California State Assembly

PUBLIC SAFETY

REGINALD BYRON JONES-SAWYER SR.
CHAIR

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AGENDA

Tuesday, March 28, 2023
9 a.m. -- State Capitol, Room 126

REGULAR ORDER OF BUSINESS

HEARD IN SIGN-IN ORDER

1.	AB 44	Ramos	Peace officers: tribal police.
2.	AB 455	Quirk-Silva	Firearms: prohibited persons.
3.	AB 458	Jones-Sawyer	Peace officers.
4.	AB 523	Vince Fong	Organized retail theft: cargo.
5.	AB 567	Ting	Criminal records: relief.
6.	AB 642	Ting	Law enforcement agencies: facial recognition technology.
7.	AB 667	Maienschein	PULLED BY THE AUTHOR
8.	AB 852	Jones-Sawyer	Sentencing: bias.
9.	AB 977	Rodriguez	PULLED BY THE AUTHOR
10.	AB 1028	McKinnor	Reporting of crimes: mandated reporters.
11.	AB 1034	Wilson	Law enforcement: facial recognition and other biometric surveillance.
12.	AB 1047	Maienschein	PULLED BY THE AUTHOR
13.	AB 1067	Jim Patterson	Vehicle accidents: fleeing the scene of an accident.
14.	AB 1089	Gipson	Firearms.
15.	AB 1104	Bonta	Corrections and rehabilitation: sentencing.
16.	AB 1118	Kalra	Criminal procedure: discrimination.
17.	AB 1149	Grayson	Human trafficking Act: California Multidisciplinary Alliance to Stop Trafficking (California MAST).
18.	AB 1177	McKinnor	Parole: hearing records.
19.	AB 1186	Bonta	Juveniles: restitution.
20.	AB 1226	Haney	Corrections: Placement of incarcerated persons.
21.	AB 1266	Kalra	Infractions: warrants and penalties.
22.	AB 1310	McKinnor	Sentencing: recall and resentencing.
23.	AB 1351	Haney	Coroners and medical examiners: reporting drug overdose deaths.

24. AB 1368 Lackey Sexual assault forensic evidence: testing.

COVID FOOTER

SUBJECT:

All witness testimony will be in person; there will be no phone testimony option for this hearing. You can find more information at www.assembly.ca.gov/committees.

Date of Hearing: March 28, 2023
Counsel: Liah Burnley

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

AB 44 (Ramos) – As Amended March 2, 2023

As Proposed to be Amended in Committee

SUMMARY: Allows law enforcement agencies of federally recognized Indian Tribes, as defined, to apply for access to the California Law Enforcement Telecommunications System (CLETS). Specifically, **this bill**:

1) Adds one representative from a federally recognized Indian Tribe that is a CLETS system subscriber to the existing CLETS Advisory Committee (the committee).

2) States that the system may connect and exchange traffic with compatible systems of a Tribe.

3) Allows a law enforcement agency of a Tribe to apply for system service.

4) Provides that the system shall provide service to any law enforcement agency of a Tribe qualified by the committee that desires connection, at its own expense.

5) Requires the Director of General Services to fix the charge to be paid by any Tribe to the Department of Justice (DOJ) for connection to the system.

6) Prohibits the committee from approving a Tribe's application for system service unless a law, resolution, or ordinance is adopted by the Tribe, as specified, that provides for all of the following:

    a) An express waiver of sovereign immunity for claims arising out of, connected with, or related to CLETS, as specified;

    b) That the Tribe agrees that the substantive and procedural laws of the State of California shall govern any claim or suit related to CLETS, as specified;

    c) That the courts of the State of California or the federal government, as applicable, shall have exclusive jurisdiction over such claims;

    d) That the Tribe shall cooperate with any inspections, audits and investigation by the DOJ for improper use and compliance with the operating policies, practices and procedures, including any sanction, discipline from the DOJ, as specified; and,

    e) That the Tribe shall comply with all of the laws of the State relating to the use of records and information in the system.

7) Defines "Tribe" as a federally recognized Indian Tribe whose territorial boundaries lie within the State of California and the agencies, entities, arms of the Tribe, as appropriate, either together or separately.

8) Defines "Sovereign Immunity" as immunity from suit or action of the Tribe and its agencies, entities, arms, including the officers, agents and employees of the Tribe when acting within the scope of their authority and duty.

9) States legislative findings and declarations.

EXISTING LAW:

1) Establishes CLETS for the State of California. (Gov. Code, § 15151.)

2) Requires the DOJ to maintain CLETS for the use of law enforcement agencies. (Gov. Code, § 15152.)

3) States that the system shall be under the direction of the Attorney General (AG), and shall be used exclusively for the official business of the state, and the official business of any city, county, city and county, or other public agency. (Gov. Code, § 15154.)

4) Requires the AG to appoint a CLETS advisory committee, referred to as "the committee", to advise and assist the AG in the management of the system with respect to operating policies, service evaluation, and system discipline. (Gov. Code, § 15154.)

