basis, based on the individual's behavior, mental health status, and safety or security needs. (*Id.*, at p. 2.) Ultimately, the institution head retains the authority to remove or restrict use of an approved religious item based on a serious threat to facility security or to the safety of the incarcerated population or staff. (*Ibid.*)

Regulations require that an incarcerated individual's hair and facial hair be clean, neatly styled, and groomed, when the person is away from the immediate area of the person's

quarters. (Cal. Code of Regs., tit. 15, § 3062, subd. (a).) Regulations further specify that an incarcerated individual's hair or facial hair may be any length but is prohibited from extending over the eyebrows or covering the person's face. (Cal. Code of Regs., tit. 15, § 3062, subd. (e).) If hair or facial hair is long, it is required to be worn in a neat, plain style, which does not draw undue attention to the individual. (*Ibid.*)

For local detention facilities, Board of State and Community Corrections regulations are less prescriptive and only require facility administrators to "develop written policies and procedures to provide opportunities for incarcerated persons to participate in religious services, practices, and counseling on a voluntary basis." (Cal. Code Regs., tit. 15 § 1072.)

5) **Argument in Support**: According to the *Prosecutors Alliance of California*, "Currently, California does not have a consistent or codified statewide policy for prisons and jails that ensures the right to religious clothing, grooming, and headwear accommodations for individuals in their custody. While the California Department of Corrections and Rehabilitation (CDCR) has policies and regulations that touch on the right to certain religious clothing and headwear, they do not meet the heightened protections provided under federal law. The Board of State and Community Corrections (BSCC) provides no guidance for local detention facilities on religious accommodations, leaving it to the discretion of each local detention facility, city, or county to adopt their own policies. As a result, there are inconsistent policies for religious clothing, headwear and grooming from one facility to another leaving many of those incarcerated unprotected and stripped of their right to practice this dimension of their faith."

6) **Related Legislation**: AB 958 (Santiago), would make the right to personal visits for incarcerated persons a civil right. AB 958 is pending in Senate Public Safety Committee.

REGISTERED SUPPORT / OPPOSITION:

Support

ACLU California Action
Asian Americans Advancing Justice-southern California
California Attorneys for Criminal Justice
California Catholic Conference
California Coalition for Women Prisoners
California Immigrant Policy Center
California Public Defenders Association
Church State Council
Council on American-islamic Relations, California
Ella Baker Center for Human Rights
Hadassah
Jewish Center for Justice
Jewish Community Relations Council of Sacramento
Jewish Community Relations Council of Silicon Valley
Jewish Democratic Club of Silicon Valley
Jewish Democratic Club of Solano County
Jewish Family & Children's Service of Long Beach and Orange County

Jewish Family & Community Services East Bay
Jewish Family Service San Diego
Jewish Family Services of Silicon Valley
Jewish Federation of Greater Santa Barbara
Jewish Federation of The Greater San Gabriel and Pomona Valleys
Jewish Federation of The Sacramento Region
Jewish Long Beach
Jewish Public Affairs Committee
National Association of Social Workers, California Chapter
Progressive Zionists of California
Prosecutors Alliance California
Secure Justice
Sikh American Legal Defense and Education Fund (SALDEF)
Sikh Coalition
St. Vincent De Paul Sacramento, Exodus Project

Opposition
None Submitted.

Analysis Prepared by: Liah Burnley / PUB. S. / (916) 319-3744

Date of Hearing: June 27, 2023
Counsel: Cheryl Anderson

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

SB 359 (Umberg) – As Amended June 19, 2023

SUMMARY: Requires the Department of Corrections and Rehabilitation (CDCR) to compile data related to credits awarded to incarcerated persons, as specified, and to submit an annual report to the Legislature on or before January 1, 2025. Specifically, **this bill**:

1) States the intent of the legislature to require CDCR to compile and analyze data and report that data to the Legislature for the purpose of understanding how credits awarded to persons during incarceration for participation and achievement in activities and programs, including, but not limited to, firefighting, library services, and postsecondary education relate to postrelease recidivism.

