California State Assembly

PUBLIC SAFETY

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AGENDA

Tuesday, March 23, 2021
1:30 p.m. -- State Capitol, Room 4202

Part III
Bills heard in Alphabetical Order

AB 253 (Patterson) – AB 518 (Wicks)

Date of Hearing: March 23, 2021
Counsel: Matthew Fleming

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

AB 253 (Patterson) – As Introduced January 14, 2021

SUMMARY: Allows a law enforcement agency to publish a petition to humanely euthanize or otherwise dispose of animals or birds who were seized in connection with an arrest for an offense pertaining to illegal animal fighting, in an online or print newspaper, on a social media outlet account belonging to a law enforcement agency or appropriate governmental agency, or on a law enforcement internet website.

EXISTING LAW:

1) Allows an officer making an arrest for offenses related to animal fighting to lawfully take possession of the animals. (Pen. Code § 599aa, subd. (a).)

2) Requires that upon taking possession of the animals, the officer shall inventory the animals seized and question the persons present as to the identity of the owner or owners and requires that the inventory list identify the location where the animals were seized, the names of the persons from whom the animals were seized, and the names of any known owners of the animals. (Pen. Code § 599aa, subd. (b)(1).)

3) Requires the officer to file the inventory list with the magistrate presiding over the criminal case and requires the magistrate to order the seized animals to be held until the final disposition of any charges. (Pen. Code § 599aa, subd. (c).)

4) States that if ownership of the seized animals cannot be determined after reasonable efforts, the officer or other person named and designated in the order as custodian of the animals may, after holding the animals and birds for a period of not less than 10 days, petition the magistrate for permission to humanely euthanize or otherwise dispose of the animals or birds. (Pen. Code § 599aa, subd. (e)(1).)

5) Requires the petition to humanely euthanize or otherwise dispose of the animals to be published for three successive days in a newspaper of general circulation. (*Ibid.*)

6) Requires the magistrate to hold a hearing on the petition not less than 10 days after seizure of the animals, after which the magistrate may order the animals to be humanely euthanized or otherwise disposed of, or to be retained by the officer or person with custody until the conviction or final discharge of the arrested person. (*Ibid.*)

7) Makes it a felony to do any of the following:

a) Own, possess, keep, or train any dog, with the intent that the dog shall be engaged in an exhibition of fighting with another dog;

b) For amusement or gain, cause any dog to fight with another dog, or cause any dogs to injure each other; or,

c) Permit any act in violation of dog fighting, training or injuring to be done on any premises under his or her charge or control, or aids or abet that act. (Pen. Code § 597.5, subd. (a).)

8) Makes it a misdemeanor to knowingly be present, as a spectator, at any place, building, or tenement where preparations are being made for an exhibition of the fighting of dogs, with the intent to be present at those preparations, or knowingly be present at that exhibition or at any other fighting or injuring of dogs. (Pen. Code § 597.5, subd. (b).)

9) Makes it a misdemeanor for any person who, for amusement or gain, causes any bull, bear, or other animal, not including any dog, to fight with like kind of animal or creature, or causes any animal, including any dog, to fight with a different kind of animal or creature, or with any human being, or who, for amusement or gain, worries or injures any bull, bear, dog, or other animal, or causes any bull, bear, or other animal, not including any dog, to worry or injure each other, or any person who permits the same to be done on any premises under his or her charge or control, or any person who aids or abets the fighting or worrying of an animal or creature. (Pen. Code § 597b, subd. (a).)

10) Makes it a misdemeanor for any person who, for amusement or gain, causes any cock to fight with another cock or with a different kind of animal or creature or with any human being; or who, for amusement or gain, worries or injures any cock, or causes any cock to worry or injure another animal; and for any person who permits the same to be done on any premises under his or her charge or control, and any person who aids or abets the fighting or worrying of any cock. ((Pen. Code § 597b, subd. (b).)

11) Makes a second or subsequent conviction of bull, bear, other animal, or cock fighting a misdemeanor or felony (wobbler). ((Pen. Code § 597b, subd. (c).)

12) Makes it a misdemeanor for any person to be knowingly present as a spectator at any place, building, or tenement for an exhibition of animal fighting, or to be knowingly present at that exhibition or knowingly present where preparations are being made for animal fighting. (Pen. Code § 597c).

13) Makes it a misdemeanor for any person to own, possess, keep, or train any bird or other animal with the intent that it be used or engaged by himself or herself, by his or her vendee, or by any other person in an exhibition of fighting. (Pen. Code § 597j.)

14) Authorizes search and arrest warrants for animal fighting offenses. (Pen. Code § 599a.)

15) Defines "newspaper of general circulation" is a newspaper published for the dissemination of local or telegraphic news and intelligence of a general character, which has a bona fide subscription list of paying subscribers, and has been established, printed and published at regular intervals in the State, county, or city where publication, notice by publication, or

official advertising is to be given or made for at least one year preceding the date of the publication, notice or advertisement. (Gov. Code, § 6000.)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: "California's law enforcement officers are responsible for handling the animals illegally used in cockfighting and other animal fights, a process that involves numerous steps and attention to detail. With the advancement of technology and media, continuing to require law enforcement to place these ads in a newspaper of general circulation is a less efficient method in meeting the requirements laid out in the law. AB 253 attempts to modernize the code surrounding cockfighting and other illegal animal fights to more efficiently advertise the publication notice requirements within this area of the law."

2) **Background**: The following information was also submitted by the author: "Illegal rooster fighting, also known as 'cock fighting,' is a highly aggressive gambling sport where two roosters bred for aggression are placed in a small ring and forced to fight to death. This illegal sport takes place all over the state. California's law enforcement officers are responsible for breaking up cockfights and confiscating all property left, which includes the roosters.

   "Once law enforcement personnel break up the cockfight, current law requires them to inventory all confiscated items left, including the birds, and attempt to question those (if any) still present for ownership. If no one comes forward, law enforcement must then do the following:

   (1) Relocate the birds to an appropriate storage facility.

   (2) If no owner is suspected, law enforcement must file a petition with the courts to, after a period no less than 10 days, humanely euthanize the birds or otherwise dispose of them (e.g. an animal preservation group takes possession of them).

   (3) Before disposing of the birds, law enforcement must first advertise, in a newspaper of general circulation (hard copy), the birds and the warning to euthanize unless the owners come forward. If no owner comes forward, law enforcement will euthanize the birds or dispose of them otherwise.

   "Current law on the issue is decades old and explicitly states that the petition to destroy animals or birds used in combat must be published for three consecutive days in only a newspaper of general circulation (hard copy). This statute was implemented long before the advent of online publications and social media, a simpler and more efficient process for law enforcement to advertise these types of petitions. Additionally, newspapers can charge high prices for these type of advertisements (see attached an invoice stating the Fresno Bee charged Fresno County Sheriffs $8,005.86 for one ad).

   "AB 253 would make a technical and minor adjustment to modernize Penal Code Section 599aa dealing with the publication notice requirements of the seizure and destruction of roosters used for cockfighting. Instead of only requiring publication in a "newspaper of

general circulation" (in physical print), this bill will allow the following publishing mediums to be considered for the purposes of satisfying this code requirement: social media outlets, websites belonging to a law enforcement agency or local government entity, and newspaper websites. This bill not only modernize the process for attempting to return the birds back to their owners through advertisements but it will also save law enforcement and ultimately the state money spent on physical ads."

3) **Seizing Animals Involved in Fighting Offenses**: The act of fighting animals for amusement or economic gain is illegal in California. The animals that are most often used in fighting events are dogs and roosters. Under Penal Code Section 597.5, it is a felony to own, keep, or train a dog with the intent that the dog engage in an exhibition of fighting. Penal Code Section 597b criminalizes the fighting of other animals, including roosters (commonly known as cock-fighting).

   When an officer makes an arrest for one of these animal fighting offenses, the problem arises of what to do with the animals. Under California law, if the animals are dogs, the officer must take possession of the animals. In the case of other animals the officer may, and likely will, take possession in order to locate them within a humane storage facility. The officer is then required to file a complaint in court. Pursuant to court order, the animals are placed in the custody of a proper person or place, such as an animal shelter. If the person charged with the offense is convicted, and other ownership of the animals cannot be determined, the animals are to be forfeited and then euthanized or otherwise disposed of. (*See Jett v. Mun. Court* (1986) 177 Cal. App. 3d 664, 669.). Prior to any euthanization or other disposal of the animals, existing law requires that a petition to do so be filed with the court. The petition is also required to be published for three days in a newspaper of general circulation.

4) **The Need for This Bill**: The policy rationale behind requiring law enforcement to publish its intent to humanely euthanize or dispose of animals that have been involved in illegal fighting is to attempt to reach the owner of an animal, thereby giving an opportunity for the animal to be claimed prior to being euthanized. Since owning or possessing animal for the purpose of fighting, and even being present at an animal fight, is illegal in the state of California, the notion that someone will voluntarily expose him or herself to law enforcement in order claim ownership of a fighting animal seems unlikely. The proponents of this bill were unaware of any situation in which the public notice had reunited an animal with its owner, and the opponents of the bill were also unable to provide any such examples.

   Nonetheless, there may be a rare case in which a person has had a bird or dog stolen and somehow that animal winds up being trained to fight, and is later involved in an animal fighting offense and recovered by law enforcement. In that situation, the more people who see a published petition to dispose of the animals, the more likely it is that an owner who lost their pet to the underground world of dog or cock fighting may be able to recover the animal. The ideal policy for publishing such information should therefore be designed to reach as many people as possible. Current law requires that the petition to euthanize animals who were seized from fighting offenses be published in a (print) newspaper of general circulation. This bill proposes to allow law enforcement to publish its intent to euthanize seized animals in one of several different places, including on law enforcement social media accounts or on the law enforcement agency's website.

   Over the years, people have begun to consume their news digitally as opposed to getting it

from print newspapers. According to the Pew Research Center, the circulation of daily newspapers has been on the decline since the early 1990's. (*Newspapers Fact Sheet*, Pew Research Center, July 9, 2019, available at: https://www.journalism.org/fact-sheet/newspapers/, [as of March 9, 2021].) Based on that decline, it is reasonable to assume that print newspapers may no longer reach as many people as an online publication. In addition, the pandemic of COVID-19 appears to have exacerbated the decline of print newspaper subscriptions. (James, *Coronavirus Crisis Hastens the Collapse of Local Newspapers. Here's Why it Matters*, Los Angeles Times, April 17, 2020, available at: https://www.latimes.com/entertainment-arts/business/story/2020-04-17/coronavirus-local-newspapers-struggle, [as of March 9, 2021].) In this sense, transitioning the petition to destroy animals from print newspaper to digital formats may result in more people taking notice of the petition, thereby increasing the likelihood that a person may recover an animal that somehow wound up being involved in an animal fighting exhibition.

Regardless of where the publication is placed, the consistency provided by requiring a public notice of euthanization in exactly one location may be more effective than allowing the notice to be placed in a variety of locations. Under current law, pet owners who have lost an animal and fear that it may have been swept up in an animal fighting ring will know that they must look in the local newspaper for potential information about their pet. The clarity of one place of publication saves a person from having to look at both print and online newspaper publications as well as a multitude of social media accounts as well as the individual law enforcement websites for both the local police and the local county sheriff. In addition, allowing for online publication would decrease the possibility that someone would be made aware of the publication if that person does not have access to internet.

It appears that the impetus for this bill is mostly economic. It is expensive for law enforcement agencies to run print newspaper advertisements for three days prior to disposing of an animal, especially because existing law requires the entire petition to be published word for word. The costs incurred by law enforcement agencies to run these advertisements are in addition to any costs related to storing the animal in an appropriate location. In support of this bill, the sponsor submitted an invoice from the Fresno Bee for more than $8,000 for running a petition to euthanize roosters that were involved in a cock-fighting offense. That cost is reportedly consistent with other charges that the Fresno Bee has required in the past. Should the Legislature continue to require these high-cost advertisements to be run, given the apparent low likelihood of them actually resulting in the reunification of an animal and its owner?

5) **Argument in Support**: According to the bill's sponsor, the *California State Sheriffs' Association*: "The statute that dictates the practice of publicizing the seizure and proposed destruction of roosters used in illegal activities has not been updated for decades. Current law explicitly states that the petition to destroy animals or birds used in combat must be published for three consecutive days in only a newspaper of general circulation. This statute was contemplated long before the advent of online publications and social media.

"This requirement should conform to allow for a news publication other than a "newspaper of general circulation" (in physical print). Publications that should be considered include but are not limited to social media outlets and/or internet publication through newspaper companies that are of general circulation."

6) **Argument in Opposition**: According to *California News Publishers Association*:

"**First, AB 253 presumes a media reality that does not currently exist in California.**

AB 253 contemplates reliance on government websites and social media as a first resort for public information. Information consumption in the State contradicts this belief. More than 10 million Californians rely on home-delivered print newspapers or their e-editions for news. The weekly circulation, unique web visitor counts and social media following of newspapers is a thousand-fold police websites. The fact is, with AB 253, most people won't get notices and pet owners will have many fewer chances to be reunited with their beloved companions.

Second, AB 253 relies too heavily on broadband connectivity.

As the Committee is well aware, there are 24 bills introduced in this session which try to ensure adequate broadband coverage in the state. The volume of proposed legislation serves to affirm the inadequacy. Moreover, BroadBandNow.com reports that 30% of the state's population does not have access to low cost, high speed internet facilities. This problem is particularly acute in rural areas of the state that depend on print publications for their news. If AB 253 proceeds, more pets could die because owners have not been adequately notified.

Third, AB 253 does not live up to the independence standard envisioned by public notices.

Newspaper public notices constitute a forum that is independent of the government. It gives an agency of government control over outcomes without adequate assurances that the public's right to know has been accounted for. However, a person who visits law enforcement sites or uses social media will not have any idea what to look for other than that information they are seeking. The State should not be a party to such potential limitations on freedom of information.

Finally, AB 253 could impact the entire system of public notices

AB 253 sets a dangerous precedent by dismissing a public notice statutory scheme in effect since 1943 and today spans more than 1,7000 sections of code. AB 253's language states the notice may be published, "in a newspaper, online or in print, of general circulation," which could impact the system of public notices. The term "newspaper of general circulation" is a term of art that applies only to printed publications that have been legally deemed to distribute substantially to subscribers in the area. A twitter account cannot say the same.

Newspapers of general circulation remain the most effective means to convey public notices because they are legally deemed to reach a "substantial" number of readers in the area. To pass a bill with language that indicates there could be a newspaper of general circulation online would open the door to changes in this entire statutory scheme informing the public of important information since 1943."

7) **Prior Legislation**:

a) AB 3035 (Patterson), of the 2019 – 2020 Legislative Session, was identical to this bill. AB 3035 died in the Senate Public Safety Committee.

b) AB 1553 (Fong), Chapter 7, Statutes of 2019, replaced terms such as the "pound" and "destroy animals" with references to "animal shelter" and "humanely euthanize animals."

c) SB 196 (Knight), Chapter 422, Statutes of 1997, established the requirement that a petition to euthanize animals seized by law enforcement be published in a newspaper of general circulation.

REGISTERED SUPPORT / OPPOSITION:

Support

American Society for The Prevention of Cruelty to Animals
California State Sheriffs' Association
Fresno County Sheriff

Oppose

American Civil Liberties Union/northern California/southern California/san Diego and Imperial Counties
California Black Media
California News Publishers Association

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

Date of Hearing: March 23, 2021
Counsel: Matthew Fleming

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

AB 262 (Patterson) – As Amended March 15, 2021

SUMMARY: Provides additional legal rights when a victim of human trafficking petitions the court to vacate a conviction for a non-violent crime that was committed while the petitioner was a victim of human trafficking. Allows a person, when petitioning to vacate a non-violent conviction because the petitioner was a victim of human trafficking and the conviction was a direct result of being a victim of human trafficking, to appear at the court hearings by counsel and removes time limitations to bring the petition. Specifically, **this bill**:

1) Prohibits a court from refusing to hear the petition to vacate a non-violent conviction committed while the petitioner was the victim of human trafficking on the basis of the petitioner's outstanding fines and fees or the petitioner's failure to meet the conditions of probation.