5) Requires the committee to serve at the pleasure of the AG without compensation except for reimbursement of necessary travel expenses. (Gov. Code, § 15154.)

6) Provides that the committee shall consist of representatives from the following organizations:

   a) Two representatives from the California Peace Officers' Association;

   b) One representative from the California State Sheriffs' Association;

   c) One representative from the League of California Cities;

   d) One representative from the County Supervisors Association of California;

   e) One representative from the DOJ;

   f) One representative from the Department of Motor Vehicles;

   g) One representative from the Office of Emergency Services;

   h) One representative from the Department of the California Highway Patrol; and,

   i) One representative from the California Police Chiefs Association. (Gov. Code, § 15155.)

7) Requires the committee to meet at least twice each year, as specified. (Gov. Code, § 15158.)

8) Provides that all meetings of the committee and all hearings held by the committee shall be open to the public. (Gov. Code, § 15159.)

9) Requires the AG, upon the advice of the committee, to adopt and publish for distribution to the system subscribers and other interested parties the operating policies, practices and procedures, and conditions of qualification for membership. (Gov. Code, § 15160, subd. (a).)

10) Provides that the system may connect and exchange traffic with compatible systems of adjacent states and otherwise participate in interstate operations. (Gov. Code, § 15162.)

11) Requires the system to provide service to any law enforcement agency qualified by the committee which, at its own expense, desires connection through the county terminal. (Gov. Code, § 15163.)

12) Requires any subscriber to the system to file with the AG an agreement to conform to the operating policies, practices and procedures approved by the committee under penalty of suspension of service or other appropriate discipline by the committee. (Gov. Code, § 15165.)

13) States that the Director of General Services shall fix the charge to be paid by any state department, officer, board or commission to the DOJ for connection to the system. (Gov. Code, § 15166.)

14) States that no subscribers to the system shall use information other than criminal history information transmitted through the system for immigration enforcement purposes, as defined. (Gov. Code, § 15160, subd. (b)(1).)

15) Requires any inquiry for information other than criminal history information submitted through the system to include a reason for the initiation of the inquiry. (Gov. Code, § 15160, subd. (b)(2).)

16) Permits the AG to conduct investigations, inspections, audits to monitor compliance, and to review and inspect case files and any records identified in the investigation process to substantiate a reason given for accessing information other than criminal history information in the system. (Gov. Code, § 15160, subd. (b)(2).)

17) Provides that it is a felony to misuse public records and information from the system, including imprisonment for up to two, three or four years. (Gov. Code, § 6200.)

18) Provides that it is a misdemeanor for any person who is authorized by law to receive a record or information obtained from a record who knowingly furnishes the record or information to a person not authorized by law to receive the record or information. (Pen. Code, §§ 11142, 13303.)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "The devastating issue of MMIP has caused untold tragedy that often becomes long lingering ripples of grief and further tragedy. We can reduce the number of cases through greater collaboration by law enforcement, tribal communities, mental health and other service providers to ensure that victims and their loved ones receive the support and attention they need to overcome these acts of violence."

2) **California Law Enforcement Telecommunications System**: CLETS is a communications network that provides public safety agencies access to databased information, such as domestic violence restraining orders, criminal history, warrants, and driver license and vehicle registration information databases within California, other states on a national level, and federal databases sponsored by the Federal Bureau of Intelligence (FBI). CLETS is extensively used by law enforcement entities, and other criminal justice agencies, such as California courts, may also apply for and receive access privileges. (Judicial Council of California, *CLETS Message Management System*, at p. 2 <https://www.courts.ca.gov/documents/cletsmms-rfp.pdf> [as of March 22, 2023].)

   According to the DOJ, agencies desiring access to the system must submit an application for service to DOJ. The committee reviews and approves the applications. (DOJ, *CLETS Policies, Practices, and Procedures* at p. 13 <https://oag.ca.gov/sites/default/files/clets-ppp%2012-2019.pdf> [as of March 22, 2023].) This bill would allow law enforcement agencies of a federally recognized Indian Tribe to apply for access to CLETS. It would also add one representative from a federally recognized Indian Tribe that is a system subscriber to the committee.

3) **Murdered and Missing Indigenous People**: For Native Americans and Alaska Natives, rates of murder, rape, and violent crime are all higher than the national averages. When looking at missing and murdered cases, data shows that Native American and Alaska Native women make up a significant portion of missing and murdered individuals. (U.S. Department of the Interior, Indian Affairs, *Missing and Murdered Indigenous People Crisis* <https://www.bia.gov/service/mmu/missing-and-murdered-indigenous-people-crisis> [as of March 21, 2023].)

   According to background material from the author, "facing the ever-increasing crisis of murdered and missing indigenous people (MMIP) (most often women, girls and in some cases children), tribal police are limited in their investigative and arrest authority over these crimes." Without access to CLETS, "tribal law enforcement cannot enter domestic violence protective person's information or receive vital officer safety information while tribal police officers are in the field. Tribal law enforcement and courts are therefore unable to search and access in real-time the criminal history, outstanding warrants and/or restraining orders related to specific individuals and cases. Without orders, emergency protective orders, or other restraining orders, limiting the ability of county and state law enforcement to protect tribal people."