2) Requires CDCR to, on or before January 1, 2025, and annually thereafter, compile data related to credits awarded to incarcerated persons and to prepare a report on its findings to the Assembly and Senate Committees on Public Safety.

3) Requires the report to include all of the following:

   a) An analysis of the relationship between each category of credits awarded and the recidivism rates of inmates who received those credits;

   b) A description of how an incarcerated person is assessed to determine whether they should participate in a particular rehabilitation program during their incarceration, and if so, which programs were determined to be appropriate for the inmate and the reasons the programs were determined to be appropriate;

   c) An analysis of the difference, if any, between the recidivism rates of incarcerated persons who do and do not participate in rehabilitative programming during their incarceration;

   d) A description of post-release support programs that individuals receive after incarceration and an analysis of the difference, if any, between the recidivism rates of individuals who do and do not receive post-release support; and,

   e) An analysis of the impact of racial inequality on rehabilitation program outcomes for inmates.

4) Provides that the report shall not include information that would disclose the identity of an incarcerated person.

EXISTING LAW:

1) Provides that an incarcerated person, unless otherwise precluded, is eligible to receive good conduct, rehabilitation, and/or education credits to advance their release date if sentenced to a determinate term or to advance their initial parole hearing date if sentenced to an indeterminate term with the possibility of parole. (Pen. Code, §§ 2931, 2933 & 2933.05; see also 15 CCR § 3043.4 et seq.)

2) Enacts provisions to enhance public safety, improve rehabilitation, and avoid the release of prisoners by federal court order. (Cal. Const. art. I, § 32, subd. (a).)

3) Provides that any person convicted of a nonviolent felony offense and sentenced to state prison shall be eligible for parole consideration after completing the full term for their primary offense. (Cal. Const. art. I, § 32, subd. (a)(1).)

4) Defines "full term for the primary offense" as the longest term of imprisonment imposed by the court for any offense, excluding the imposition of an enhancement, consecutive sentence, or alternative sentence. (Cal. Const. art. I, § 32, subd. (a)(1)(A).)

5) Authorizes the CDCR to award credits earned for good behavior and approved rehabilitative or education achievements. (Cal. Const. art. I, § 32, subd. (a)(2).)

6) States that CDCR shall adopt regulations in furtherance of these provisions, and the Secretary of the Department of Corrections and Rehabilitation shall certify that these regulations protect and enhance public safety. (Cal. Const. art. I, § 32. subd. (b).)

FISCAL EFFECT: Unknown.

COMMENTS:

1) **Author's Statement**: According to the author, "SB 359 would require the Department of Corrections and Rehabilitation to study the best early release credits to determine their relative effectiveness for reducing recidivism.

   "In 2016, Proposition 57 authorized the Department of Corrections and Rehabilitation to award credits to prisoners earned for good behavior and approved rehabilitative or educational achievements. Credits can be awarded for various reasons. They range from completing post-secondary and trade courses, to participating in drug and counseling programs. Credits can also be awarded for generalized good behavior.

   "There is some confusion surrounding how credits are awarded and how to quantify the benefits they provide. One of the best ways to determine the merit of credits awarded is how they affect the rates of recidivism. Programs offered to those incarcerated vary depending on where an individual has been assigned to serve their sentence. Some facilities offer classes in underwater welding, while others may acquire greater access to educational recourses. All of these programs can be exceedingly beneficial for rehabilitation but can leave policymakers and CDCR in the dark regarding which programs contribute to the lowest rates of recidivism. Studying which credits correlate to the highest and lowest rates of recidivism would provide

valuable insight for those seeking out these programs and the policymakers who fund them. California should continue to support and expand the most effective programs in the rehabilitation process.

"SB 359 will help ensure that we support the most valuable rehabilitative programs in our correctional system by studying and determining which early release credits contribute to the lowest rates of recidivism."