2) Specifies that with the exception of victim restitution, the collection of fines imposed as a result of a nonviolent offense that is the subject of the petition be stayed while the petition is pending.

3) States that if the petition to vacate a non-violent conviction because the petitioner was a victim of human trafficking and the conviction was a direct result of being a victim of human trafficking is unopposed, the petitioner may appear at all hearings on the petition, if any, by counsel.

4) Specifies that if the petition to vacate a non-violent conviction because the petitioner was victim of human trafficking and the conviction that was a direct result of being a victim of human trafficking is opposed and the court orders a hearing for relief on the petition, the petitioner shall appear in person unless the court finds a compelling reason why the petitioner cannot attend the hearing, in which case the petitioner may appear by telephone, videoconference, or by other electronic means established by the court.

5) States that a petition can be made and heard at any time after the person has ceased to be a victim of human trafficking, or at any time after the petitioner has sought services for being a victim of human trafficking, whichever occurs later.

6) Provides that the right to petition for relief on a non-violent conviction, as described in this bill, does not expire with the passage of time.

7) Provides that if the court issues an order for vacatur relief it shall also order any law enforcement agency that has taken action or maintains records because of the offense including, but not limited to, departments of probation, rehabilitation, corrections, and parole.

8) Requires that, if the court issues an order for vacatur relief, it shall also order specified entities to seal and destroy the arrest records within one year of the date of arrest, or 90 days from the date the court order for vacatur relief is granted, whichever is later.

9) Requires agencies who are ordered to seal and destroy their records to comply with the order within one year of the date of the court order.

10) Requires that, if the court issues an order for vacatur relief, it shall also provide the petitioner and their counsel with a copy of any form the court submits to any agency related to the sealing and destruction of arrest records.

11) Requires that, if the court issues an order for vacatur relief, order the expungement of the petitioner's searchable database profile and destruction of any DNA sample maintained by the Department of Justice's (DOJ) DNA and Forensic Identification Database and Databank Program.

12) Requires that the DOJ destroy the DNA sample within one year of the court order and notify the petitioner and petitioner's counsel that the department has complied with the order to destroy petitioner's DNA specimen and sample and expunge the petitioner's searchable database profile from the DOJ's DNA and Forensic Identification Database and Databank Program by the applicable deadline.

EXISTING LAW:

1) Provides that if a person was arrested for, or convicted of any nonviolent offense committed while he or she was a victim of human trafficking, the person may petition the court vacate their convictions and arrests. (Pen. Code, § 236.14, subd. (a).)

2) Requires the petitioner to establish, by clear and convincing evidence, that the arrest or conviction was the direct result of being a victim of human trafficking. (Pen. Code, § 236.14, subd. (a).)

3) States that the petition to vacate conviction or arrest shall be submitted under penalty of perjury and shall describe all of the available grounds and evidence that the petitioner was a victim of human trafficking and the arrest or conviction of a nonviolent offense was the direct result of being a victim of human trafficking. (Pen. Code, § 236.14, subd. (b).)

4) Provides that if opposition to the petition is not filed by the applicable state or local prosecutorial agency, the court shall deem the petition unopposed and may grant the petition. (Pen. Code, § 236.14, subd. (d).)

5) States that if the petition is opposed or if the court otherwise deems it necessary, the court shall schedule a hearing on the petition. The hearing may consist of the following:

   a) Testimony by the petitioner, which may be required in support of the petition;

   b) Evidence and supporting documentation in support of the petition; or,

c) Opposition evidence presented by any of the involved prosecutorial agencies that obtained the conviction. ((Pen. Code, § 236.14, subd. (f)(1)-(3).)

6) Allows the court after considering the totality of the evidence presented, to vacate the conviction and expunge the arrests and issue an order if it finds all of the following:

   a) That the petitioner was a victim of human trafficking at the time the nonviolent crime was committed;

   b) The commission of the crime was a direct result of being a victim of human trafficking;

   c) The victim is engaged in a good faith effort to distance himself or herself from the human trafficking scheme; and,

   d) It is in the best interest of the petitioner and in the interests of justice. (Pen. Code, § 236.14, subd. (g)(1)-(4).)

7) States that the order vacating a conviction or expunging and arrest shall do the following:

   a) Set forth a finding that the petitioner was a victim of human trafficking when he or she committed the offense;

   b) Set aside the verdict of guilty or the adjudication and dismiss the accusation or information against the petitioner; and,

   c) Notify the Department of Justice (DOJ) that the petitioner was a victim of human trafficking when he or she committed the crime and of the relief that has been ordered. (Pen. Code, § 236.14, subd. (h)(1)-(3).)

8) Specifies that a petitioner shall not be relieved of any financial restitution order that directly benefits the victim of a nonviolent crime, unless it has already been paid. (Pen. Code, § 236.14, subd. (i).)

9) Specifies that when the court orders the conviction vacated, the court shall also order the law enforcement agency having jurisdiction over the offense, DOJ, and any law enforcement agency that arrested the petitioner or participated in the arrest of the petitioner to seal their records of the arrest and the court order to seal and destroy the records for three years from the date of the arrest, or within one year after the court order is granted, whichever occurs later, and thereafter to destroy their records of the arrest and the court order to seal and destroy those records. (Pen. Code, § 236.14, subd. (k).)

10) Requires the petition to vacate the conviction to be made and heard within a reasonable time after the person has ceased to be a victim of human trafficking, or within a reasonable time after the petitioner has sought services for being a victim of human trafficking, whichever occurs later, subject to reasonable concerns for the safety of the petitioner, family members of the petitioner, or other victims of human trafficking who may be jeopardized by the bringing of the application or for other reasons consistent with the purposes of this section. (Pen. Code, § 236.14, subd. (l).)

11) States petitioner, or his or her attorney may be excused from appearing in person at a hearing for relief pursuant to this section only if the court finds a compelling reason why the petitioner cannot attend the hearing, in which case the petitioner may appear telephonically, via videoconference, or by other electronic means established by the court. (Pen. Code, § 236.14, subd. (n).)

12) Specifies that notwithstanding any other law, the records of the arrest, conviction, or adjudication shall not be distributed to any state licensing board. (Pen. Code, § 236.14, subd. (p).)

13) Defines a "nonviolent offense" for the purposes of vacatur relief, as one that does not appear on California's violent felony list. (Pen. Code, § 236.14, subd. (t).)

14) Provides if a defendant has been convicted of solicitation or prostitution, and if the defendant has completed any term of probation for that conviction, the defendant may petition the court for relief. If the defendant can establish by clear and convincing evidence that the conviction was the result of his or her status as a victim of human trafficking, the court may issue an order that does all of the following: (Pen. Code, § 1203.49.)

    a) Sets forth a finding that the petitioner was a victim of human trafficking when he or she committed the crime;

    b) Order specified expungement relief; and,

    c) Notifies the Department of Justice that the petitioner was a victim of human trafficking when he or she committed the crime and the relief that has been ordered. (Pen. Code, § 1203.49, subd. (a)-(c).)

15) Establishes the DNA and Forensic Identification Database and Data Bank to assist federal, state, and local criminal justice and law enforcement agencies within and outside California in the expeditious and accurate detection and prosecution of individuals responsible for sex offenses and other crimes, the exclusion of suspects who are being investigated for these crimes, and the identification of missing and unidentified persons, particularly abducted children. (Pen. Code, § 295.)

16) Requires any person, including any juvenile who is convicted of a or pleads guilty or no contest to any felony offense, or is found not guilty by reason of insanity of any felony offense, or any juvenile who is adjudicated for committing any felony offense, as specified, to provide buccal swab samples, right thumbprints, and a full palm print impression of each hand, and any blood specimens or other biological samples required for law enforcement identification analysis. (Pen. Code, § 296, subd. (a)(1).)

17) Requires any adult person who is arrested for or charged with any felony offense to provide buccal swab samples, right thumbprints, and a full palm print impression of each hand, and any blood specimens or other biological samples required for law enforcement identification analysis. (Pen. Code, § 296, subd. (a)(2).)

18) Requires any person, including any juvenile who is required to register as a sex offender or as an arsonist, because of the commission of, or the attempt to commit, a felony or

misdemeanor offense, or any person, including any juvenile, who is housed in a mental health facility or sex offender treatment program after referral to such facility or program by a court after being charged with any felony offense, to provide buccal swab samples, right thumbprints, and a full palm print impression of each hand, and any blood specimens or other biological samples required for law enforcement identification analysis. ((Pen. Code, § 296, subd. (a)(3).)

19) Authorizes qualifying persons whose DNA profile has been included in the DOJ DNA and Forensic Identification Database and Databank Program to have their DNA specimen and sample destroyed and searchable database profile expunged from the databank program. (Pen. Code, § 299, subd. (a).)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "In 2019, the U.S. State Department identified 24.9 million victims of human trafficking globally. Within the United States alone, there are hundreds of thousands of identified victims. Just last year, the National Human Trafficking Hotline received 23,784 calls of suspected trafficking instances and reported 4,585 cases. Once free from trafficking, victims desire a fresh start on life and seek out secure housing, employment, counseling and involvement within their community. However, many victims possess criminal records that can hinder them on numerous levels, such as finding employment or even volunteering in their child's school. Many of these offenses come with fines and a sentence of probation.

   "Victims of Human Trafficking are in a unique position when it comes to their record and the law should not hinder but aide them in clearing their record to step into a new life. There are tangible and emotional barriers a victim of human trafficking has to endure, entangled throughout so many areas of their lives. The worst part is often the part we cannot see. The emotional weight carried silently, every day. This bill says to a victim of human trafficking, we see you, and makes a statement of support to help one move beyond a victim, to thriving and contributing mothers and fathers, employees and volunteers in their community."

2) **Vacating a Conviction:** Defendants who have successfully completed probation (including early discharge) can petition the court to set aside a guilty verdict or permit withdrawal of the guilty or nolo contendere plea and dismiss the complaint, accusation, or information. (Penal Code Section 1203.4.) Defendants who have successfully completed a conditional sentence also are eligible to petition the court for expungement relief under Penal Code Section 1203.4. (*People v. Bishop* (1992) 11 Cal.App.4th 1125, 1129.) Penal Code Section 1203.4 also provides that the court can, in the furtherance of justice, grant this relief if the defendant did not successfully complete probation. (Penal Code Section 1203.4; see *People v. McLernon* (2009) 174 Cal.App.4th 569, 577.)

   Expungement relief pursuant to Penal Code Section 1203.4 does not relieve the petitioner of the obligation to disclose the conviction in response to any direct question in any questionnaire or application for public office or for licensure by any state or local agency. Expungement relief pursuant to Penal Code Section 1203.4a, on the other hand, does not explicitly require the person to disclose the conviction in an application for a state license or

public office. Penal Code Section 1203.4a is only available for defendants convicted of a misdemeanor and not granted probation.

By regulation, a private employer may not ask a job applicant about any misdemeanor conviction dismissed under Penal Code1203.4. (2 Cal. Code of Regs. Section 7287.4(d).]) Also, under Labor Code Section 432.7, a private or public employer may not ask an applicant for employment to disclose information concerning an arrest or detention that did not result in conviction, or information concerning a referral to, and participation in, any pretrial or post-trial diversion program. However, if the employer is an entity statutorily authorized to request criminal background checks on prospective employees, the background check would reveal the expunged conviction with an extra entry noting the dismissal on the record.

Current law allows a victim of human trafficking to vacate a non-violent conviction that was a direct result of being a victim of human trafficking. By vacating the conviction, the remedy is actually more forceful than an expungement. Unlike an expungement, getting a conviction vacated effectively means that the conviction never occurred. "Vacate" means that the arrest and any adjudications or convictions suffered by the petitioner are deemed not to have occurred and that all records in the case are sealed and destroyed, as specified.

A petitioner who has their non-violent conviction vacated because it was a direct result of being a victim of human trafficking, may lawfully deny or refuse to acknowledge an arrest, conviction, or adjudication that is set aside pursuant to the order. Current law also specifies that for a conviction that has been vacated, the records of the arrest, conviction, or adjudication shall not be distributed to any state licensing board.

This bill specifically defines a "nonviolent offense" as one that does not appear in California's list of violent felonies. The "violent felony list" includes offenses such as murder, rape, robbery, kidnapping, etc. All of the offenses on the violent felony list would count as a third strike under California's reformed three strikes law. These offense represent serious conduct for which a person can be charged and convicted and carry some of the most severe penalties.

3) **Probation Fines and Petitions to Vacate Convictions for Victims of Human Trafficking:** The author indicates that as a matter of practice, many counties in California are requiring human trafficking victims to have paid the fines on their conviction (that was a result of being a victim of human trafficking) before they are they are granted relief under the petition process.

The statutory language regarding the existing process to vacate a non-violent conviction committed because the person was a victim of human trafficking does not indicate that the person needs to have paid their fines before the conviction is set aside. The law identifies four criteria that court must examine in deciding whether to grant the petition to vacate the conviction:

That the petitioner was a victim of human trafficking at the time the nonviolent crime was committed;

The commission of the crime was a direct result of being a victim of human trafficking;

The victim is engaged in a good faith effort to distance himself or herself from the human trafficking scheme; and,

It is in the best interest of the petitioner and in the interests of justice. (Pen. Code, § 236.14, subd. (g)(1)-(4).)

The fourth element includes consideration of the "interest of justice." That is the only factor that arguably could be interpreted to include payment of fines connected to the conviction, but such an interpretation seems tenuous. There is no language in current law that provides a basis for a court to refuse to set or hear a petition on the basis of unpaid fines.

The language regarding the expungement process is very different language from the language regarding the process to vacate a conviction for a victim of human trafficking.

"In any case in which a defendant has fulfilled the conditions of probation for the entire period of probation, or has been discharged prior to the termination of the period of probation, or in any other case in which a court, in its discretion and the interests of justice, determines that a defendant should be granted the relief available under this section, the defendant shall, at any time after the termination of the period of probation, if he or she is not then serving a sentence for any offense, on probation for any offense, or charged with the commission of any offense, be permitted by the court to withdraw his or her plea of guilty or plea of nolo contendere and enter a plea of not guilty . . . "

Under the expungement language, satisfaction of probation conditions (which would include fine payments) are factors to be explicitly considered.

The language of this bill would clarify that a court cannot refuse to hear the petition to vacate a non-violent conviction committed while the petitioner was the victim of human trafficking on the basis of the petitioner's outstanding fines and fees or the petitioner's failure to meet the conditions of probation.

4) **Time Limits to Vacate a Non-Violent Conviction Because the Petitioner Was a Victim of Human Trafficking:** Under current law, the petition to vacate the non-violent conviction must be made and heard within a *reasonable* time after the person has ceased to be a victim of human trafficking, or within a *reasonable* time after the petitioner has sought services for being a victim of human trafficking, whichever occurs later, subject to reasonable concerns for the safety of the petitioner, family members of the petitioner, or other victims of human trafficking who may be jeopardized by the bringing of the application or for other reasons consistent with the purposes of this section. (Pen. Code, § 236.14, subd. (l).)

   This bill would allow the petition to be made at *any* time after the person has ceased to be a victim of human trafficking, or at *any* time after the petitioner has sought services for being a victim of human trafficking, whichever occurs later. This bill would specify that the right to petition for relief on a non-violent conviction, as described in this bill, does not expire with the passage of time.