   In addition, "Native victims report that sometimes law enforcement officers will not enforce a tribal protective order unless it can be verified in the California Restraining and Protective Order System (CARPOS) though [CLETS]. Currently most tribal courts and law enforcement agencies in California do not have access to these systems, California clarified in no uncertain terms that federal and state law require that tribal protection orders be

accorded full faith and credit through the issuance of a California Attorney General Bulletin (DOJ Bulletin) and production of an educational video. The DOJ Bulletin and video emphasize that these orders do not need to be registered with the state court or locatable in law enforcement data bases. If the orders are valid on their face they must be enforced." (Judicial Council of California, *Tribal Communities and Domestic Violence*, at p. 9 <https://www.courts.ca.gov/documents/Tribal-DVBenchguide.pdf> [as of March 21, 2023].)

4) **Argument in Support**: According to the *Northern California Tribal Chairperson's Association* (NCTCA), "Studies have shown that public safety improves when Tribal Nations have the resources to enforce their own laws and to protect their people. However, current California State law presents barriers for Tribes to strengthen their public safety systems. [...]

"Tribal police departments and courts need access to the California Law Enforcement Telecommunications System (CLETS) in order to enter, verify, and update missing person's information. Currently only a couple of tribal law enforcement departments have access to CLETS as a result of their Deputation Agreement with their county sheriff or the Bureau of Indian Affairs. No California tribal court has access to CLETS. This lack of access means that tribal police departments and tribal courts are unable to search and access in real-time the criminal history, outstanding warrants and/or restraining orders related to specific individuals and cases. Without tribal access to CLETS, tribal courts and tribal law enforcement cannot enter domestic violence protective orders, emergency protective orders, or other restraining orders, limiting the ability of county and state law enforcement to protect tribal people."

5) **Related Legislation**:

   a) AB 1574 (Waldron), would authorize the Governor to appoint a Red Ribbon Panel to address the murdered or missing indigenous persons crisis. AB 1574 is pending referral in Assembly Rules Committee.

   b) SB 719 (Becker), would require agencies with access to CLETS to ensure access, in real time, to the radio communications of that agency to duly authorized media representatives or organizations, as specified. SB 719 is pending in Senate Public Safety Committee.

   c) ACR 25 (Ramos), would designate the month of May 2023 as Missing and Murdered Indigenous People awareness Month in California. ACR 25 is pending referral in Assembly Rules Committee.

6) **Prior Legislation**:

   a) AB 1314 (Ramos), Chapter 476, Statutes of 2022, authorizes law enforcement agencies to request the Department of the California Highway Patrol to activate a "Feather Alert," as defined, if specified criteria are satisfied with respect to an endangered indigenous person who has been reported missing under unexplained or suspicious circumstances.

   b) SB 1000 (Becker), of the 2021-2022 Legislative Session, would have required agencies with access to CLETS to ensure access, in real time, to the radio communications of that

agency to duly authorized media representatives or organizations, as specified. SB 1000 failed passage in Assembly Appropriations Committee.

c) AB 3099 (Ramos), Chapter 170, Statutes of 2020, requires the DOJ upon an appropriation of funds by the Legislature, to provide technical assistance to local law enforcement agencies, as specified, and tribal governments with Indian lands, relating to tribal issues, including providing guidance for law enforcement education and training on policing and criminal investigations on Indian lands, providing guidance on improving crime reporting, crime statistics, criminal procedures, and investigative tools, and facilitating and supporting improved communication between local law enforcement agencies and tribal governments.

d) AB 1854 (Frazier), of the 2019-2020 Legislative Session, would have created the Missing or Murdered Native American Women Task Force in the Department of Justice, and would provide for the membership of that task force. AB 1854 was never heard in this Committee.

e) AB 1507 (Hernández), of the 2015-2016 Legislative Session, would have required each police chief, county sheriff, or other head of a law enforcement agency to assess their jurisdiction to determine if any Indian tribal lands lie within the jurisdiction, and to ensure that those peace officers employed by the agency who work in, or adjacent to, Indian tribal lands, or who may be responsible for responding to calls for service on, or adjacent to, Indian tribal lands, complete a course that includes, but is not limited to, a review of Public Law 280. AB 1507 failed passage by the Senate.