2) **Proposition 57 Credit Earning and Rehabilitation:** On November 8, 2016, Californians voted on whether to increase rehabilitation services and decrease the state's prison population by approving Proposition 57. Known as The Public Safety and Rehabilitation Act of 2016, Proposition 57 authorizes CDCR to award sentence credits for rehabilitation, good behavior, and education. It requires CDCR to pass regulations to that effect. (https://vig.cdn.sos.ca.gov/2016/general/en/pdf/complete-vig.pdf.) Voters approved Proposition 57 by a margin of nearly 30 points. (https://ballotpedia.org/California_Proposition_57,_Parole_for_Non-Violent_Criminals_and_Juvenile_Court_Trial_Requirements_(2016).)

   As required, CDCR has since issued regulations to effectuate the proposition's purpose. (Cal. Const., art. I, § 32, subd. (b); 15 CCR § 3043, *et seq.*) Awarding credits is based on several different eligibilities including Good Conduct, Milestone Completion, Rehabilitative Achievement, Educational Merit, and Extraordinary Conduct. (https://www.cdcr.ca.gov/proposition57/.)

3) **State Auditor's Report**: In 2019, the California State Auditor reported that additional oversight was needed to ensure the effectiveness of rehabilitation programs. A significant concern outlined in the report was how CDCR had neither developed any performance measures for its rehabilitation programs, such as a target reduction in recidivism, nor assessed program cost-effectiveness. (https://www.auditor.ca.gov/pdfs/reports/2018-113.pdf.)

   While the CDCR has declined to disclose credit calculations that lead to early inmate release due to inmate privacy, it has released annual recidivism reports for years. These reports stopped in 2016, delayed due to Covid, but thereafter resumed. (https://www.cbsnews.com/sacramento/news/missing-cdcr-prop-57-recidivism-data/.) The CDCR has now released recidivism reports through Fiscal Year 2017-2018. The most recent report includes data on the first cohort of releases who earned credits under Prop 57. It notes the three-year conviction rate for offenders who earned credit was slightly lower than the rate for offenders with no enhanced credit earnings. (https://www.cdcr.ca.gov/research/wp-content/uploads/sites/174/2023/04/Recidivism-Report-for-Offenders-Released-in-Fiscal-Year-2017-18.pdf.)

   This bill would, somewhat in line with the State Auditor's recommendations in its 2019 report, require CDCR to collect data related to credits awarded to inmates and provide the legislature with an annual report, beginning January of 2025, analyzing the relationship between each category of credits awarded and the recidivism rates of persons who received them. It would also require the report to analyze the difference, if any, between the recidivism rates of incarcerated persons who do and do not participate in rehabilitative programming during their incarceration. The bill would provide some minimal guidance on

the specific data to be collected and analyzed to determine the relationship between credits and recidivism. It would require the report to analyze the impact of racial inequality on rehabilitation program outcomes for incarcerated individuals. It would require the report to include data and analysis of post-release support programs and the effect on recidivism. Would this include public assistance programs generally directed at assistance with food, finances, and health, and its impacts on recidivism? It would not appear to include informal support outside of post-release support programs though they may also play a crucial role in recidivism – e.g., family or other social support. There are likely many other nuanced factors not specifically mentioned under this bill that impact recidivism rates and would inform the analysis.

Further, as the State Auditor's report noted, in order to analyze whether CDCR's rehabilitation programs reduce recidivism, CDCR needs to collect additional data and take steps to ensure it delivers specified programs as intended across all its facilities. The report also recommended that CDCR ensure it has reliable tools for assessing the needs of its incarcerated persons. "Research shows that rehabilitation programs can reduce recidivism by changing inmates' behavior *based on their individual needs and risks*." (https://www.auditor.ca.gov/pdfs/reports/2018-113.pdf [emphasis added].) If programs are not being properly implemented, or individuals are not being assessed and placed in appropriate programs based on their individual needs and risks, how can the efficacy of rehabilitation programs on recidivism be accurately measured? This bill would require the report from CDCR to provide a description of how they assess an incarcerated person to determine whether they should participate in a particular rehabilitation program, and if so, which programs were determined to be appropriate for the inmate and the reasons the programs were determined to be appropriate. Would this include description of the actions taken by CDCR to ensure it is using effective assessment tools and analysis of whether these tools are, in fact, reliable? Notably, this bill would not call for any data collection or analysis of whether once assessed and placed in a program, even assuming it is an appropriate program for the individual, the program itself was delivered as intended.