5) **Allowing Petitioner to Appear Through Counsel:** Existing law generally requires the petitioner to be present at the hearing to vacate the non-violent conviction. Existing law allows the petitioner's presence to be excused only if the court finds a compelling reason

why the petitioner cannot attend the hearing, in which case the petitioner may appear telephonically, via videoconference, or by other electronic means established by the court. (Pen. Code, § 236.14, subd. (n).)

This bill would allow the petitioner not to be personally present at the hearing on the petition if the petition is unopposed. If the petitioner chooses not to appear under those circumstances, the petitioner would be represented by their counsel.

This bill further specifies that if the petition to vacate a non-violent conviction because the petitioner was victim of human trafficking and the conviction that was a direct result of being a victim of human trafficking is opposed and the court orders a hearing for relief on the petition, the petitioner shall appear in person unless the court finds a compelling reason why the petitioner cannot attend the hearing, in which case the petitioner may appear by telephone, videoconference, or by other electronic means established by the court.

6) **DNA Collection and Removal from the Database**: California law authorizes the collection of DNA from many people who are convicted or arrested for a variety of criminal offenses. DNA that is collected from convicted persons and arrestees is stored in the DOJ's DNA and Forensic Identification Database and Databank Program. Any person (adult or juvenile) who is newly convicted/adjudicated of a felony offense, or who is newly convicted or adjudicated of a misdemeanor but has a prior felony conviction will have to provide a DNA sample. Any person (adult or juvenile) currently in custody or on probation, parole, or any other supervised release after conviction for any felony offense committed prior to November 3, 2004 must provide a DNA sample. Any person (adult or juvenile) currently on probation or any other supervised release for any offense with a prior felony (California or equivalent out-of-state crime) on their record. Both sex registrants and arson registrants whose underlying offense was a misdemeanor are required to participate in DNA collection. In addition, as of January 1, 2009, adults arrested for any felony offense are subject to DNA collection.

   Under existing law, certain persons qualify to have their DNA sample destroyed and their profile removed from the DNA database. If a person has no past or present offense or pending charge which qualifies that person for inclusion within the state's DNA and Forensic Identification Database and Databank Program, and there otherwise is no legal basis for retaining the specimen or sample or searchable profile, then the person may apply to have their profile expunged from the databank.

7) **Argument in Support**: According to *Every Neighborhood Partnership*: "California has one of the highest rates for human trafficking within the United States. Once removed from trafficking, victims desire a fresh start on life and seek out secure housing, employment, counseling and involvement within their community. Unfortunately, many victims possess criminal records related to their victimhood which can hinder this desire on numerous levels.

   "AB 262 will prevent a court from refusing to hear a human trafficking victim's petition to clear their record due to fines owed and/or probation requirements not met. Current law provides that a victim of human trafficking may petition the court for vacatur relief of nonviolent offenses including, but not limited to, prostitution, but they first must pay all fines and meet all probation requirements before petitioning the court to clear their record. In some counties, the court chooses to waive this requirement while others do not—it is up to the discretion of the judge and their interpretation of code. This barrier stops victims from

addressing one of the most vital issues preventing them from starting a new life: clearing their record.

"Additionally, AB 262 will clarify code to state that a victim can petition the court for vacatur relief at any point in time once removed from trafficking, even 20 years down the road. This bill will also allow a victim of human trafficking to appear at all court hearings via counsel. Many victims have multiple offenses in multiple counties requiring travel to locations where they were either trafficked or lived while in trafficking, making the petitioning process lengthy, time-consuming, costly, and even traumatic.

"AB 262 will clarify how and when a victim of human trafficking may petition for vacatur relief, and ease the process along the way. Clearing one's record of crimes they committed directly as a result of their victimhood is the first step towards a new life, and one that cannot be understated for victims trying to leave their traumatic past behind."

8) **Prior Legislation**:

a) AB 2868 (Patterson), of the 2019-202 Legislative Session, would have provided additional legal rights in the judicial process when a victim of human trafficking petitions the court to vacate a conviction for a non-violent crime that was committed while the petitioner was a victim of human trafficking. AB 2868 was never heard in the Assembly Public Safety Committee.

b) AB 2869 (Patterson), of the 2019-2020 Legislative Session, would have allowed a petitioner, on a petition to vacate a non-violent conviction because the petitioner was victim of human trafficking and the conviction that was a direct result of being a victim of human trafficking, to appear at the court hearings by counsel. AB 2869 was never heard in the Assembly Public Safety Committee.

c) SB 823 (Block), Chapter 650, Statutes of 2016, allowed a person arrested or convicted of a nonviolent crime while he or she was a human trafficking victim to apply to the court to vacate the conviction and seal and destroy records of arrest.

d) AB 1585 (Alejo), Chapter 708, Statutes of 2014, provides that a defendant who has been convicted of solicitation or prostitution may petition the court to set aside the conviction if the defendant can establish by clear and convincing evidence that the conviction was the result of his or her status as a victim of human trafficking.

e) AB 2040 (Swanson), Chapter 197, Statutes of 2012, provides that a person who was adjudicated a ward of the court for the commission of a violation of specified provisions prohibiting prostitution may petition a court to have his or her records sealed as these records pertain to the prostitution offenses without showing that he or she has not been subsequently convicted of a felony or misdemeanor involving moral turpitude, or that rehabilitation has been attained.

REGISTERED SUPPORT / OPPOSITION:

Support

American Academy of Pediatrics, California
California Alliance of Child and Family Services
California Catholic Conference
California District Attorneys Association
California Public Defenders Association (CPDA)
City of Clovis
Every Neighborhood Partnership
Jd Food
San Francisco Public Defender
San Joaquin Valley Manufacturing Alliance

1 private individual

Opposition

None

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

Date of Hearing: March 23, 2021
Counsel: Matthew Fleming

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

AB 228 (Rodriguez) – As Introduced January 12, 2021

SUMMARY: Increases the penalty for knowingly buying or receiving a stolen firearm, when the value of the firearm is less than $950, from a misdemeanor to an alternate felony/misdemeanor (a "wobbler"), subject to approval by the voters.

EXISTING LAW:

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

2) States that obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars ($950) shall be considered petty theft and shall be punished as a misdemeanor, except that such person may instead be punished with a felony if that person has one or more prior convictions for a violent felony, as defined, or for an offense registration as a sex offender.

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

4) States that grand theft is committed when the property taken is a firearm, regardless of value. (Pen. Code, § 487, subd. (d)(2).)

5) States that any person who buys or receives any property that has been stolen or that has been obtained in any manner constituting theft or extortion, knowing the property to be so stolen or obtained, or who conceals, sells, withholds, or aids in concealing, selling, or withholding any property from the owner, knowing the property to be so stolen or obtained is guilty of the offense of receiving or concealing stolen property. (Pen. Code, § 496, subd. (a).)

6) States that a petty theft may be charged as a misdemeanor or an infraction, at the discretion of the prosecutor, provided that the person charged with the offense has no other theft or theft-related conviction. (Pen. Code, § 490.1.)

7) Punishes petty theft by a fine not exceeding one thousand dollars ($1,000), or by imprisonment in the county jail not exceeding six months, or both. (Pen. Code, § 490.)

8) Punishes grand theft when the property taken is a firearm by imprisonment in the state prison for 16 months, or two or three years. (Pen. Code, § 489, subd. (a).)

9) Punishes other forms of grand theft, including when the money, labor, or real or personal property taken is of a value exceeding nine hundred fifty dollars ($950) as an alternate

felony/misdemeanor (a "wobbler.") (Pen. Code, § 489(c)(1).)

10) Punishes the offense of buying or receiving stolen property as a misdemeanor when the value of the property is $950 or less, and as an alternate felony/misdemeanor when the value of the property exceeds $950. (Pen. Code, § 496, subd. (a).)

11) Provides that the following persons are prohibited from owning, purchasing, receiving, or possessing a firearm for life:

    a. Anyone with a felony conviction;

    b. Anyone who has a conviction for an offense that constitutes "violent use of a firearm," as specified;

    c. Anyone who is addicted to the use of any narcotic drug; or,

    d. Anyone who has a conviction for a misdemeanor domestic violence offense, as specified. (Pen. Code, §§ 29800, 23515, and 29805, subd. (b).)

12) Provides that it is a felony offense for anyone who has a prior felony conviction, a conviction for an offense that constitutes "violent use of a firearm," or who is addicted to the use of any narcotic drug, to possess a firearm in violation of that lifetime prohibition. (Pen. Code § 29800.)

13) Provides that it is an alternate felony misdemeanor (a "wobbler"), for any person who has a conviction for a misdemeanor domestic violence offense, as specified, to possess a firearm in violation of the lifetime prohibition. (Pen. Code, § 29805, subd. (b).)

14) Provides that persons with specified misdemeanor offenses involving violence or threats of violence are prohibited from owning, purchasing, receiving, or possessing a firearm for a period of 10 years and punishes a violation of that prohibition as an alternate felony misdemeanor (a "wobbler.") (Pen. Code, § 29805, subd. (a).)

15) Provides that it is a felony to carry a concealed pistol, revolver, or other firearm capable of being concealed upon the person in either a vehicle or upon the person, if the firearm is stolen and the person knew or had reasonable cause to believe that it was stolen. (Pen. Code § 25400, subds. (a) and (c)(2).)

16) Provides that it is a felony to carry a loaded firearm on the person or in a vehicle while in any public place or on any public street in an incorporated city or in any public place or on any public street in a prohibited area of unincorporated territory, if the firearm is stolen and the person knew or had reasonable cause to believe that it was stolen. (Pen. Code § 25850 subds. (a) and (c)(2).)

17) Provides that it is an alternate felony/misdemeanor ("a wobbler") for a person who is suffering from a mental disorder, as specified, to have in their possession or under their custody or control, or purchase or receive, or attempt to purchase or receive, any firearms whatsoever. (Welf. & Inst. § 8100.)

18) Provides that where there is an applicable triad for an enhancement related to the possession of, being armed with, use of, or furnishing or supplying a firearm, as specified, the fact that a person knew or had reason to believe that a firearm was stolen shall constitute a circumstance in aggravation of the enhancement justifying imposition of the upper term on that enhancement. (Pen. Code, § 1170.89.)

EXISTING FEDERAL LAW:

1) Provides that it is unlawful for any person to receive, possess, conceal, store, barter, sell, or dispose of any stolen firearm or stolen ammunition, or pledge or accept as security for a loan any stolen firearm or stolen ammunition, knowing or having reasonable cause to believe that the firearm or ammunition was stolen. (18 U.S.C. § 922, subd. (j).)

2) Provides that possession of a stolen firearm is a felony, with a maximum possible punishment of ten years in federal prison. (18 U.S.C. § 924, subd. (a)(2).)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: "Receiving a stolen firearm valued at less than $950, except in very limited circumstances, can only be charged as a misdemeanor, which does not reflect the dangerousness of the crime.

   "Proposition 47, also known as the Safe Neighborhoods and Schools Act, was approved by the voters in November 2014. The initiative generally reduced the penalties for theft, shoplifting, receiving stolen property, writing bad checks, and check forgery valued at $950 or less from felonies to misdemeanors. Since then, Proposition 63 from 2016 restored the possibility of felony punishment for stealing a firearm. However, receiving a stolen firearm valued at less than $950 remains a misdemeanor.

   "Stolen firearms are often found in the underground gun market, where they are illegally sold, traded, and used to facilitate violent crimes, posing a significant risk to community safety."

2) **Theft of Firearms Pursuant to Proposition 47**: Proposition 47, also known as the Safe Neighborhoods and Schools Act, was approved by the voters in November 2014. Proposition 47 reduced the penalties for certain drug and property crimes and directed that the resulting state savings be directed to mental health and substance abuse treatment, truancy and dropout prevention, and victims' services. The initiative reduced the penalties for theft, shoplifting, receiving stolen property, writing bad checks, and check forgery valued at $950 or less from felonies to misdemeanors. The measure limited the reduced penalties to offenders who do not have prior convictions for serious or violent felonies and who are not required to registered sex offenders. (*See* Legislative Analyst's Office (LAO) analysis of Proposition 47, available at http://www.lao.ca.gov/ballot/2014/prop-47-110414.pdf, [as of Feb. 23, 2021].)

   Proposition 47 added Penal Code section 490.2 which provides a new definition for grand theft: "*Notwithstanding Section 487 or any other provision of law defining grand theft,*

obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars ($950) shall be considered petty theft and shall be punished as a misdemeanor ….." (Pen. Code, § 490.2, subd. (a), *emphasis* added.) In other words, Proposition 47 put in a blanket $950 threshold for conduct to be grand theft. Previously, there were a number of carve-outs which made conduct grand theft based on the conduct involved or the manner in which the crime is committed or based on the value being less than $950. Because the new statute specifically stated "notwithstanding Section 487," it arguably superseded all of Penal Code section 487, including subdivision (d)(2), which explains that grand theft occurs when the property taken is a firearm. The question became whether, notwithstanding newly-created Penal Code section 490.2, theft of a firearm remained a felony.

3) **Theft of Firearms Pursuant to Proposition 63**: Due to the uncertainty regarding the punishment for theft of a firearm in the wake of Proposition 47, a couple of legislative endeavors sought to add an explicit statute, reaffirming that theft of a firearm could be charged as a felony offense. Specifically, SB 452 (Galgiani) and AB 1176 (Cooper), of the 2015 – 2016 Legislative Sessions, sought to make this change. In addition, Proposition 63 of 2016, the Background Checks for Ammunition Purchases and Large-Capacity Ammunition Magazine Ban, included language that would implement the same penalty increase. All three measures contained language to make theft of a firearm grand theft, punishable by imprisonment in the state prison for 16 months, two or three years.

   SB 452 was held in the Senate Appropriations Committee. AB 1176, which began as a vehicular air pollution bill, was gutted and amended in the Senate, becoming a penalty increase for both theft of a firearm and also for receiving or buying a stolen firearm, in the same manner as this proposal. AB 1176 was vetoed by Governor Brown. In his veto message, the Governor stated that "This bill proposes to add an initiative that is nearly identical to one which will already appear on the November 2016 ballot. While I appreciate the authors' intent in striving to enhance public safety, I feel that the objective is better attained by having the measure appear before the voters only once."

   Proposition 63, the Background Checks for Ammunition Purchases and Large-Capacity Ammunition Magazine Ban Initiative, was approved by the voters on November 8, 2016. One of its provisions included raising the penalty for theft of a firearm (regardless of the firearm's value) to a felony, punishable by 16 months, 2, or 3 years in the state prison. Proposition 63 did not increase the penalty for receiving or buying a stolen firearm, as contemplated by AB 1176 and this bill.