REGISTERED SUPPORT / OPPOSITION:

Support

Sycuan Band of The Kumeyaay Nation (Co-Sponsor)
Yurok Tribe (Co-Sponsor)
Augustine Band of Cahuilla Indians
Bakersfield American Indian Health Project
Barbara Schneider Foundation
Bear River Band of The Rohnerville Rancheria
Brownstein Hyatt Farber Schreck, Llp
Cahuilla Band of Indians
Cahuilla Consortium Victim Advocacy Program
Cal Poly Humboldt University Senate
California Consortium for Urban Indian Health
California Indian Legal Services
California Partnership to End Domestic Violence
California Tribal Business Alliance
California Tribal Families Coalition
California Tribal Police Chiefs Association
Cher-ae Heights Indian Community of The Trinidad Rancheria
District Attorney County of Humboldt
Family Violence Appellate Project
Friendship House Association of American Indians

Habematolel Pomo of Upper Lake
Hoopa Valley Tribe
Humboldt Area Foundation & Wild Rivers Community Foundation
Northern California Tribal Chairmen's Association
Picayune Rancheria of The Chukchansi Indians
Resighini Rancheria Tribal Council
Safe Passages
San Diego County Sheriff's Department
Southern California Tribal Chairmen's Association
Strong Hearted Native Women's Coalition, INC.
Tolowa Dee-ni' Nation
Tribal Law and Policy Institute
Willow Creek Youth Partnership Dba Dream Quest
Wilton Rancheria

14 Private Individuals

Opposition

None.

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

Amended Mock-up for 2023-2024 AB-44 (Ramos (A))

Mock-up based on Version Number 98 - Amended Assembly 3/2/23
Submitted by: Staff Name, Office Name

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

SECTION 1. The Legislature finds and declares all of the following:

(a) California is home to more Native American and Alaska Native people than any other state in the country. There are approximately 110 federally recognized tribes in California and 81 entities petitioning for recognition. Federally recognized tribes have a unique government-to-government relationship with local, state, and federal entities, and are recognized as sovereign nations. Tribes can create their own laws, governmental structure, and enrollment or membership rules for the land and citizens of their nation.

(b) California has the fifth largest caseload of missing and murdered Indigenous women and people. Nationwide, more than four in five Native American and Alaska Native women have experienced violence in their lifetime, and more than one in three have in the last year. One in 130 Native American children are likely to go missing each year. Indigenous women go missing and are murdered at rates higher than any other ethnic group in the United States. Nearly one-half of all indigenous women have been raped, beaten, or stalked by an intimate partner. LGBTQ+ Native Americans and people who identify as "two-spirit" people within tribal communities are also often the targets of violence.

(c) California Indian tribes retain the inherent authority to self-govern, including the authority to enact laws that govern their lands.

(d) Approximately 26 tribal governments in the state have exercised their inherent authority by establishing law enforcement agencies to maintain public safety on Indian lands. Additionally, tribes have exercised their inherent authority by establishing 22 tribal courts statewide, serving approximately 40 tribes.

(e) Federal law requires certain states, including the State of California, to enforce state criminal laws on Indian lands in those states, but does not provide adequate resources to the selected states or the tribes within those states for public safety.

(f) Thirteen states and the federal government provide tribal law enforcement authority to enforce state or federal law if tribal officers meet qualifications delineated in the state and federal authorizing legislation and regulations. Twenty-one of the 27 tribal law enforcement departments in California have deputation agreements with the federal Bureau of Indian Affairs, Office of Justice Services, which allows qualified tribal officers to become special commissioned federal officers authorized to enforce federal law on Indian lands in their jurisdiction.

~~(g) Legal status as a peace officer in California has been extended to a large number of persons under state law, including, but not limited to, the members of the University of California Police Department, certain employees of the Department of Fish and Wildlife, the Department of Parks and Recreation, the Department of Tax and Fee Administration, and the Department of Alcoholic Beverage Control, museum safety and security employees of the California Science Center, police appointed the California Exposition and State Fair, and persons designated by a local agency as a park ranger. Tribes have been excluded from that designation.~~

~~(h) State law authorizes federal officers to exercise state peace officer arrest authority, and while some county sheriffs recognize tribal officers with a special commission as federal officer for purposes of that law, other sheriffs do not, or will not allow these officers to arrest offenders for violations of state law.~~

~~(i) While there are avenues for tribal officers to enforce state law on Indian lands, these options are limited, discretionary, and inconsistently applied across counties. While state law authorizes a county sheriff to deputize a tribal officer as a reserve or auxiliary deputy, those agreements are often limited by the sheriff's term in office and subject to termination at any time.~~

(j) Where state and county law enforcement departments have developed close working and cooperative relationships with the tribal law enforcement agencies, these relationships have resulted in greater public safety for both the non-Indian and Indian communities.

(k) State law establishing the California Law Enforcement Telecommunications System (CLETS) states that "the maintenance of law and order is, and always has been, a primary function of government," and that "the state has an unmistakable responsibility to give full support to all public agencies of law enforcement," and that the state's responsibility "includes the provision of an efficient law enforcement communications network available to all such agencies." Indian tribes have not been considered public agencies for purposes of this statute, excluding them from CLETS access.

(l) Current entities with access to CLETS include sheriffs, city police departments, district attorneys, courts, probation departments, the California Highway Patrol, the Department of Justice, the Department of Insurance, the Employment Development Department, university, college, and school district police departments, fire department arson investigation units, and the Federal Bureau of Investigation. Despite this broad application of public agencies with access to CLETS, tribal courts and tribal police that operate within California's borders do not have CLETS access.