Moreover, while CDCR recently informed this committee it has taken actions to ensure its assessment tools and rehabilitative programs are effective and aid in reducing recidivism, should CDCR be the one to audit and report on its own performance in these areas? On the other hand, as discussed further below, the Public Policy Institute of California (PPIC) is currently undertaking a comprehensive analysis of the efficacy of CDCR's rehabilitation programs.

AB1688 (Calderon), of the 2019-2020 Legislative Session, would have required the CDCR to contract with a researcher to conduct a recidivism analysis of the effectiveness of rehabilitation programs and to submit a report to the Legislature. In vetoing the bill, the Governor stated, in part, "Any such review should be evaluated in the larger context of significant changes occurring in the area of corrections." (https://www.gov.ca.gov/wp-content/uploads/2019/10/AB-1688-Veto-Message.pdf.)

4) **Public Policy Institute of California (PPIC) Analysis of the Efficacy of CDCR Rehabilitation Programs**: According to information recently provided to this committee by CDCR, the department has contracted with PPIC for a multi-year and multi-phased longitudinal research study of the department's rehabilitative programming.

PPIC has been awarded a grant to, over the course of several years, "evaluate every education, employment, and rehabilitative program offered by the CDCR with the intent of understanding the efficacy of these programs. This analysis will be the first of its kind to examine all of the programs offered by one state prison system, characterize who interacted with the programming in the context of the released population over a five-year period, and bridge the gap between reentry research and research of prison programming. One key element PPIC intends to explore is how racial inequality can impact program outcomes." (https://20mm.org/2023/04/11/ppic-analyze-cdcr-educational-programs/.)

According to information provided to this committee by PPIC, "In the summer of 2021, the Public Policy Institute of California (PPIC) entered into agreements with the California Department of Corrections and Rehabilitation (CDCR) to share data and conduct research into prison programming. PPIC's multiyear initiative will evaluate all education (i.e., adult basic education through college, special education, and literacy), prison jobs and job training (i.e., career technical education and workforce development), and rehabilitative (e.g., various cognitive behavioral interventions and substance use treatment) programs offered to CDCR prisoners by examining a five-year cohort of nearly 170,000 individuals released from state prison between 2015 and 2019. PPIC is currently working with CDCR to gather data and understand the processes by which people enroll in, proceed through, and finish programs and to assess how program participation impacts in-prison and post-prison outcomes. As the relationship between prison programs and recidivism is of paramount concern, PPIC has also entered into an agreement with the California Department of Justice to share criminal history and reoffending information for the cohort members. Yet prison programs have other objectives related to employment, education, health, and social relationships. Therefore, the relationship between prison programs and recidivism must be understood in the broader context of the lives and multidomain outcomes of the formerly imprisoned. PPIC is currently negotiating a data sharing agreement with the Employment Development Department and plans to pursue data from other state and national sources to inform this understanding."

Is this bill necessary in light of the comprehensive analysis already being undertaken by PPIC in this area?

5) **Positive Correlation between Rehabilitation Programs and Reduced Recidivism Rates**: Available research does indicate a positive correlation between rehabilitation programs and reduced recidivism rates. One of the most notable interventions is access to higher education opportunities in state prisons that equip inmates with the necessary tools to compete in the job market. Since 2014, all state prisons have offered associate degrees. A handful of bachelor's programs are also offered, mostly through Cal State Universities. Recently, UC Irvine developed the Leveraging Inspiring Futures through Educational Degrees (LIFTED) program. It is the first bachelor's degree completion program in the University of California system for persons incarcerated in prison. Piloted at UC Irvine, LIFTED enables incarcerated individuals to apply to transfer in as juniors and earn a bachelor's degree while serving their sentence. Soon, building on recent admission successes and support from the Legislature, the LIFTED program will be replicated at UC Campuses throughout the state. According to Keramet Reiter, a professor of criminology, law and society and director of the program, "We know that people who earn a college degree in prison have a recidivism rates approaching zero…." (https://www.google.com/search?q=leveraging+inspiring+futures+through+educational+degrees&rlz=1C1GCEA_enUS991US991&oq=leveraging+inspiring+futures+through+education

al+degrees&aqs=chrome..69i57j33i160i395l2.20016j1j4&sourceid=chrome&ie=UTF-8; https://lifted.uci.edu.)