4) **Existing Felony Penalties Appear to be Adequate to Cover the Conduct in this Bill**: This bill would increase the penalty for the crime of receiving or buying stolen property, with the knowledge or reasonable cause to believe that it is stolen, when that property is a firearm that is valued at less than $950. As noted above, Proposition 47 made such conduct publishable as a misdemeanor unless the defendant has certain qualifying prior convictions. According to information submitted by the author, firearm theft is a nationwide problem; many firearms are stolen each year in the state of California, and elsewhere. (Parsons, "Gun Theft in the United States: A State-by-State Analysis," Center for American Progress, March 4, 2020, available at: https://www.americanprogress.org/issues/guns-crime/news/2020/03/04/481029/gun-theft-united-states-state-state-analysis/, [as of March 18, 2021].) According to the Center for American Progress, the estimated value for the

"average" stolen firearm is around $450. (*Id.*)

Existing law provides many prosecutorial options for the charging and punishing of people who are unlawfully in possession of stolen firearms. The act of stealing a firearm is a felony, and it is the most likely charge when someone is found to be in possession of a stolen firearm. Theft of a firearm carries a punishment of incarceration in the state prison for 16 months, two, or three years. (Pen. Code, § 487, subd. (d)(2).) The act of carrying a concealed firearm on the person or in a vehicle, or openly carrying a loaded firearm in public, is a felony when the person has reasonable cause to believe the firearm was stolen. (Pen. Code, §§ 25400; 25850.) Felony penalties can be charged when the person in possession of the firearm has a prior felony conviction or certain qualifying misdemeanor convictions, if the person is addicted to drugs, or if they suffer from mental illness. (Pen. Code, §§ 29800; 29805; Welf. & Inst. Code, § 8100, subd. (g).) Although it is not felony conduct, there are graduated criminal sanctions for the failure to report a stolen firearm (Pen. Code, §§ 25250; 25265.) In addition, there are numerous sentencing enhancements that can be applied when a firearm is used in a crime. (*See* Pen. Code, §§ 12022 et. seq.) Those enhancements range in time from one year to life imprisonment. (*Id.*) And when there is a triad of punishments that can be given for a particular enhancement, the fact that the person had reason to believe the firearm was stolen is a factor that must be used to as a circumstance in aggravation, lending support for selection of the upper term. (Pen. Code, § 1170.89.) Finally, a person in possession of a stolen firearm, regardless of where, when, or whether they have prior convictions, can be charged with a felony under federal law, which is punishable by up to ten years in federal prison. (18 U.S.C. §§ 922, subd. (j); and 924, subd. (a)(2).)

California has a robust body of law dedicated to the regulation of firearms. According to the Giffords Law Center to Prevent Gun Violence, California has the strongest gun laws in the United States, and receives an "A" grade for its efforts. (Giffords Law Center Scorecard, available at: https://giffords.org/lawcenter/resources/scorecard/, [as of March 18, 2021].) Given the robust felony options available to prosecutors for the conduct contemplated by this bill, and California's "A" grade for firearm laws generally, this bill may be an unnecessary penalty increase.

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

In 2014, the National Academy of Sciences (NAS) published a comprehensive report examining the state of imprisonment in the United States and taking a deep dive into research of its causes and consequences. (Travis, The Growth of Incarceration in the United States: Exploring Causes and Consequences," NAS, 2014, available at: http://johnjay.jjay.cuny.edu/nrc/NAS_report_on_incarceration.pdf, [as of March 18, 2014].) The report discusses the effects on crime reduction through incapacitation and deterrence, and describes general deterrence compared to specific deterrence:

> A large body of research has studied the effects of incarceration and other criminal penalties on crime. Much of this research is guided by the hypothesis

> that incarceration reduces crime through incapacitation and deterrence. Incapacitation refers to the crimes averted by the physical isolation of convicted offenders during the period of their incarceration. Theories of deterrence distinguish between general and specific behavioral responses. General deterrence refers to the crime prevention effects of the threat of punishment, while specific deterrence concerns the aftermath of the failure of general deterrence—that is, the effect on reoffending that might result from the experience of actually being punished. Most of this research studies the relationship between criminal sanctions and crimes other than drug offenses. A related literature focuses specifically on enforcement of drug laws and the relationship between those criminal sanctions and the outcomes of drug use and drug prices.

In regard to deterrence, the authors note that in "the classical theory of deterrence, crime is averted when the expected costs of punishment exceed the benefits of offending. Much of the empirical research on the deterrent power of criminal penalties has studied sentence enhancements and other shifts in penal policy. . . .

> Deterrence theory is underpinned by a rationalistic view of crime. In this view, an individual considering commission of a crime weighs the benefits of offending against the costs of punishment. Much offending, however, departs from the strict decision calculus of the rationalistic model. Robinson and Darley (2004) review the limits of deterrence through harsh punishment. They report that offenders must have some knowledge of criminal penalties to be deterred from committing a crime, but in practice often do not." (*Id.*)

The authors of the 2014 report discussed above conclude that incapacitation of certain dangerous offenders can have "large crime prevention benefits," but that incremental, lengthy prison sentences are ineffective for crime deterrence:

> Whatever the estimated average effect of the incarceration rate on the crime rate, the available studies on imprisonment and crime have limited utility for policy. The incarceration rate is the outcome of policies affecting who goes to prison and for how long and of policies affecting parole revocation. Not all policies can be expected to be equally effective in preventing crime. Thus, it is inaccurate to speak of the crime prevention effect of incarceration in the singular. Policies that effectively target the incarceration of highly dangerous and frequent offenders can have large crime prevention benefits, whereas other policies will have a small prevention effect or, even worse, increase crime in the long run if they have the effect of increasing postrelease criminality.
>
> Evidence is limited on the crime prevention effects of most of the policies that contributed to the post-1973 increase in incarceration rates. Nevertheless, the evidence base demonstrates that lengthy prison sentences are ineffective as a crime control measure. Specifically, the incremental deterrent effect of increases in lengthy prison sentences is modest at best. Also, because recidivism rates decline markedly with age and prisoners necessarily age as they serve their prison sentence, lengthy prison sentences are an inefficient approach to preventing crime by incapacitation unless they are specifically targeted at very high-rate or extremely dangerous offenders. For these reasons, statutes mandating lengthy

prison sentences cannot be justified on the basis of their effectiveness in preventing crime. (*Id.*)

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The National Institute of Justice (NIJ) has also looked into the concept of improving public safety through increased penalties. The NIJ is one of the organizations who has developed research on the deterrent effect of penalty increases. The NIJ is the research, development and evaluation agency of the United States Department of Justice (USDOJ). According to the NIJ website, it is an organization that is dedicated to improving knowledge and understanding of crime and justice issues through science. It aims to provide objective and independent knowledge and tools to inform the decision-making of the criminal and juvenile justice communities to reduce crime and advance justice, particularly at the state and local levels. (https://nij.ojp.gov/about-nij.) As early as 2016, the NIJ has been publishing its findings that increasing punishment for given offenses does little to deter criminals from engaging in that behavior. ("Five Things About Deterrence," NIJ, May 2016, available at: https://www.ojp.gov/pdffiles1/nij/247350.pdf, [as of March 9, 2021].) In fact, the NIJ has found that increasing penalties are generally ineffective and may exacerbate recidivism and actually reduce public safety. (*Ibid.*) Instead the NIJ, advocates for polices that "increase the perception that criminals will be caught and punished" because such perception is a vastly more powerful deterrent than increasing the punishment. (*Ibid.*)

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

   The Public Policy Institute of California (PPIC) has published reports discussing population impacts on California jails related to Realignment and Proposition 47. After realignment began, the jail population began to rise; as of October 2014, the month before the passage of Proposition 47, it stood at 82,005 inmates, a gain of 14% — and about 2,000 inmates over the rated capacity of 80,000 (set by the California Board of State and Community Corrections). To address these capacity constraints, counties released 14,321 pre-sentenced and sentenced inmates in October 2014 — an increase of 4,102 (or 40%) from September 2011. (Martin, "California's County Jails," PPIC, February, 2021, available at: http://www.ppic.org/publication/californias-county-jails/, [as of March 18, 2021].).

   Voters approved Proposition 47 in November 2014, reclassifying several property and drug crimes from felonies to misdemeanors. Prop 47 has had an immediate and lasting impact: the average daily population dropped by almost 10,000 between October 2014 and January 2015. The jail population has remained relatively flat since January 2015, and as of December 2016 it stood at 73,460 inmates, a decrease of 8,545 (or 10.4%) from October 2014. At the end of 2016, 28 jails housed populations that exceeded their rated capacities, compared to 53 jails in October 2014. (*Id.*)

   This bill would substantially increase the sentencing range for individuals convicted of the offense of buying or receiving stolen property, when the property is a firearm valued under $950. According to information submitted by the author, the "average" value of a stolen firearm is estimated to be around $450. The sentences served by the individuals sentenced pursuant to the provisions of this bill would be served in county jail.

7) **COVID-19 Considerations**: COVID-19 poses a heightened danger to persons involved the criminal justice system. Specifically, jails and prisons make disease mitigation and prevention efforts virtually impossible when detention facilities are at or near capacity. Social distancing and sanitary practices are difficult in close quarters particularly when they lack a ready supply of personal protective equipment and rationed access to sanitary facilities. By their nature, detention facilities are generally designed in a manner to pack the maximum number of people into the smallest space to make them easy to secure and monitor. The spread of COVID-19 in jails and prisons poses a health risk to all Californians, starting first with the employees of jails and prisons, people who are incarcerated, and their family members. The impacts reverberate through secondary institutions including law enforcement agencies and the judicial system.

   COVID-19 has exacerbated the state's already existing concerns with prison and jail overcrowding. In January 2010, a three-judge panel issued a ruling ordering the State of California to reduce its prison population to 137.5% of design capacity because overcrowding was the primary reason that the California Department of Corrections and Rehabilitation (CDCR) was unable to provide inmates with constitutionally adequate healthcare. The United State Supreme Court upheld the decision, declaring that "without a

reduction in overcrowding, there will be no efficacious remedy for the unconstitutional care of the sick and mentally ill" inmates in California's prisons. (*Brown v. Plata* (2011) 563 U.S. 493, 530.)

The very crux of the criticism of California's incarceration situation is the lack of adequate health care. Today, the jail and prison population are at higher risk than the general public to the spread of COVID-19: individuals in these systems are unable to social distance or to practice standard sanitary procedures. Further, employees and contractors who work with incarcerated persons are placed at a higher risk of potential infection and are in danger of spreading the infections to their families and communities around California. In addition the fact that jails and prisons are a "tinder box" for spreading the virus, "[s]ome 45,000 of California's 110,000 inmates suffer from an underlying medical condition that makes them vulnerable to coronavirus infection." (Winton, "*I Don't Deserve a Death Sentence*: Coronavirus Outbreaks Bring Fear Inside California Prisons," Los Angeles Times, April 25, 2020, available at: https://www.latimes.com/california/story/2020-04-25/i-dont-deserve-a-death-sentence-says-inmate-with-coronary-disease-in-chino-coronavirus-prison-hotspot, [AS OF March. 10, 2021].) More recently, there has been concern over accuracy of the numbers of COVID-19 deaths within jails and prisons and whether some deaths are going uncounted. (Plummer, "As Prisons and Jails In California Battle COVID-19, Some Inmate Deaths Go Uncounted," January 28, 202, available at: https://www.kpbs.org/news/2021/jan/28/prisons-and-jails-california-battle-covid-19-some-/, [as of March 10, 2021].)

It may behoove the Legislature to closely examine legislation that might impact already crowded jails and prisons to determine if the proposal is worth the risk of potentially increasing the risk of spreading COVID-19 around the state of California. "[N]ew arrivals are a frequent vector for prison outbreaks. During the 1918 influenza pandemic, a single new prisoner precipitated a mass outbreak in California's San Quentin prison." (Ellis, "Covid-19 Poses a Heightened Threat in Jails and Prisons," Wired, Mar. 24, 2020, available at: https://www.wired.com/story/coronavirus-covid-19-jails-prisons/, [as of March 10, 2021].) Significant efforts have been undertaken to lessen the impact that COVID-19 has on the inmate population, including premature releases. (*See* "Reducing Jail and Prison Populations During the Covid-19 Pandemic," Brennan Center for Justice, March 8, 2021, available at: https://www.brennancenter.org/our-work/research-reports/reducing-jail-and-prison-populations-during-covid-19-pandemic, [as of March 10, 2021].)

Although the long term impacts of the pandemic on county jail systems are unknown, there is no doubt that the pandemic has created a number of unique challenges. Local governments have directed law enforcement avoid arrests and bookings. (Martin, "California's County Jails," PPIC, February, 2021, available at: http://www.ppic.org/publication/californias-county-jails/, [as of March 18, 2021].) In addition, an emergency statewide zero-bail order was put in place to reduce the number of individuals coming into jails. (*Ibid.*) According to the PPIC "Statewide data on jail bookings support this notion, as the number of weekly bookings dropped from about 17,000 in February 2020 to roughly 12,000 in September 2020. However, given crowded conditions in some jails and jail systems' limited health care infrastructure, it has been hard to prevent outbreaks among inmates and staff. In addition, the state prison system has not allowed transfers of jail inmates with prison sentences throughout most of the pandemic, requiring these inmates to be held in county jails until the state has the ability to safely place them in state prisons." (*Ibid.*). Because this bill has the possibility to increase county jail populations, it is worth considering whether its goals are essential at a

time when such an increase in the State's in-custody population may exacerbate the year-long COVID-19 pandemic.

8) **Arguments in Support**: According to the *California State Sheriffs' Association*: "Proposition 47 from 2014 changed the law regarding specific theft and drug related crimes, reducing some offenses to misdemeanors. Theft of a firearm under $950 was made a misdemeanor by Proposition 47 but the felony penalty was ultimately restored by Proposition 63. While receiving a stolen gun valued at less than $950 also became a misdemeanor, the possibility of a felony penalty has not been restored.

"Receiving a stolen firearm valued at less than $950, except in very limited circumstances, can only be charged as a misdemeanor, which does not reflect the dangerousness of the crime. Stolen firearms are often found in the underground gun market, where they are illegally sold, traded, and used to facilitate violent crimes, posing a significant risk to community safety. For these reasons, the loophole created by Proposition 47 must be fixed so receiving a stolen firearm can be charged either as a misdemeanor or a felony."

9) **Argument in Opposition**: According to the *American Civil Liberties Union of California*: "Under current law, a person who buys or receives a firearm that has been stolen can already be punished with a felony so long as the value of the firearm exceeds $950 dollars. (Penal Code, §496, subd. (a).) There are likewise myriad felonies and felony enhancements with which a person can be charged if they use a stolen firearm to commit a crime. (See e.g. Penal Code, §25400 [carrying a concealed firearm is punishable as a felony if the firearm is stolen]; Penal Code, §25850 [carrying a loaded firearm is punishable as a felony if the firearm is stolen]; Penal Code, §1170.89 [when there is an applicable triad for an enhancement related to the possession of, being armed with, use of, or furnishing or supplying a firearm, the fact that a person knew or had reason to believe that a firearm was stolen shall constitute a circumstance in aggravation of the enhancement].)

"The California voters approved current law on November 4, 2014, in our statewide general election, when they overwhelmingly passed Proposition 47. The arguments in favor of the initiative were true in 2014 and remain true today: there are already numerous state and federal laws that impose felony penalties on those who use stolen guns to commit crimes, and Proposition 47 did nothing to change those laws. The will of the voters should be respected."

10) **Prior Legislation**:

a) AB 3268 (Rodriguez), of the 2019 – 2020 Legislative Session, was identical to this bill. AB 3268 died without a hearing in the Assembly Public Safety Committee.

b) AB 1176 (Cooper), of the 2015 – 2016 Legislative Session, would have made the theft of a firearm grand theft in all cases, punishable by imprisonment in the state prison for 16 months, or 2 or 3 years, and would have provided that every person who buys or receives a stolen firearm is guilty of an alternate felony/misdemeanor. AB 1176 was vetoed.

c) SB 452 (Galgiani), of the 2015 – 2016 Legislative Session, made the theft of a firearm grand theft in all cases, punishable by imprisonment in the state prison for 16 months, or 2 or 3 years. SB 452 died in the Senate Appropriations Committee.