(m) Without access to CLETS, tribal police cannot receive, share, or update critical criminal record information, missing and unidentified persons files, protective order files, and violent persons files; all of which are critical to effective and thorough investigations of, and related to, missing and murdered Indigenous women and people, violence, and domestic violence on tribal lands.

(n) Without tribal access to CLETS, tribal courts and tribal law enforcement cannot enter domestic violence protective orders, emergency protective orders, or other restraining orders, limiting the ability of county and state law enforcement to protect tribal people. Tribal protective orders can only be entered into the Tribal Access Program and are only viewable by other law enforcement through National Crime Information Center, limited systems ~~that do not give county or state law enforcement access to the parameters of these protective orders~~. Because tribal law enforcement lack access to CLETS, they are unable to view the parameters of a CLETS protective order when they respond to calls for service in these matters. This lack of access to CLETS hampers state and county police officers from effectively protecting victims of violence and harassment, and creates a greater risk that these legal protective orders will not be enforced at the expense of the safety of women, children, and victims fleeing violence. This exacerbates the crisis of missing and murdered Indigenous women and people.

(o) In a pilot program involving the Sycuan Tribal Police Department, an agreement with the county allowed full access to CLETS by tribal officers. Because information is mutually shared between the tribe and local law enforcement, both tribal police and sheriff's deputies have access to each other's data, including witness contact information, civilian contact with law enforcement, report narratives, and lists of stolen items. This mutual relationship of support, resource sharing, and communication between the tribe and local and state government has been beneficial to both agencies and critical to increasing public safety for the Sycuan Tribe, including an increase in crimes solved throughout the community.

SEC. 2. Section 15153 of the Government Code is amended to read:

15153. ~~(a)~~ The system shall be under the direction of the Attorney General, and shall be used exclusively for the official business of the state, and the official business of any city, county, city and county, other public **agency.** ~~agency, or federally recognized Indian tribe.~~

~~(b) All system-related policies, practices, and procedures applicable to state and local law enforcement agencies shall apply to any tribal law enforcement agency that employs any peace officer described in Section 830.16 of the Penal Code, including, without limitation, all applicable security and application requirements, subscriber agreements, and privacy controls. The Attorney General shall also grant system access to a tribal court authorized under federal law.~~

SEC. 3. Section 15155 of the Government Code is amended to read:

15155. The committee shall consist of representatives from the following organizations:

(a) Two representatives from the California Peace Officers' Association.

(b) One representative from the California State Sheriffs' Association.

(c) One representative from the League of California Cities.

(d) One representative from the County Supervisors Association of California.

(e) One representative from the Department of Justice.

(f) One representative from the Department of Motor Vehicles.

(g) One representative from the Office of Emergency Services.

(h) One representative from the Department of the California Highway Patrol.

(i) One representative from the California Police Chiefs Association.

(j) One representative from a federally recognized Indian tribe that is a system subscriber.

SEC. 4. Section 15168 is added to the Government Code to read:

(a) The system may connect and exchange traffic with compatible systems of a Tribe.

(b) A law enforcement agency of a Tribe may apply for system service. The system shall provide service to any law enforcement agency of a Tribe qualified by the committee that desires connection, at its own expense.

(c) The committee shall not approve an application for system service pursuant to subdivision (b) of this Section unless a law, resolution or ordinance, which shall be maintained in continuous force, is adopted by the appropriate board, agency, entity arm of the Tribe, and provides for the following:

(1) That the Tribe expressly waives its right to assert its sovereign immunity from suit, regulatory, or administrative action and enforcement of any ensuing judgment or arbitral award, for any and all claims arising from any actions or omissions of the Tribe, including its officers, agents and employees, when acting within the scope of their authority and duty, arising out of, connected with, or related to, the California Law Enforcement Telecommunications System.

(2) That the Tribe expressly agrees that the substantive and procedural laws of the State of California shall govern any claim, suit, administrative or regulatory action, that the obligations, rights and remedies shall be determined in accordance with such laws, and that the courts of the State of California or of the federal government, as applicable, shall have exclusive jurisdiction.

(3) That the Tribe shall cooperate with any inspections, audits and investigation by the Department of Justice for improper use and compliance with the operating policies, practices and procedures, including any sanction, discipline from the department up to and including, removal of system service, as authorized under Sections 15154 and 15160.

(4) That the Tribe and its agencies, entities, arms, including the officers, agents and employees of the Tribe when acting within the scope of their authority and duty, shall comply with the laws of the State of California relating to the use of records and information from CLETS, including but not limited to, Sections 6200, 15000-15168 of the Government Code, Sections 502, 11105, 11141-11143, 13300-13304 of the Penal Code, and Section 1808.45 of the Vehicle Code.

(d) The Director of General Services shall fix the charge to be paid by any Tribe to the Department of Justice.

(e) "Tribe" means a federally recognized Indian Tribe whose territorial boundaries lie within the State of California and the agencies, entities, arms of the Tribe, as appropriate, either together or separately.