There are also programs through the California Prison Industry Authority (CALPIA), a self-funded state entity that aims to provide real-world job skills to over 6,500 individuals incarcerated in prison. Those who participate and graduate from the program can also receive sentence reductions. CALPIA recently held a graduation ceremony for inmates at the Avenal State Prison who received job certificates. Avenal has poultry, egg production, general fabrication, furniture, laundry and healthcare facility maintenance. Avenal also has administrative, warehouse and maintenance and repairs support functions. By allowing inmates to learn new trades and skill sets, they will also be able to better compete in the job market, similar to those in educational credit programs. "CALPIA proudly reported that individuals who participate in their programs have lower rates of recidivism, compared to those who were qualified to, but did not participate." (https://hanfordsentinel.com/news/local/inmates-at-avenal-state-prison-celebrate-job-certifications-with-calpia-program/article_49742698-c828-539e-8c35-edc45f608f23.html.)

CALPIA also operates a dive school for inmates at the California Institute for Men in Chino. It is a six to 18 month program offering classes of roughly 15 inmates multiple certifications in commercial diving. The school has proven to reduce recidivism rates below 6%, indicating that rehabilitative programs have a positive correlation to recidivism reductions. (https://abc7.com/calpia-dive-school-chino-inmate-corrections/12910029/.)

Moreover, to the extent someone does, in fact, recidivate after participation in one of these programs, the cause(s) could be varied and nuanced circumstances beyond the post-release support programs they receive or racial inequality, as mentioned to be analyzed in this bill. Recidivism could be influenced by circumstances as varied and personal as one's family and other social support, etc.

6) **Argument in Support**: According to the *California District Attorneys Association*, "As you know, since the passage of Proposition 57, CDCR has been given unprecedented authority to award various types of conduct credit to nearly all inmates, including murderers, sex offenders and other violent offenders. Many of the new conduct credits were created through a regulatory process and contradict existing statutory authority limiting the awarding of conduct credits to certain classes of inmates, including those convicted of murder and other violent offenses, as well as those sentenced pursuant to the Three Strikes Act.

"Your bill is an important first step in trying to understand the awarding of credits by requiring CDCR to compile and analyze data, as well as report that data to the Legislature for the purpose of understanding how credits awarded to inmates during incarceration for participation and achievement in activities and programs relate to post-release recidivism."

7) **Argument in Opposition**: None on file.

8) **Related Legislation**: AB 15 (Dixon) states that CDCR records pertaining to an inmates release date and what an inmate did to earn release credits are public records subject to disclosure under the California Public Records Act. AB 15 failed passage in this Committee and was granted reconsideration.

9) **Prior Legislation**:

a) AB 1688 (Calderon), of the 2019-2020 Legislative Session, would have required the CDCR to contract with a researcher to conduct a recidivism analysis of the effectiveness of rehabilitation programs and to submit a report to the Legislature. AB 1688 was vetoed by the Governor.

b) AB 561 (Burke), of the 2019-2020 Legislative Session, would have required CDCR, by January 1, 2022, to complete a statewide evaluation of rehabilitation programs and to report its findings and plan to improve performance measures to the Legislature by July 1, 2022. AB 561 was not heard in this Committee.

c) AB 1929 (Lackey), of the 2017-2018 Legislative Session, would have required the Office of the Inspector General (OIG) and CDCR to evaluate adult inmate and parolee rehabilitation programs. AB 1929 was held in the Assembly Appropriations Committee.

d) AB 900 (Solorio), Chapter 7, Statutes of 2007, created "The Public Safety and Offender Rehabilitation Services Act of 2007," which among other things required CDCR to implement and significantly enhance anti-recidivism programming including substance abuse treatment, mental health care, and academic and vocational education.

REGISTERED SUPPORT / OPPOSITION:

Support

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

Opposition

None on file

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