REGISTERED SUPPORT / OPPOSITION:

Support

California Coalition of School Safety Professionals
California District Attorneys Association
California Rifle and Pistol Association, INC.
California State Sheriffs' Association
Los Angeles County Sheriff's Department
Los Angeles School Police Officers Association
Palos Verdes Police Officers Association
Peace Officers Research Association of California (PORAC)
Riverside Sheriffs' Association
San Bernardino County Sheriff's Department
Santa Ana Police Officers Association

Oppose

American Civil Liberties Union/Northern California/Southern California/San Diego and Imperial Counties
California Public Defenders Association
Ella Baker Center for Human Rights
San Francisco Public Defender

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

Date of Hearing: March 23, 2021
Counsel: Nikki Moore

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

AB 409 (Seyarto) – As Introduced February 3, 2021

SUMMARY: Requires a law enforcement official to inform a witness or victim of a gang-related offense that that person's name could be made public under the California Public Records Act (CPRA), and collect articulable evidence, if appropriate, to support a conclusion that disclosure of the person's name would endanger that person's safety. Specifically, **this bill:**

1) Requires an employee of a law enforcement agency who personally receives a report alleging the commission of a gang-related offense to inform a victim or witness of such offense that the victim's or witness's name will become a matter of public record unless the law enforcement agency determines that release of the victim's or witness's name would endanger that person's safety.

2) Requires an employee of a law enforcement agency who personally receives a report alleging the commission of a gang-related offense to inform a victim or witness that that person may provide the agency with evidence that an articulable threat exists that supports a conclusion that disclosure of that person's name would endanger their safety.

3) Requires a written report of a gang-related offense indicate: a) that any victim or witness has been properly informed of the possibility of their name being made public, and b) that the person may provide evidence of an articulable threat. The law enforcement employee shall memorialize that person's responses in the written report.

4) Instructs a law enforcement agency to consider evidence that an articulable threat exists that supports a conclusion that the disclosure of a victim's or witness's name would endanger their safety in making the determination that disclosure of the victim's or witness's name would endanger the victim or witness.

5) Prohibits a law enforcement agency from disclosing to a person, except the prosecutor, parole officers of the Department of Corrections and Rehabilitation (CDCR), hearing officers of the parole authority, probation officers of county probation departments, or other persons or public agencies where authorized or required by law, the name of victim or witness when the law enforcement agency has determined that disclosure of the victim's or witness's name would endanger the victim or witness. Limits this access to the victim or witness name deemed confidential to only a parole officer of CDCR, hearing officer of the parole authority, and probation officer of county probation department that is supervising or investigating the person who is alleged to commit the gang-related offense.

6) Makes legislative findings that the interest in protecting the safety of a victim or witness involved in a gang-related offense that it is appropriate to permit those victims and witnesses

to provide evidence that an articulable threat exists that supports a conclusion that the disclosure of their name would endanger their safety.

EXISTING LAW:

1) Establishes that it is a crime to actively participate in any criminal street gang with knowledge that its members engage in, or have engaged in, a pattern of criminal gang activity, and to willfully promote, further, or assist in any felonious criminal conduct by members of that gang. (Pen. Code, § 186.22.)

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

3) Defines "public records" as any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics. (Gov. Code, § 6250 et seq.)

4) Prohibits a state or local agency from allowing another party to control the disclosure of information that is otherwise subject to disclosure pursuant to this chapter. (Gov. Code, § 6253.3.)

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

6) Permits an agency to withhold records of complaints to, or investigations conducted by an agency, as specified, for correctional, law enforcement, or licensing purposes. (Gov. Code, § 6254 subd. (f).)

7) Requires an agency to produce information contained in an investigatory record, as specified, unless disclosure of a particular item of information would endanger the safety of a person involved in an investigation or would endanger the successful completion of the investigation or a related investigation. (Gov. Code, § 6254 subd. (f).)

8) Requires the disclosure of the full name and occupation of every individual arrested by the agency, the individual's physical description including date of birth, color of eyes and hair, sex, height and weight, the time and date of arrest, the time and date of booking, the location of the arrest, the factual circumstances surrounding the arrest, the amount of bail set, the time and manner of release or the location where the individual is currently being held, and all charges the individual is being held upon, including any outstanding warrants from other jurisdictions and parole or probation holds. (Gov. Code, § 6254 subd. (f)(1).)

9) Requires the disclosure of the substance, and location of all complaints or requests for assistance received by the agency and the time and nature of the response thereto, including, to the extent the information regarding crimes alleged or committed or any other incident investigated is recorded, the time, date, and location of occurrence, the time and date of the

report, the name and age of the victim, the factual circumstances surrounding the crime or incident, and a general description of any injuries, property, or weapons involved. (Gov. Code, § 6254 subd. (f)(1).)

10) Provides that an agency shall refuse to disclose the name of a victim of any certain crimes, as specified, including sexual assault, rape, human trafficking, domestic violence, prostitution, injury to or molestation of a child, stalking, may be withheld at the victim's request, or at the request of the victim's parent or guardian if the victim is a minor. When a person is the victim of more than one crime, information disclosing that the person is a victim of a crime as specified may be deleted at the request of the victim, or the victim's parent or guardian if the victim is a minor, in making the report of the crime, or of any crime or incident accompanying the crime, available to the public in compliance with the requirements as specified. (Gov. Code, § 6254 subd. (f)(2)(a).)

11) Provides that an agency may refuse to disclose the names and images of a victim of human trafficking, and of that victim's immediate family, other than a family member who is charged with a criminal offense arising from the same incident, at the victim's request until the investigation or any subsequent prosecution is complete. (Gov. Code, § 6254 subd. (f)(2)(b).)

12) Requires the disclosure of the current address of every individual arrested by the agency and the current address of the victim of a crime, if the requester declares under penalty of perjury that the request is made for a scholarly, journalistic, political, or governmental purpose, or that the request is made for investigation purposes by a licensed private investigation, except as specified. (Gov. Code, § 6254 subd. (f)(3).)

13) Provides that commencing July 1, 2019, a video or audio recording retained or owned by an agency at the time of the request that relates to a "critical incident," as defined, must be disclosed unless the agency demonstrates that it is necessary to delay disclosure to ensure the successful completion of an investigation. (Gov. Code, § 6254 subd. (f)(4).)

14) Allows an agency to demonstrate, on the facts of the particular case, that the public interest in withholding a video or audio recording clearly outweighs the public interest in disclosure because the release of the recording would, based on the facts and circumstances depicted in the recording, violate the reasonable expectation of privacy of a subject depicted in the recording. In that case, the agency shall provide in writing to the requester the specific basis for the expectation of privacy and the public interest served by withholding the recording and may use redaction technology, including blurring or distorting images or audio, to obscure those specific portions of the recording that protect that interest. (Gov. Code, § 6254 subd. (f)(4)(B)(i).)

15) Provides that if the agency demonstrates that the reasonable expectation of privacy of a subject depicted in the recording cannot adequately be protected through redaction and that interest outweighs the public interest in disclosure, the agency may withhold the recording from the public, except that the recording, either redacted as provided in clause (i) or unredacted, shall be disclosed promptly, upon request, to any of the following:

a) The subject of the recording whose privacy is to be protected, or his or her authorized representative;

b) If the subject is a minor, the parent or legal guardian of the subject whose privacy is to be protected; and,

c) If the subject whose privacy is to be protected is deceased, an heir, beneficiary, designated immediate family member, or authorized legal representative of the deceased subject whose privacy is to be protected. (Gov. Code, § 6254 subd. (f)(4)(B)(ii).)

16) Requires an employee of a law enforcement agency who personally received a report from a person alleging that he or she has been the victim of a sex offense, to inform the person making the report that his or her name will become a matter of public record unless he or she requests that it not become a matter of public record. Provides that if the victim makes this request then the law enforcement agency shall not disclose the name of a victim, except as specified. (Penal Code Section 293 (a)-(d).)

17) Provides that any victim of a sexual crime who has not elected to exercise his or her right to keep his or her name confidential may request to be identified in all court records and proceedings as either Jane Doe or John Doe, if the court finds that such an order is reasonably necessary to the protect the privacy of the person and will not unduly prejudice the prosecution or the defense. (Penal Code Section 293.5.)

18) Requires the prosecuting attorney to disclose to the defendant or his or her attorney the names and addresses of persons the prosecutor intends to call as witnesses at trial, if it is in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agencies (Pen. Code, § 1054.1, subd. (a).)

19) Prohibits an attorney from disclosing to a defendant, members of the defendant's family, or anyone else, the address or telephone number of a victim or witness whose name is disclosed to the attorney pursuant to discovery of evidence in a criminal case, unless specifically permitted to do so by the court after a hearing and a showing of good cause. (Pen. Code, § 1054.2, subd. (a)(1).)

20) Allows an attorney to disclose the address or telephone number of a victim or witness to persons employed by the attorney or to persons appointed by the court to assist in the preparation of a defendant's case if that disclosure is required for that preparation. (Pen. Code, § 1054.2, subd. (a)(2).)

21) States that except as otherwise required by criminal discovery, or by the United States Constitution or the California Constitution, no law enforcement agency shall disclose to any arrested person, or to any person who may be a defendant in a criminal action, the address or telephone number of any person who is a victim or witness in the alleged offense. (Pen. Code, § 841.5, subd. (a).)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "With a statewide rise in violent crime, California needs to encourage communities to work with their local law enforcement agencies to reduce crime and help victims. AB 409 is a simple fix to protect victims and witnesses of gang crimes and foster cooperation among communities. By allowing law enforcement to protect the identities of these individuals, AB 409 will reduce retaliation and help bring justice to some of California's most senseless crimes."

2) **The California Public Records Act:** The CPRA requires every state and local agency to make its records available for public inspection upon request, subject to certain exemptions. The CPRA derives from Article I ("The Declaration of Rights") of the California Constitution and is rooted in the principle that the conduct of government should be subject to public scrutiny. The placement of the right of access to public records in Section 3 of Article I of the state constitution puts it on par with the people's fundamental rights of assembly and petition. Because of the obviously high value placed on access to public records, the California Constitution expressly requires that the right of access in the CPRA be broadly construed, and that any limitation on this access be "narrowly construed." (Article 1 Section 3(b)(2).) In addition, the state constitution requires that any limitation on access to public records be supported "with findings demonstrating the interest protected by the limitation and the need for protecting that interest." (*Id.*)

   The fundamental precept of the CPRA is that governmental records shall be disclosed to the public, upon request, unless there is a specific reason not to do so. Most of the reasons for withholding disclosure of a record are set forth in specific exemptions contained in the CPRA. However, some confidentiality provisions are incorporated by reference to other laws. Also, the CPRA provides for a general balancing test by which an agency may withhold records from disclosure, if it can establish that the public interest in nondisclosure clearly outweighs the public interest in disclosure. (http://ag.ca.gov/publications/summary_public_records_act.pdf)

   There are two recurring interests that justify most of the exemptions from disclosure. First, several CPRA exemptions are based on recognition of the individual's right to privacy (e.g., privacy in certain personnel, medical or similar records). Second, a number of disclosure exemptions are based on the government's need to perform its assigned functions in a reasonably efficient manner (e.g., maintaining confidentiality of investigative records, official information, records related to pending litigation, and preliminary notes or memoranda).

   If a record contains exempt information, the agency generally must segregate or redact the exempt information and disclose the remainder of the record. If an agency improperly withholds records, a member of the public may enforce, in court, his or her right to inspect or copy the records and receive payment for court costs and attorney's fees.

3) **Standards and Procedures for the Disclosure of Information from a Law Enforcement Investigatory Record**: Police reports involving gang-related offenses are investigative records. Under the CPRA, investigatory records are exempt from disclosure at the discretion of the agency, except as specified. The CPRA generally requires disclosure of the names of all persons involved in a law enforcement agency's investigation into a crime, including the name of all victims, witnesses and alleged perpetrators or arrestees. There is an exception to this general rule if "the disclosure would endanger the safety of a witness or other person

involved in the investigation." (Gov. Code Section 6254 subd. (f).) There is an additional exception when the incident involves specified crimes like sexual assault, rape, human trafficking, domestic violence, prostitution, injury to or molestation of a child, and stalking. (Gov. Code Section 6254 subds. (f)(2) and (3).) In those cases, there is a presumption that the victim's name should not be disclosed under the CPRA unless the victim or their guardian consents to disclosure of their name.

The potential for retribution in a gang-related incident arguably justifies extending additional confidentiality protections to a victim or witness of such incidents as a person may only be safe providing information to law enforcement if they do so anonymously. This bill would require a law enforcement agent who personally receives a report alleging the commission of a gang-related offense from a victim or witness to inform that person that their name will be made public unless the agency determines that release of the person's name would endanger that person's safety. A written report of the encounter shall memorialize that this conversation occurred and that a victim or witness was informed of their rights. The written report must also include any articulable concern presented by the victim or witness to support the conclusion that disclosure of that person's name would endanger the victim or witness. This information shall be considered by the agency in determining whether disclosure of a person's name is required if the agency receives a CPRA request for information related to that incident. The agency is the ultimate decision-maker with respect to what should be disclosed under the CPRA. (Gov. Code Section 6253.3.)

To avoid the specious withholding of information, this bill would require an officer to create a record of any articulable concern provided by a victim or witness which supports the conclusion that disclosure of that person's name would endanger their safety. A purely speculative statement regarding vague safety concerns would be insufficient to meet this burden. The standard in this bill is consistent with the standard that agencies apply when determining whether to withhold a police officer's name from the public. (*Long Beach Police Officers Association v. City of Long Beach* (2014) 59 Cal.4th 59 ["Vague safety concerns that apply to all officers involved in shootings are insufficient to tip the balance against disclosure of officer names. As we have said in the past, '[a] mere assertion of possible endangerment does not 'clearly outweigh' the public interest in access to ... records.'"] citing *CBS, Inc. v. Block* (1986) 42 Cal.3d 646, 652.).) Nothing limits the agency from making the determination that disclosure would endanger a witness or victim, or otherwise endanger the successful completion of the investigation, absent articulable facts provided by a victim or witness.

4) **Argument in Support**: According to the *Riverside Sheriffs' Association*, "AB 409 would allow victims and witnesses of gang crimes to petition law enforcement to redact their identities, pursuant to the California Public Records Act, if they feel that their life could be in serious danger because of their role in reporting information related to a crime.

"As the author has pointed out: *Current law requires law enforcement to inform victims of sex offenses of their right to request that their name does not become a matter of public record. However, there are no similar protections for witnesses or victims reporting any other crime. In a recent FEMA study, more than 40% of females and 30% of males listed fear of retaliation as a major barrier when deciding whether to report information about a crime.*

"AB 409 is a common-sense measure that will improve public safety by protecting witnesses

and victims who are willing to come forward and report criminal gang activity."

5) **Argument in Opposition:** According to the *California Attorneys for Criminal Justice,* "While CACJ understands the author's intent, to protect victims and witnesses from retaliation, we do not believe that this bill is the answer. Existing law already allows law enforcement to withhold the disclosure of information that would endanger a person involved in an investigation. CACJ believes that victims and witnesses are adequately protected by existing law, and the creation of a separate petition process is unnecessary."

6) **Related Legislation**:

   a) AB 268 (Irwin) would create a procedure for a qualified family member to prevent the disclosure of an autopsy report under the CPRA. AB 268 is currently pending before this committee.

   b) SB 16 (Skinner) would expand the categories of police officer personnel information that shall be disclosed under the CPRA. SB 16 is currently pending before the Senate Judiciary Committee.

7) **Prior Legislation**:

   a) AB 941 (Cunningham), of the 2019-2020 Legislative Session, would have prohibited law enforcement agencies, upon request, from disclosing the names of victims of, and witnesses to, specified gang-related offenses. AB 941 died in the Assembly Appropriations Committee.

   b) AB 2013 (Cunningham), of the 2017-2018 Legislative Session, would have prohibited law enforcement agencies, upon request, from disclosing the names of victims of, and witnesses to, specified gang-related offenses. AB 2013 died in the Assembly Appropriations Committee.