(f) "Sovereign Immunity" means immunity from suit or action of the Tribe and its agencies, entities, arms, including the officers, agents and employees of the Tribe when acting within the scope of their authority and duty.

~~**SEC. 4.** Section 830.8 of the Penal Code is amended to read:~~

~~**830.8.** (a) Federal criminal investigators and law enforcement officers, and tribal police officers possessing a Special Law Enforcement Commission from the federal Bureau of Indian Affairs are not California peace officers, but may exercise the powers of arrest of a peace officer in any of the following circumstances:~~

~~(1) Any circumstances specified in Section 836 of this code or Section 5150 of the Welfare and Institutions Code for violations of state or local laws.~~

~~(2) When these investigators and law enforcement officers are engaged in the enforcement of federal criminal laws and exercise the arrest powers only incidental to the performance of these duties.~~

~~(3) When requested by a California law enforcement agency to be involved in a joint task force or criminal investigation.~~

~~(4) When probable cause exists to believe that a public offense that involves immediate danger to persons or property has just occurred or is being committed.~~

~~In all of these instances, the provisions of Section 847 shall apply. These investigators and law enforcement officers, prior to the exercise of these arrest powers, shall have been certified by their~~

~~agency heads as having satisfied the training requirements of Section 832, or the equivalent thereof.~~

~~This subdivision does not apply to federal officers of the Bureau of Land Management or the United States Forest Service. These officers have no authority to enforce California statutes without the written consent of the sheriff or the chief of police in whose jurisdiction they are assigned.~~

~~(b) Duly authorized federal employees who comply with the training requirements set forth in Section 832 are peace officers when they are engaged in enforcing applicable state or local laws on property owned or possessed by the United States government, or on any street, sidewalk, or property adjacent thereto, and with the written consent of the sheriff or the chief of police, respectively, in whose jurisdiction the property is situated.~~

~~(c) National park rangers are not California peace officers but may exercise the powers of arrest of a peace officer as specified in Section 836 and the powers of a peace officer specified in Section 5150 of the Welfare and Institutions Code for violations of state or local laws provided these rangers are exercising the arrest powers incidental to the performance of their federal duties or providing or attempting to provide law enforcement services in response to a request initiated by California state park rangers to assist in preserving the peace and protecting state parks and other property for which California state park rangers are responsible. National park rangers, prior to the exercise of these arrest powers, shall have been certified by their agency heads as having satisfactorily completed the training requirements of Section 832.3, or the equivalent thereof.~~

~~(d) Notwithstanding any other provision of law, during a state of war emergency or a state of emergency, as defined in Section 8558 of the Government Code, federal criminal investigators and law enforcement officers who are assisting California law enforcement officers in carrying out emergency operations are not deemed California peace officers, but may exercise the powers of arrest of a peace officer as specified in Section 836 and the powers of a peace officer specified in Section 5150 of the Welfare and Institutions Code for violations of state or local laws. In these instances, the provisions of Section 847 of this code and of Section 8655 of the Government Code shall apply.~~

~~(e) (1) Any qualified person who is appointed as a Washoe tribal law enforcement officer is not a California peace officer, but may exercise the powers of a Washoe tribal peace officer when engaged in the enforcement of Washoe tribal criminal laws against any person who is an Indian, as defined in subsection (d) of Section 450b of Title 25 of the United States Code, on Washoe tribal land. The respective prosecuting authorities, in consultation with law enforcement agencies, may agree on who shall have initial responsibility for prosecution of specified infractions. This subdivision is not meant to confer cross-deputized status as California peace officers, nor to confer California peace officer status upon Washoe tribal law enforcement officers when enforcing state or local laws in the State of California. Nothing in this section shall be construed to impose liability upon or to require indemnification by the County of Alpine or the State of California for any act performed by an officer of the Washoe Tribe. Washoe tribal law enforcement officers shall have~~

the right to travel to and from Washoe tribal lands within California in order to carry out tribal duties.

(2) Washoe tribal law enforcement officers are exempted from the provisions of subdivision (a) of Section 25400 and subdivision (a) and subdivisions (c) to (h), inclusive, of Section 25850 while performing their official duties on their tribal lands or while proceeding by a direct route to or from the tribal lands. Tribal law enforcement vehicles are deemed to be emergency vehicles within the meaning of Section 30 of the Vehicle Code while performing official police services.

(3) As used in this subdivision, the term "Washoe tribal lands" includes the following:

(A) All lands located in the County of Alpine within the limits of the reservation created for the Washoe Tribe of Nevada and California, notwithstanding the issuance of any patent and including rights-of-way running through the reservation and all tribal trust lands.

(B) All Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

(4) As used in this subdivision, the term "Washoe tribal law" refers to the laws codified in the Law and Order Code of the Washoe Tribe of Nevada and California, as adopted by the Tribal Council of the Washoe Tribe of Nevada and California.

SEC. 5. Section 830.16 is added to the Penal Code, to read:

830.16. (a) As provided in this section, a regularly employed police officer of a federally recognized Indian tribe in California is a peace officer with authority within the territorial boundaries of the Indian country of the employing tribe, and whose authority may extend to any place in the state, under any of the following circumstances:

(1) At the request of a state or local law enforcement agency.

(2) Under exigent circumstances involving an immediate danger to persons or property, or of the escape of a perpetrator.

(3) When investigating or making an arrest for a public offense committed, or for which there is probable cause to believe has been committed, within the Indian country of the tribe that employs the peace officer, and with the prior consent of the chief of police or chief, director, or chief executive officer of a consolidated municipal public safety agency, or person authorized by that chief, director, or officer to give consent, if the place is within a city, or of the sheriff, or person authorized by the sheriff to give consent, if the place is within a county.

(b) (1) Subdivision (a) shall only apply to a person who meets the training standards for peace officers as described in Section 832 and any regulations adopted thereto.

(2) A person acting as a peace officer pursuant to this section is subject to the requirements of Sections 1029, 1031, and 1031.4 of the Government Code.

(c) Subdivision (a) shall only apply to a person employed by a tribe that meets all of the following requirements:

(1) The tribal government has enacted a law or resolution expressing their intent that tribal officers be California peace officers and adopting any requirements prescribed by this section.

(2) The tribal government has adopted a limited waiver of tribal sovereign immunity for claims arising from any actions or omission of a tribal police officer acting as a California peace officer pursuant to this section in an amount not exceeding the limitations of the insurance coverage described in paragraph (3).

(3) The tribal government maintains, either through self-insurance or through a policy of liability and property damage insurance, coverage in an amount no less than two million dollars ($2,000,000) per incident for all vehicles operated by police personnel, and, either through self-insurance or through a policy of professional liability insurance, coverage in an amount no less than two million dollars ($2,000,000) per incident for the negligent or wrongful acts or omissions of its police officers.

(4) The tribal government has complied with Sections 1030 and 1044 of the Government Code in the appointment of peace officers.

(5) The tribal government has submitted all required documentation of compliance with this section to the Department of Justice, in a manner and form prescribed by the department.

(d) As used in this section, the term "Indian country" has the same meaning as provided in Section 1151 of Title 18 of the United States Code.

SEC. 6. Section 832 of the Penal Code is amended to read:

832. (a) Every person described in this chapter as a peace officer shall satisfactorily complete an introductory training course prescribed by the Commission on Peace Officer Standards and Training. On or after July 1, 1989, satisfactory completion of the course shall be demonstrated by passage of an appropriate examination developed or approved by the commission. Training in the carrying and use of firearms shall not be required of a peace officer whose employing agency prohibits the use of firearms.

(b) (1) Every peace officer described in this chapter, prior to the exercise of the powers of a peace officer, shall have satisfactorily completed the training course described in subdivision (a).

(2) Every peace officer described in Section 13510 or in subdivision (a) of Section 830.2 may satisfactorily complete the training required by this section as part of the training prescribed pursuant to Section 13510.

~~(c) Persons described in this chapter as peace officers who have not satisfactorily completed the course described in subdivision (a), as specified in subdivision (b), shall not have the powers of a peace officer until they satisfactorily complete the course.~~

~~(d) A peace officer who, on March 4, 1972, possesses or is qualified to possess the basic certificate as awarded by the Commission on Peace Officer Standards and Training is exempted from this section.~~

~~(e) (1) A person completing the training described in subdivision (a) who does not become employed as a peace officer within three years from the date of passing the examination described in subdivision (a), or who has a three-year or longer break in service as a peace officer, shall pass the examination described in subdivision (a) prior to the exercise of the powers of a peace officer, except for a person described in paragraph (2).~~

~~(2) The requirement in paragraph (1) does not apply to a person who meets any of the following requirements:~~

~~(A) Is returning to a management position that is at the second level of supervision or higher.~~

~~(B) Has successfully requalified for a basic course through the Commission on Peace Officer Standards and Training.~~

~~(C) Has maintained proficiency through teaching the course described in subdivision (a).~~

~~(D) During the break in California service, was continuously employed as a peace officer in another state or at the federal level.~~

~~(E) Was continuously employed as a police officer by a federally recognized Indian tribe and was deputized or commissioned to enforce state or federal law.~~

~~(F) Has previously met the requirements of subdivision (a), has been appointed as a peace officer under subdivision (c) of Section 830.1, and has been continuously employed as a custodial officer as defined in Section 831 or 831.5 by the agency making the peace officer appointment since completing the training prescribed in subdivision (a).~~

~~(f) The commission may charge appropriate fees for the examination required by subdivision (e), not to exceed actual costs.~~

~~(g) Notwithstanding any other law, the commission may charge appropriate fees for the examination required by subdivision (a) to each applicant who is not sponsored by a local or other law enforcement agency, or is not a peace officer employed by, or under consideration for employment by, a state or local agency, department, or district, or is not a custodial officer as defined in Sections 831 and 831.5. The fees shall not exceed actual costs.~~

~~(h) (1) When evaluating a certification request from a probation department for a training course described in this section, the commission shall deem there to be an identifiable and unmet need for the training course.~~

~~(2) A probation department that is a certified provider of the training course described in this section shall not be required to offer the course to the general public.~~

Date of Hearing: March 28, 2023
Counsel: Liah Burnley

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

AB 455 (Quirk-Silva) – As Introduced February 6, 2023

As Proposed to Be Amended In Committee

SUMMARY: Prohibits individuals in pretrial mental health diversion for a felony or specified misdemeanor charge from owning a firearm until they successfully complete diversion.