REGISTERED SUPPORT / OPPOSITION:

Support

California Coalition of School Safety Professionals
California District Attorneys Association
Los Angeles School Police Officers Association
Palos Verdes Police Officers Association
Riverside Sheriffs' Association
Santa Ana Police Officers Association

Opposition

California Attorneys for Criminal Justice

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

Date of Hearing: March 23, 2021
Counsel: David Billingsley

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

AB 292 (Stone) – As Amended March 17, 2021

SUMMARY: Directs the California Department of Corrections and Rehabilitation (CDCR) to use its constitutional authority to award custody credits to specified inmates serving a sentence for a violent felony or a nonviolent second- or third-strike felony at a rate of a one day credit for every day in custody (50% credit). Specifically, **this bill**:

1) Directs CDCR to use its authority pursuant to the California Constitution (Proposition 57) to award one day of Good Conduct Credit for every day of incarceration (50 percent) to all of the following:

   a) An inmate sentenced to a determinate term with prior strike convictions, as specified, who is not serving a term for a violent felony and does not have a VIO administrative determinant;

   b) An inmate sentenced to an indeterminate term with prior strike convictions, as specified, who is not serving a term for a violent felony and does not have a VIO administrative determinant; and,

   c) An inmate serving a determinate term for a violent felony who does not have a VIO administrative determinant. An inmate serving an indeterminate term for a violent felony who does not have a VIO administrative determinant.

2) Defines "VIO administrative determinant" as "the in custody classification given to an inmate by CDCR based on convictions for certain offenses (violent felony) and pursuant to specified regulations.

3) States that an inmate who does not have a VIO administrative determinant includes, but is not limited to, an inmate for whom a previous VIO administrative determinant was removed or for whom a VIO administrative determinant was not imposed initially, as specified.

4) Defines "Good Conduct Credit" as "credit awarded to an inmate by the department pursuant to specified regulations.

5) Specifies that an inmate eligible for credit pursuant to the provisions of this bill shall still be eligible to receive more credits if eligible for more credit pursuant other law or as awarded by CDCR under its constitutional authority.

6) States that CDCR shall conduct programming in a manner that does all of the following:

a) Prevents facility transfers from disrupting an incarcerated person's programming. To accomplish this, the department shall, among other things, allow for voluntary facility transfers first;

b) Prioritize an incarcerated person that has transferred facilities for similar programs at the new facility;

c) Ensures programming is offered even if the institution, facility or a section of the facility is on modified or restrictive programming;

d) If distance learning or other alternatives to in-person programming are offered, ensure that those alternatives do no diminish in-person programming;

e) Minimizes programming wait lists, especially in those institutions or facilities where programming wait lists exceed one year;

f) Minimizes conflicts with an incarcerated person's work schedule;

g) Is available without restrictions to incarcerated persons that have recently changed status, security level, or facility; and,

h) Offers an equitable selection of programming to incarcerated persons regardless of security level or sentence length.

7) Directs CDCR to award credits in a manner that does all of the following:

a) Prevents disruptions in credits due to nonadverse transfers;

b) Ensures credit earning opportunities are still provided if an institution, facility, or section of a institution is restricted for a security or medical concern;

c) Ensures that credits are received when a program is canceled;

d) Provides credits for all in-prison jobs, including, but not limited to, clerks, librarians, and porters, that is equitable to programming credits;

e) Provides the same credit-earning opportunities and incentives for rehabilitative programming for incarcerated persons who participate in an in-prison programming as afforded to those who participate in a Department of Forestry and Fire Protection fire camp.

EXISTING LAW:

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

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

3) Provides that for every six months of continuous state prison custody, a prisoner shall be awarded credit reductions from his or her term of confinement of six months. (Pen. Code, § 2933, subd. (b).)

4) Specifies that credit should be awarded pursuant to regulations adopted by the secretary. Under no circumstances shall any prisoner receive more than six months' credit reduction for any six-month period under this section. (Pen. Code, § 2933, subd. (b).)

5) States that notwithstanding any other law, any person who is convicted of a violent felony offense, as specified, shall accrue no more than 15 percent of worktime custody credit. (Pen. Code, § 2933.1, subd. (a).)

6) Specifies that for defendants sentenced to state prison with a strike prior the total amount of credits awarded shall not exceed one-fifth of the total term of imprisonment imposed and shall not accrue until the defendant is physically placed in the state prison. (Pen. Code, § 667, subd. (c)(5), Pen. Code, §, 1170.12, subd. (a)(5).)

7) States that the award of specified custody credits, shall advance a state prison inmate's release date if sentenced to a determinate term or advance an inmate's initial parole hearing date, as specified, if sentenced to an indeterminate term with the possibility of parole. (Cal. Code of Regs, Title 15, § 3043.)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "Before the COVID-19 pandemic, major administrative barriers prevented many incarcerated people from taking advantage of rehabilitative programming and credit earning opportunities. The impact of the pandemic has made these barriers all but insurmountable. AB 292 will break down those barriers by implementing programs that are not solely based on in-person instruction, and limiting transfer-related disruptions. The bill will also address the inequity in our credit system that currently requires people to risk their lives by participating in Fire Camp in order to earn the maximum credit rate. By increasing the credit earning potential for in-prison programming, we can ensure that elderly people and people with disabilities can also access the maximum credit rate. AB 292 provides equal protection, equal justice and equal opportunity to access the full benefits of programming."

2) **Existing Credit Structure for Inmates Convicted of Violent Offenses or Offenses with Strike Priors Based on Statutes Enacted by the Legislature and Voters:**

Violent Offenses: The existing Legislative intent and statutory directive regarding custody credits for individuals convicted of violent offenses is contained in Pen. Code, § 2933.1, which states that any person who is convicted of a violent felony offense is limited to 15% custody credits. Violent offenses are listed in Penal Code, § 667.5. The list of violent offenses consists of very serious offenses including forcible sex crimes, homicide, and crimes

involving the infliction of great bodily injury. Generally, an inmate in state prison is eligible to earn one day credit for every day in custody (50% credit).

Strike Priors: Proposition 184 (Three Strikes-1994) limited credits for defendant sentenced to a felony with a prior strike conviction to 20% credit earnings. The three-strikes law was amended by Proposition 36 (2012) but the limitation on custody credit were not changed. Proposition 36 requires a 2/3 vote of the legislature to amend that the provisions of the initiative. If the Legislature was seeking to amend credit limitation for sentences with prior strike convictions, the Legislature would need to do so with a 2/3 vote based on the amendment language in Proposition 36.

However, Proposition 57 (2016), provided CDCR with the authority to award credits earned for good behavior and approved rehabilitative or educational achievements. CDCR now has the authority to award custody credits as they determine to be appropriate and are not bound by the credit limitation previous imposed by Proposition 184 and 36. CDCR is also not bound by existing legislative statutes on credit limitations like the existing statute regarding violent felonies.

This bill would be a legislative directive for CDCR use their authority under Proposition 57 to award credits in the manner described in this bill. This bill would direct CDCR to award 50% custody credits to inmates that are serving a sentence which included an enhancement because the inmate had one or more strike priors. This directive to award 50% credit would apply whether the sentence was determinate (specified number of years) or indeterminate (life sentence with the possibility of parole) as long as the current conviction for the inmate was not for a violent offense and CDCR does not have the inmate classified "VIO." "VIO" is an administrative classification CDCR uses for housing and programming which is based on prior convictions for violent offenses.

This bill would also direct CDCR to award 50% custody credits to inmates sentenced for a current conviction of a violent offense if CDCR does not have the inmate classified as "VIO." It is not clear if this bill would repeal the existing statutes limiting credits for the circumstances described in this bill.

3) **Constitutional Authority to Award Credits Granted to CDCR by Proposition 57**: Proposition 57, the "The Public Safety and Rehabilitation Act of 2016" of the November 2016 election changed the rules governing parole and the granting of custody credits to inmates in state prison. Prop. 57 authorized CDCR to award credits earned for good behavior and approved rehabilitative or educational achievements. Before Prop. 57, the matter of conduct credits earned in prison was governed by statute. (See e.g., Pen. Code, §§ 2933 and 2933.1.)

Specifically, Prop. 57 added section 32 to article I of the California Constitution which states, in pertinent part:

"32. (a) The following provisions are hereby added to enhance public safety, improve rehabilitation, and avoid the release of prisoners by federal court order, *notwithstanding anything in this article or any other provision of law*....

(2) Credit Earning: *The Department of Corrections and Rehabilitation shall have authority to award credits earned for good behavior and approved rehabilitative or educational achievements.*
(b) The Department of Corrections and Rehabilitation 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, emphasis added)

"It is at least arguable that CDCR is given total control over credits because the Act specifies that CDCR 'shall have the authority to award credits' 'notwithstanding any other law.'" (See Proposition 57: The Public Safety and Rehabilitation Act of 2016, by Couzens & Bigelow, May 2017, p. 13. (http://www.courts.ca.gov/documents/prop57-Parole-and-Credits-Memo.pdf)

In *People v. Brown* (2016) 63 Cal.4th 335, the Supreme Court considered the scope of Elections Code section 9002, which permits amendments to an initiative if they are "reasonably germane" to the measure's theme, purpose, or subject. In opining the proposed amendments to Proposition 57 which would grant CDCR the power to award credits violated this section, Justice Chin's dissenting opinion discussed the implications:

> "The constitutional amendment would also give the Department of Corrections and Rehabilitation (department) constitutional authority to award behavior and other credits. The Legislature has already enacted detailed mandatory provisions for the department to award conduct and participation credits. (See Pen. Code, § 2931 et seq.) But the amended measure's proposed constitutional language is permissive. Presumably, authority to award credits includes authority not to award credits or to award lower credits than the statutes currently require. Because the Constitution prevails over mere statutes, it appears the proposed constitutional amendment would displace the current statutory provisions for credits and shift authority over such credits from the legislative to the executive branch of government."
>
> For the moment, I will assume that altering the balance of power between the two branches of government in this way would not be an impermissible constitutional *revision*. … But shifting power from one branch of government to another is not reasonably germane to the original measure, which left the separation of powers between the branches of government untouched. (*Brown, supra*, 63 Cal.4th at p. 359.)

Justice Chin's dissent further stated:

> "The proposed constitutional amendment gives the department "authority to award credits earned for good behavior and approved rehabilitative or educational achievements." (Amended measure, § 3, adding art. I, proposed § 32, subd. (a)(2).) But it does not explain how this new, apparently permissive constitutional provision would interact with the detailed, mandatory provisions for credits the Legislature has enacted. As I have already discussed, the constitutional provision would seem to displace the statutory scheme. But I am not sure that is the intent. Displacing the statutory credit scheme might be one of the measure's "unintended

consequences"…. (*Brown, supra*, 63 Cal.4th at p. 361.)

It remains an open question whether the Legislature still has the authority to enact statutes pertaining to credits. However, as noted by Justice Chin, it is possible that one of the "unintended consequences" of Prop. 57 was to shift this authority exclusively to the executive branch.

This bill would direct CDCR to award credits in a specified fashion using mandatory language (shall). It is not clear that the Legislature has the authority to make such a mandate. However, even if the Legislature does not have the ability to mandate, the passage of this bill would provide guidance from the legislative branch as to how CDCR should exercise their constitutional authority to award credit.

4) **Benefits of Rehabilitative Programs:** The Rand Corporation reviewed the relevant literature and conducted meta-analysis to examine the association between correctional education and reductions in recidivism, improvements in employment after release from prison, and learning in math and in reading. The meta-analysis led to the following conclusions:

   a) Correctional education improves inmates' chances of not returning to prison;

   b) Inmates who participate in correctional education programs had a 43 percent lower odds of recidivating than those who did not. This translates to a reduction in the risk of recidivating of 13 percentage points;

   c) It may improve their chances of obtaining employment after release. The odds of obtaining employment post-release among inmates who participated in correctional education was 13 percent higher than the odds for those who did not participate in correctional education;

   d) Inmates exposed to computer-assisted instruction learned slightly more in reading and substantially more in math in the same amount of instructional time;

   e) Providing correctional education can be cost-effective when it comes to reducing recidivism. (https://www.rand.org/pubs/research_reports/RR266.html)

   This bill seeks to direct CDCR to operate its programming in ways that maximize the availability of programming and minimizes disruption to programming. Those directives include distance learning, minimizing waitlists, and working programming around inmates' work schedules and security levels.

5) **Argument in Support**: According to *Root and Rebound*, "The Access to Programming Act ensures that programming will be offered even if a facility is on lockdown, and would allow incarcerated people to earn milestone credits for work assignments. Current CDCR policy does not distinguish between lockdowns for security reasons and lockdowns for institutional needs like staff training. However, almost all rehabilitative programming is stopped for the duration of any and all lockdowns. These disruptions often undermine incarcerated people's opportunity to learn valuable insights and skills. Since the onset of the COVID-19 pandemic in March 2020, this disruption has made it so virtually no programming has been offered

indefinitely. Further, incarcerated people are often denied access to education opportunities, and educational milestone credits, due to conflicting work assignments. This bill recognizes the training and skill-building that occurs within most job assignments.

"The Access to Programming Act would reduce current barriers to programming due to transfers. Under current CDCR regulations, an incarcerated person's current programming is not considered during a non-adverse facility transfer. The Access to Programming Act instructs prisons to place transferred people on priority for programming that is consistent with the programming the person was participating in at the prison they are transferred from.

"The Access to Programming Act offers equal incentives for programming, regardless of persons, health, or age, or physical abilities. Current CDCR policy awards enhanced good conduct credit earning for people who volunteer to fight fires. This policy excludes people who do not meet the criteria to volunteer due to disability, health, age, or physical reasons. It also is a very narrow incentive due to housing capacities. For example, of all the fire camps, only three are available to women. This bill will increase the effectiveness of this incentive by creating a fair standard and allowing everyone, regardless of disability, age, or health, a pathway to earn the same credits as people who volunteer in fire camps."

6) **Argument in Opposition:** According to the *California Police Chiefs*, "After the passage of Proposition 57 (2016), the California Department of Corrections and Rehabilitation (CDCR) made massive changes to their programming and credit earning system to allow for early release of inmates. This included increasing "Good Conduct Credits" for inmates convicted of various crimes. For example, those convicted of violent offenses could now receive 20% credit for good behavior. AB 292 seeks to raise this to 50%, more than double what had just been done, which represents a massive increase. This is especially concerning given the fact many of the crimes on the list of violent felonies – rape, murder, robbery, kidnapping, continuous sexual abuse of a child, etc. – are the most horrendous crimes imaginable. Those that are convicted of these types of crimes often need years of programming to be rehabilitated, something that should not be rushed. For that reason, we must strongly oppose AB 292."

7) **Related Legislation**: SB 416 (Hueso), would require CDCR to offer college programs to inmates with a general education development certificate or equivalent or a high school diploma. SB 416 is set for hearing in the Senate Public Safety Committee on March 23, 2021.

8) **Prior Legislation**:

   a) AB 3160 (Stone), of the 2019-2020 Legislative Session, would have directed CDCR to use its constitutional authority to award custody credits to specified inmates convicted of a violent felony or a nonviolent second- or third-strike felony at a rate of a one-day reduction in the term of confinement for every day of incarceration AB 3160 was never heard in the Assembly Public Safety Committee.

   b) AB 965 (Stone), Chapter 577, Statutes of 2019, authorized the Secretary of CDCR to allow persons eligible for youthful offender parole to obtain an earlier youth offender parole hearing by adopting regulations to award custody credits towards their youth offender parole eligibility date.

REGISTERED SUPPORT / OPPOSITION:

Support

Initiate Justice (Co-Sponsor)
Re:store Justice (Co-Sponsor)
Anti-recidivism Coalition
Asian Americans Advancing Justice - California
Asian Prisoner Support Committee
Bend the Arc: Jewish Action
Boundless Freedom Project
California Attorneys for Criminal Justice
California Catholic Conference
California Immigrant Policy Center
California Public Defenders Association (CPDA)
California Reentry Program
California United for A Responsible Budget (CURB)
Californians for Safety and Justice
Communities United for Restorative Youth Justice (CURYJ)
Criminal Justice Clinic, UC Irvine School of Law
Defy Ventures
Drug Policy Alliance
Ella Baker Center for Human Rights
Fair Chance Project
Five Keys Schools and Programs
Freedom Within Project
Fuel
Grip Training Institute/insight-out
Heals Project- Helping End All Life Sentences
Holy Cross Lutheran Church, Livermore, CA
Hustle 2.0, Pbc
Insight Garden Program
Jail Guitar Doors
Literacy Lab
Los Angeles Regional Reentry Partnership (LARRP)
Marin Shakespeare Company
National Center for Youth Law
Paws for Life K9 Rescue
Prison Education Project
Prison Yoga Project
Project Rebound Consortium
Root & Rebound
San Francisco Public Defender
Santa Cruz Barrios Unidos INC.
Showing Up for Racial Justice (SURJ) Bay Area
Silicon Valley De-bug
Starting Over INC.

Success Stories Program
The Place4grace
Tides Advocacy
Translatin@ Coalition
White People 4 Black Lives
William James Association
Ywca Berkeley/oakland

Oppose

California District Attorneys Association
California Police Chiefs Association

Analysis Prepared by:

David Billingsley / PUB. S. / (916) 319-3744

Date of Hearing: March 23, 2021
Counsel: Cheryl Anderson

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

AB 503 (Stone) – As Introduced February 9, 2021

SUMMARY: Limits the period of time in which a court may place a ward of the court on probation to six months, except that a court may extend the probation in six month increments if it is in the best interest of the ward. Specifically, **this bill**:

1) States that a minor adjudged to be a ward of the court who is supervised by probation in the community shall not be placed on probation for a period that exceeds six months, except as follows:

   a) A court may extend the probation period for a period not to exceed six months after a noticed hearing and upon proof by clear and convincing evidence that it is in the ward's best interest;

   b) At the noticed hearing, the probation agency shall submit a report to the court detailing the basis for any request to extend probation and the ward's attorney shall be given the opportunity to examine witnesses and present evidence; and

   c) In cases in which the court finds by clear and convincing evidence a basis for extending probation beyond the six-month period, the court shall state the reasons for the findings orally on the record. The court shall also set forth the reasons in an order entered upon the minutes if requested by either party or when the proceedings are not being recorded electronically or reported by a court reporter.

2) Provides that this provision does not preclude termination of the ward's probation before the end of the six-month period.

3) Requires that conditions of probation for a ward be individually tailored, developmentally appropriate, and reasonable.

4) Removes the authority of the court to order the ward go to work and earn money for the support of the ward's dependents or to effect reparation and the requirement that the ward keep an account of and report their earnings to probation and apply these earnings as directed by the court.

5) Removes the authority of the court to order the minor to pay a $250 fine or participate in an uncompensated work program in lieu of restitution.

EXISTING LAW:

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

2) Provides, effective July 1, 2021, that juvenile court jurisdiction may continue until age 21, except as follows:

   a) If the wardship is based on the commission of a specified serious offense, the juvenile court may retain jurisdiction until age 23, unless the ward would have faced an aggregate sentence of seven years or more in criminal court, in which case the juvenile court's jurisdiction would continue until age 25. (Welf. & Inst. Code, § 607, subds. (a) – (c), as effective July 1, 2021.)

3) Authorizes the juvenile court to place a ward of the court on supervised probation. The probation officer may place the ward in a relative's home, a suitable licensed community care facility, or with a foster family agency, as specified, a suitable certified family home, or with a resource family. (Welf. & Inst. Code, § 727.)

4) Provides that when a ward is placed under the supervision of the probation officer or committed to the care, custody, and control of the officer, the juvenile court may make any and all reasonable orders for the conduct of the ward, and impose and require any and all reasonable conditions that it may determine fitting and proper to the end that justice may be done and the reformation and rehabilitation of the ward enhanced. (Welf. & Inst. Code, § 730, subd (b), as repealed on July 1, 2021, & § 730, subd (b), as operative on July 1, 2021.)

5) Authorizes the court to order the ward go to work and earn money for the support of the ward's dependents or to effect reparation and in either case that the ward keep an account of the ward's earnings and report the same to the probation officer and apply these earnings as directed by the court. (Welf. & Inst. Code, § 730, subd (b), as repealed on July 1, 2021, & § 730, subd (b), as operative on July 1, 2021.)

6) Authorizes, effective July 1, 2021, the court to order the ward to pay a fine up to $250 for deposit in the county treasury if the court finds the minor has the financial ability to pay, or to participate in an uncompensated work program in lieu of restitution. (Welf. & Inst. Code, § 730, subd. (a)(1)(A), as operative on July 1, 2021.)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "According to county probation data from across California, the average time a youth spends on probation is nearly two years, with youth of color spending significantly longer periods of time on probation than white youth. While on probation, youth are often required to abide by conditions that are neither developmentally appropriate, nor tailored to their individual needs and goals.

"AB 503 will establish clear statutory standards for the conditions and length of wardship probation, thus protecting youth from languishing on probation supervision for an indeterminate amount of time under excessive conditions. Specifically, the bill will limit non-custodial wardship probation to six months while allowing for extensions if a court determines at a noticed hearing that an extension is in the youth's best interest. If the evidence indicates that an extension is necessary, the court must set a review hearing no more than six months later to assess progress. In addition, AB 503 will require probation conditions to be individually tailored, developmentally appropriate, and reasonable."

2) **Juvenile Probation and Racial Disparities**: The juvenile court is authorized to place a minor declared to be a ward of the court on probation. Juvenile probation can theoretically continue as long as the juvenile court has jurisdiction over the ward. Moreover, there is no required periodic review. (Welf. & Inst. Code, §§ 602, 607, 727, 730, subd. (b).)

According to a recent report from the National Center for Youth Law and Haywood Burns Institute: "Probation is the most common court ordered outcome imposed on youth in juvenile court in California. Too often, youth are placed on probation for an unspecified amount of time, while under the microscope of overly burdensome and confusing probation conditions. Conditions are rarely individualized—or realistic—and are ultimately impediments to healthy youth development and rehabilitation. Furthermore, available data show that probation is more frequently imposed on youth of color, and for longer periods of time. Together, these practices trap many young people in the legal system for their entire adolescence, lead to further use of detention, and cause far more harm than good." (National Center for Youth Law and Haywood Burns Institute, *Ending Endless Probation* (Mar. 2021), pp. 1, 7-10, citing The Annie E. Casey Foundation, *Transforming Juvenile Probation: A Vision for Getting it Right* (2018).)

The report reflects that in 2019, almost 20,000 youth in California were placed on probation. The majority – 87 percent – were youth of color. (*Ending Endless Probation*, *supra*, at p. 3, citing Office of the Attorney General, California Department of Justice, *Juvenile Justice in California* (2019), at https://dataopenjustice.doj.ca.gov/sites/default/files/2020-06/Juvenile%20Justice%20In%20CA%202019.pdf.)

The report recommends creating a presumption that juvenile probation will terminate after six months. Subsequent extensions should be granted only where clear and convincing evidence shows that extending probation for an additional six months is in the minor's best interest. (*Ending Endless Probation*, *supra*, at p. 10.)

This bill limits to six months the period of time in which a court may place a ward of the court on probation, except that a court may extend the probation in six-month increments if it is in the best interest of the ward. There is no distinction based on severity of the offense underlying the wardship. With no distinction for more serious offenses, a court may be disinclined to grant probation in some instances, notwithstanding the ability to extend probation in six-month increments.

3) **Probation Conditions**: A juvenile court may impose on a minor on probation "any and all reasonable conditions that it may determine fitting and proper to the end that justice may be done and the reformation and rehabilitation of the ward enhanced." (Welf. & Inst. Code, § 730, subd. (b).) "A juvenile court enjoys broad discretion to fashion conditions of probation

for the purpose of rehabilitation and may even impose a condition of probation that would be unconstitutional or otherwise improper so long as it is tailored to specifically meet the needs of the juvenile." (*In re Josh W.* (1997) 55 Cal.App.4th 1, 5; *In re Sheena K.* (2007) 40 Cal.4th 875, 889.)

In *People v. Lent* (1975) 15 Cal.3d 481, the California Supreme Court articulated the following test to determine whether a probation condition constitutes an abuse of discretion: "A condition of probation will not be held invalid unless it '(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality.'" (*Id.* at p. 486.) "This test is conjunctive—all three prongs must be satisfied before a reviewing court will invalidate a probation term." (*People v. Olguin* (2008) 45 Cal.4th 375, 379.) "As such, even if a condition of probation has no relationship to the crime of which a defendant was convicted and involves conduct that is not itself criminal, the condition is valid as long as the condition is reasonably related to preventing future criminality." (*Id.* at pp. 379-380.) The *Lent* test applies to juvenile probation conditions. (*In re P.O.* (2016) 246 Cal.App.4th 288, 294; *In re D.G.* (2010) 187 Cal.App.4th 47, 52.)

"Despite this, youth are still burdened with excessive and arbitrary probation conditions which, research has shown, harms their development and prospects for rehabilitation." (*Ending Endless Probation, supra*, at p. 5, citing Stephen Handelman, *How Juvenile Probation Lands More Youths in Jail* (Oct. 26, 2020) at https://thecrimereport.org/2020/10/26/how-juvenile-probation-lands-more-young-people-in-jail/ .)

The report by the National Center for Youth Law and Haywood Burns Institute recommends that "[j]urisdictions eliminate standard one-size fits all lists of conditions, and instead create a small number of developmentally appropriate conditions tied to individual youth success." (*Ending Endless Probation, supra*, at p. 11.)

This bill requires conditions of probation for a ward to be individually tailored, developmentally appropriate, and reasonable.

4) **Juvenile Justice Realignment**: In 2020, the Legislature passed Senate Bill 823 (Committee on Budget and Fiscal Review) which established a process for realigning California's juvenile system by phasing out the state's youth prison system, the Division of Juvenile Justice, and transferring the responsibility for managing all youthful offenders to local jurisdictions. (See Sen. Comm. on Budget and Fiscal Review. Floor Analysis of Sen. Bill No. 823 (2019-2020 Reg. Sess.) as amended August 28, 2020, p. 1.)

"A troubling feature of the state youth prison system has always been that youth of color make up nearly 90 percent of the state custody population. Multiple juvenile justice reforms in California in recent years have sought to address this disparity while mandating upgrades in trauma informed care, conditions of confinement, access to education, record sealing and other areas. These reforms, combined with steep drops in youth crime rates, have driven the inmate population of DJJ from all time high of 10,000 (in 1996) to fewer than 800 youth today" (https://www.commonweal.org/news/jjp-2/ [as of March 7, 2021].)

Among other things, SB 823 states the intent of the Legislature to establish a separate dispositional track for higher-need youth by March 1, 2021. While this separate track is not currently in the law, the framework is the processes laid out in Section 30 of Senate Bill 823 as amended on August 24, 2020. (Welf. & Inst. Code, §736.5, subd. (e).) Those processes would authorize a juvenile court to commit a ward, whose wardship was based on commission of a specified serious offense when the juvenile was age 14 or older, to a secure treatment facility, as specified. (Sen. Bill 823 (2019-2020 Reg. Sess.) as amended August 24, 2020.) At the conclusion of a baseline confinement term, a ward could be discharged to a period of probation supervision in the community under conditions approved by the court, unless the court finds that the ward constitutes a substantial risk of imminent harm to others in the community if released from custody. The court could also discharge a ward to a program of probation supervision. The court would determine the reasonable conditions of probation that are suitable to meet the developmental needs and circumstances of the ward and to facilitate the ward's successful reentry into the community. If the ward was discharged to a program of probation supervision, the court would be required to periodically review the ward's progress and make any additional orders deemed necessary in order to facilitate the provision of services or to otherwise support the ward's successful reentry into the community. If the ward failed to materially comply with the reasonable orders of probation imposed by the court, the court could order that the ward be returned to custody in the secure youth treatment facility for the remainder of the presumptive term initially ordered by the court, subject to review hearings. (*Ibid.*)

In the event this secure track or other post-discharge probation language becomes law, it may be necessary to clarify how this bill's six-month presumptive probation termination provision applies to it. This necessarily includes consideration of whether it should apply to it.

5) **Practical Considerations for Youth in Foster Care Placements:** If the court places a ward on probation, the probation officer may place the minor in a foster home, the home of a relative, a private institution, or a public agency. (Welf. & Inst. Code § 727.) Other placements include the approved home of a resource family. (Welf. & Inst. Code, §§ 16519.5 & 727, subd. (a)(4)(B).)

   The bill's use of the phrase "probation supervision in the community" is not defined or entirely clear. It would appear to include youth removed from parental care and placed in resource family/relative placements/foster care, etc.

   These placements are subject to their own six-month review hearings and evidentiary burdens. The court must review the placement at a hearing within six months of the order removing custody, and within six months after each review so long as the child remains out of the custody of the parent or guardian. Additionally, the court must hold a permanency planning hearing within 12 months of the order removing custody and thereafter no less than every 12 months, during the placement period. (See Cal. Rules of Court, rule 5.810(a), (b); see also Welf. & Inst. Code § 11404.1 [reviews and hearings for AFDC-FC eligibility for children not residing with unrelated legal guardian].)

   This bill would create a separate hearing track for these wards -- also six-month intervals but with different statutory guidelines. (Compare Welf. & Inst. Code, §§ 727.2, subds. (e)-(g) & 11404.1.) Should there be multiple tracks for these youth with different statutory guidelines, and which in some cases implicates benefits?

6) **Argument in Support**: According to the National Center for Youth Law, a sponsor of this bill: "Probation is the most common disposition imposed on youth in juvenile court in California. In 2019, over 19,000 young Californians were placed on wardship probation. While probation departments intend to provide rehabilitative services to young people, this function is undermined by its simultaneous focus on surveillance and compliance. Research has concluded that "[i]n most jurisdictions, probation is a punitive system that attempts to elicit compliance from individuals primarily through the imposition of conditions, fines, and fees that in many cases cannot be met."

"Importantly, youth of color are disparately impacted by justice system involvement and probation supervision—the vast majority (87%) of young people in California placed on probation in 2019 were youth of color. According to data from the California Department of Justice (DOJ), youth of color are significantly more likely to go through court proceedings and be placed on formal probation. In 2019, Black youth were more than eight times more likely than White youth to be placed on probation and Latino youth were more than two times more likely.

"In contrast to a growing number of states, California has no statutory limitation on the length of time young people spend under court ordered, non-custodial "wardship" probation supervision—something that was recently changed in the California adult courts with AB 1950 (2020). Analysis of County probation data reveal that young people are on wardship probation for an average of up to two years, with youth of color spending significantly longer periods of time on probation than White youth.

"Long probation terms increase the likelihood that youth will be charged with probation violations, sometimes resulting in incarceration, and often for minor noncriminal transgressions. This practice is in conflict with the principles of youth development and research demonstrating that keeping youth on supervision for longer than six months does not likely result in public safety gains. Guided by this research, juvenile justice experts in the Pew Charitable Trusts' Public Safety Performance Project have recommended shorter periods of probation for youth in several states.

"Further, probation conditions all too often set youth up for failure. Research shows that youth often do not understand what is expected of them even right after they leave the courtroom at the time of disposition. The imposition of long lists of requirements, many of which bear little or no relationship to the behavior that brought the youth before the court, make it difficult for youth to succeed. Juvenile court probation orders in California can include anywhere from five to fifty conditions of probation. Standard terms and conditions of probation for youth, regardless of level of need, are not always individually tailored and developmentally appropriate to provide adequate support. Evidence supports limiting probation terms and using the incentive of shortening probation terms as a reward for positive behavior showing that this can improve outcomes and reduce costs without compromising public safety."

According to the Immigrant Legal Resource Center: "The ILRC supports AB 503. The ILRC has worked and will continue to work with the co-sponsors to mitigate any potential impact of this bill on immigrant youth seeking Special Immigrant Juvenile Status (SIJS), a path to immigration status for some children who have been abandoned, abused, or neglected by a

parent and come under juvenile court jurisdiction. For a child to maintain eligibility for SIJS, the child must remain under juvenile court jurisdiction while their applications for immigration status are adjudicated by U.S. Citizenship & Immigration Services. In some cases, this process can take years. The need for ongoing juvenile court jurisdiction is already an issue for many youth seeking SIJS, but AB 503 brings this issue to the forefront and provides an opportunity to find a creative solution. We are optimistic that the issue can be addressed by working together with the bill's co-sponsors and author."

7) **Argument in Opposition:** According to the California District Attorneys Association: "…This bill would create new W&I 602.05 to limit to six months the probation period in a juvenile case, no matter how serious or violent the crimes committed or how serious or violent the juvenile's criminal history is.

"Because the bill contains no disqualifying crimes, a minor on probation for murder, sexual assault, vehicular manslaughter, armed robbery, or a gang shooting would be treated the same as a minor on probation for petty theft or vandalism. Six months is much too short to ensure that rehabilitation occurs or that crime victims are protected. It would be impossible in most cases for a minor to participate in meaningful rehabilitative programs or to pay back even a portion of restitution owed to a crime victim in six months. Cases often involve conditions of probation to stay away from a crime victim. A short period of probation would leave a victim unprotected after six months. The bill permits extension of the six-month probation period only if it is in the minor's best interest. Neither public safety nor a crime victim's interest or safety, is a factor.

"A six-month probation period that applies to even the most serious and violent offenders would be much shorter than a period of deferred entry of judgment for less serious offenders. Welfare & Institutions Code Sections 791 – 793 currently permit a court to place an offender who has committed a less serious offense (a non-W&I 707(b) offense) into a program for one to three years. Upon successful completion of the program, the charges are dismissed and the record is sealed.

"Judges should have the flexibility and discretion to fashion sentences and probation periods that are appropriate for each juvenile offender. Proportionality is important. Probation is not punishment. On the contrary, courts have ruled that probation is an act of clemency and grace. Judges are not permitted to impose any and all probation conditions that they can dream up. There is a long-standing judicially-created test for determining whether or not a particular probation condition is valid. Probation conditions are required to relate to the crime committed, to criminal activity itself, or to the probationer's future criminality. (*People v. Olguin* (2008) 45 Cal.4th 375, 379-380; *People v. Lent* (1975) 15 Cal.3d 481, 486.)

"If there is to be a default period of probation, it should be for at least two years and should not apply in cases where a minor has committed a serious felony (P.C. 1192.7(c)), a violent felony (P.C. 667.5(c)), or any offense listed in W&I 707(b). A judge should have the authority in every case to impose a probation period of longer than two years by stating reasons on the record. The standard for extension should not be limited to only what it is in the minor's best interest. Public safety and the interests and safety of crime victims must be factors the court can consider.

"It is precisely because we believe in rehabilitation that we oppose new W&I 602.05. Offenders working toward rehabilitation and engaging in programming, the interests of crime victims, and public safety are all best served when judges have the flexibility to grant a probation period that is appropriate and proportional for each individual case."

8) **Related Legislation:**

a) SB 641 (Skinner), of the 2021-2022 Legislative Session, would make technical, non-substantive changes to provisions governing juvenile court jurisdiction. SB 641 was referred to the Senate Committee on Rules on March 3, 2021.

b) SB 383 (Cortese) of the 2021-2022 Legislative Session, amends Proposition 21 by deleting the prohibition on including minors, whose wardship is based on specified serious offenses, in an informal supervision program. SB 383 was re-referred to the Senate Committee on Public Safety on March 11, 2021.

9) **Prior Legislation**:

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

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

c) SB 1134 (Beall), of the 2019-2020 Legislative Session, would have limited to six months the period of time in which a court could place a ward of the court on probation, except that a court could have extended the probation period for a period not to exceed six months if it was in the best interest of the ward and would have required that conditions of probation be individually tailored, developmentally appropriate, and reasonable. SB 1134 was not heard in the Senate Committee on Public Safety.

d) SB 838 (Beall), Chapter 919, Statutes of 2014, reduced confidentiality protections and made ineligible for deferred entry of judgment (DEJ) juveniles who have committed or who are alleged to have committed specified sex crimes involving an unconscious or disabled victim, as specified.

e) AB 2776 (Aanestad and Longville), of the 1999-2000 Legislative Session, would have allowed individuals who are part of the juvenile justice system to be transferred to county jail for up to six months. AB 2776 failed passage in the Assembly Committee on Public Safety.

REGISTERED SUPPORT / OPPOSITION:

Support
Alliance for Boys and Men of Color (Sponsor)

National Center for Youth Law (Sponsor)
Communities United for Restorative Youth Justice (Co-Sponsor)
The W. Haywood Burns Institute (Co-Sponsor)
American Civil Liberties Union
Bill Wilson Center
California Alliance for Youth and Community Justice
California Attorneys for Criminal Justice
California Catholic Conference
California Coalition for Youth
California Latinas for Reproductive Justice
California Public Defenders Association
California Youth Connection
Casa of Los Angeles
Center for Employment Opportunities
Center for Public Interest Law/Children's Advocacy Institute/University of San Diego
Children Now
Community Agency for Resources Advocacy and Services
County of San Diego
Drug Policy Alliance
East Bay Community Law Center
Ella Baker Center for Human Rights
Felony Murder Elimination Project
Fresno Barrios Unidos
Immigrant Legal Resource Center
Initiate Justice
John Burton Advocates for Youth
Legal Services for Prisoners with Children
Midtown Family Services
Milpa (motivating Individual Leadership for Public Advancement)
Monarch Services of Santa Cruz County
National Institute for Criminal Justice Reform
Pacific Juvenile Defender Center
Public Counsel
Santa Clara County Office of the Public Defender
Sigma Beta Xi, INC. (sbx Youth and Family Services)
Silicon Valley De-bug
The Women's Foundation of California
Underground Grit
Urban Peace Institute

Opposition

California District Attorneys Association

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

Date of Hearing: March 23, 2021
Counsel: Nikki Moore

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

AB 518 (Wicks) – As Introduced February 10, 2021

SUMMARY: Provides that an act or omission that is punishable in different ways by different provisions of law may be punished under any of those provisions, including the lesser of the available sentences.

EXISTING LAW:

1) Provides that an act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other. (Pen. Code, Sec. 654, subd. (a).)

2) States that a defendant who may be punished in different ways and sentenced accordingly under one theory shall not be granted probation if any of the provisions that would otherwise apply to the defendant prohibits the granting of probation. (Pen. Code, Sec. 654, subd. (b).)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "In 1997, the Legislature enacted a law requiring the court to impose a sentence for an offense carrying the longest potential term of imprisonment. California has since taken steps to reverse the tough on crime policies of the past, which often constrained judges. In the last decade, lawmakers have enacted more than a dozen laws restoring the discretion of a judge. As the state continues to move toward a criminal justice system prioritizing public safety programs over long prison sentences, reducing recidivism rates, and reallocating resources for rehabilitation. AB 518 will modernize a criminal law that has been in place for over 20 years by authorizing a judge to exercise discretion when determining a sentence for multiple crimes during a single act."

2) **Need for this Bill:** According to the author, "Prior to 1998, California law allowed a judge to impose, for multiple crimes during a single act, a sentence for any one of the offenses committed. In *People v. Norrell* (1996) 13 Cal.4th 1, the Supreme Court affirmed that a judge had the discretion to impose the term for any one of the counts, whether it carried a greater term or lesser term than the other. In *Norrell*, the defendant was convicted of both 'kidnapping for robbery' and 'robbery.' The former carried a longer potential term. The trial court took into consideration the age of the juvenile and decided that the shorter term would be more appropriate under the circumstances. The court wanted to give the defendant the opportunity to rehabilitate, instead of serving an extended term. The People appealed. The

Supreme Court affirmed, relying on the straightforward statutory language that a defendant may be punished under either of such provisions."

3) **Restoring Judicial Discretion Regarding Sentence Length**: In 1997, the Legislature eliminated judicial discretion in sentencing when a person may be subject to sentencing for multiple crimes for a single act, mandating that a judge impose the harshest sentence. This bill would restore judicial discretion and return the sentencing decision to the trier of fact. Mandating the harshest sentence in every case robs the judiciary of an important decision which it is in the best position to make — the court has heard and considered the facts and circumstances of the case and should have discretion to formulate an appropriate sentence.

4) **One Act Rendering Multiple Convictions is Only Punished Once**: Many crimes contain the elements for other crimes. For example, a defendant committed both the offenses of carjacking using a firearm and robbery to take a victim's van and the jewelry inside of it. Because the elements for both robbery and carjacking were present, the defendant was convicted of both crimes. Under existing law, the defendant is only punished for one of the crimes (robbery and carjacking) since the victim's jewelry and van were taken as part of the same act. In that case, the defendant served the sentence for carjacking and the sentence for robbery was stayed. (*People v. Dominguez* (1995) 38 Cal. App. 4th 410.) Under existing law, a judge must sentence the defendant to the most punitive sentence. Prior to 1997, the judge had discretion to impose either sentence. This bill would restore that discretion.

   Importantly, this bill does not change the procedure for sentencing a person for *different* acts. For example, if a person committed burglary and in the process committed murder, these two distinct acts would still be separately sentenced.

5) **Argument in Support**: According to the *California Public Defenders Association*, "Under current law, it does not matter if the judge believes that society would be best protected by a punishment under the shorter term. For example, if a judge believes that a young adult or a first offender will be adequately punished and can be rehabilitated by a shorter term, the judge has no choice but to impose the longer term. Such a lack of judicial discretion harms the individual defendant as well as society by causing a first offender to spend needless years in prison long after being punished enough and wasting scarce monetary resources on imprisoning someone who is not dangerous.

   "Even though AB 518 allows judges proper discretion, Penal Code section 654 will still restrain judges from granting probation if either of the charged provisions prohibits probation."

6) **Argument in Opposition**: According to the *California District Attorneys Association*, "The purpose behind the current version of Penal Code section 654 is to ensure the punishment fits the crime and that a defendant receives neither excessive punishment nor excessive leniency. Indeed, the language AB 518 now seeks to exclude was included in section 654 over 20 years ago by SB 914 to prevent a defendant from receiving a sentencing windfall. (See Stats.1997, c. 410 (S.B.914).)

   "As the legislative history of that amendment made clear, the legislature was concerned that a defendant who committed a more serious violent offense while simultaneously committing a second less serious offense arising from the same course of conduct could escape proper

punishment on the more serious offense whereas a defendant who only committed the more serious offense could not. For example, without the requirement that a person must be punished pursuant to the law that provides for the longest potential term of imprisonment, a defendant convicted of kidnap for the purposes of robbery (which carries a punishment of life with the possibility of parole) and also convicted of the crime of robbery (which carries a punishment of two, three, or five years) could be sentenced only for the robbery. "It defies common sense that a defendant convicted of a string of crimes could avoid being sentenced on the most serious crime for which he or she is convicted." (California Bill Analysis, S.B. 914 Assem., 9/05/1997.)

"This reasoning is no less cogent today. However, it is even more imperative to retain the current language under the current law because eliminating it has the potential to undermine the balance between public safety and rehabilitation reflected in the passage of Proposition 57 (Cal. Const Art. 1, § 32), which provides: 'Any person convicted of a nonviolent felony offense and sentenced to state prison shall be eligible for parole consideration after completing the full term for his or her primary offense.' (§ 32(a)(1).)

"In Proposition 57, the voters drew a distinction between offenders who commit violent crimes and those who do not. Someone who is serving a sentence for a violent offense should not be eligible for early parole – albeit the California Supreme Court is currently considering whether a person convicted and serving a sentence for both a violent and nonviolent offense is eligible for early parole. (See *In re Mohammad* (2019) 42 Cal.App.5th 719 (S259999) [taken up for review after holding an inmate who finished serving full prison term of his sentence for nonviolent felony offense of receiving stolen property, which was designated as his primary offense, was eligible for early parole, even though inmate's sentence also included violent felony offenses].)

"If the California Supreme Court decides that a person who is simultaneously convicted of both a serious and nonserious offense is eligible for early parole regardless of whether the nonserious offense is stayed pursuant to section 654, then there may be no reason over and above the commonsense rationale described in the second paragraph of this letter.

"However, if the California Supreme Court decides that a person who is simultaneously convicted of both a violent and nonviolent offense is only eligible for early release on parole when the nonserious offense is the term imposed, then changing the language of section 654 as proposed by AB 2154 could result in a double windfall for a defendant convicted of both a violent and nonviolent offense stemming from the same conduct. (See Cal. Const Art. 1, § 32(a)(1) ['the full term for the primary offense means the longest term of imprisonment imposed by the court for any offense, excluding the imposition of an enhancement, consecutive sentence, or alternative sentence.' (emphasis added)].) This is because a court imposing a sentence on the nonviolent offense not only potentially allows the offender who commits both a nonviolent and violent offense to be given less time than an offender who only commits a violent offense, it allows for the offender who commits both the nonviolent and violent offense to obtain an earlier parole date than the offender who only commits the violent offense.

"Moreover, even if the California Supreme Court holds that a person who is serving a sentence on both a violent and nonviolent offense is not eligible for early parole under Proposition 57, unless the Court clarifies whether a sentence that is imposed but stayed under

section 654 is 'serving' a sentence, AB 518 will create other new legal issue. This because under Proposition 57, 'the full term for the primary offense means the longest term of imprisonment imposed by the court for any offense' and if a sentence for the crime with the longest term of imprisonment can be imposed but stayed, the question of what constitutes the full term for the primary offense will be very difficult to answer and create new litigation. At a minimum, this legislation should be deferred until the California Supreme Court decides the case of *In re Mohammed* so that, if necessary, the language modifying section 654 can be crafted to address the problem of interpreting Proposition 57. Moreover, the bill does not make clear that any new discretion granted courts by the proposed change does not apply to the sentences of defendants who have already been sentenced regardless of whether the conviction is final; otherwise, it will open up the floodgates of resentencing hearings.

"Finally, we are not aware of any significant systemic problems or injustices stemming from the current language. The change is simply unnecessary."

7) **Related Legislation**: SB 82 (Skinner) would provide that theft of property that is valued under $950 where specified circumstances are not present to be charged as a misdemeanor.

8) **Prior Legislation**:

   a) AB 2154 (Wicks), of the 2019-2020 Legislative Session, provided that an act or omission that is punishable in different ways by different provisions of law may be punished under any of those provisions, including the lesser of the available sentences. AB 2154 was not pursued in 2020 due to COVID-19.

   b) SB 914 (Brulte), Chapter 410, Statutes of 1997, provided that an act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, as specified.

REGISTERED SUPPORT / OPPOSITION:

Support

American Civil Liberties Union/Northern California/Southern California/San Diego and Imperial Counties
California Attorneys for Criminal Justice
California Public Defenders Association (CPDA)
Drug Policy Alliance
Ella Baker Center for Human Rights
Initiate Justice
San Francisco Public Defender

Opposition

California District Attorneys Association

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