1. Specifically, **this bill**:

1) Permits the prosecution to request an order from the court that the defendant be prohibited from owning or possessing a firearm until they successfully complete diversion, because they are a danger to themselves or others.

2) States that the prosecution shall bear the burden of proving, by clear and convincing evidence the following are true:

   a) The defendant poses a significant danger of causing personal injury to themselves or another by having in their custody or control, owning, purchasing, possessing, or receiving a firearm; and

   b) The prohibition is necessary to prevent personal injury to the defendant, or any other person, because less restrictive alternatives either have been tried and found to be ineffective, or are inadequate or inappropriate for the circumstances of the defendant.

3) Provides that, if the court finds that the prosecution has not met the burden, the court shall not issue an order prohibiting the person from having firearms.

4) Provides that, if the court finds that the prosecution has met the burden, it shall issue a firearms prohibition order and shall inform the person that they are prohibited from owning, possessing, or purchasing a firearm until they successfully complete diversion because they are a danger to themselves or others.

5) Requires the court to notify the Department of Justice (DOJ) of the firearms prohibition order as soon as possible, but not later than one court day after issuing it.

6) States that the court shall notify the DOJ that the person has successfully completed diversion as soon as possible, but not later than one court day after completion.

EXISTING FEDERAL LAW:

1) States that the right of the people to keep and bear arms shall not be infringed. (U.S. Const., 2nd Amend.)

2) Provides that no state shall deprive any person of life, liberty, or property, without due process of law. (U.S. Const., 14th Amend.)

EXISTING STATE LAW:

1) States that a person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws. (Cal. Const. art. I, § 7.)

2) Permits, on an accusatory pleading alleging the commission of a misdemeanor or felony offense, the court, in its discretion, to grant pretrial mental health diversion to a defendant if the defendant satisfies the eligibility requirements and the court determines that the defendant is suitable for that diversion. (Pen. Code, § 1001.36, subd. (a).)

3) Defines "Pretrial diversion" as the postponement of prosecution, either temporarily or permanently, at any point in the judicial process from the point at which the accused is charged until adjudication, to allow the defendant to undergo mental health treatment. (Pen. Code, § 1001.36, subd. (f).)

4) Provides that a defendant is eligible for pretrial mental health diversion if both of the following criteria are met:

    a) The defendant has been diagnosed with a mental disorder as identified in the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM), including, but not limited to, bipolar disorder, schizophrenia, schizoaffective disorder, or post-traumatic stress disorder, but excluding antisocial personality disorder, borderline personality disorder, and pedophilia; and

    b) The defendant's mental disorder was a significant factor in the commission of the charged offense. (Pen. Code, § 1001.36, subd. (b).)

5) Provides that a defendant is suitable for pretrial mental health diversion if all of the following criteria are met:

    a) In the opinion of a qualified mental health expert, the defendant's symptoms of the mental disorder causing, contributing to, or motivating the criminal behavior would respond to mental health treatment;

    b) The defendant consents to diversion and waives the defendant's right to a speedy trial;

    c) The defendant agrees to comply with treatment as a condition of diversion; and,

    d) The defendant will not pose an unreasonable risk of danger to public safety, if treated in the community. (Pen. Code, § 1001.36, subd. (c).)

6) States that a defendant may not be placed into a pretrial mental health diversion program for the following offenses:

    a) Murder or voluntary manslaughter;

b) An offense for which a person, if convicted, would be required to register as a sex offender;

c) Rape;

d) Lewd or lascivious act on a child under 14 years of age;

e) Assault with intent to commit rape, sodomy, or oral copulation;

f) Commission of rape or sexual penetration in concert with another person;

g) Continuous sexual abuse of a child; or,

h) Using a weapon of mass destruction, as specified. (Pen. Code, § 1001.36, subd. (d).)

7) Provides that, at any stage of the proceedings, the court may require the defendant to make a prima facie showing that they will meet the minimum requirements of eligibility for diversion and that the defendant and the offense are suitable for diversion. (Pen. Code, § 1001.36, subd. (e).)

8) States that the period during which criminal proceedings against the defendant may be diverted is limited as follows:

a) If the defendant is charged with a felony, the period shall be no longer than two years.

b) If the defendant is charged with a misdemeanor, the period shall be no longer than one year. (Pen. Code, § 1001.36, subd. (f).)

9) Provides that, if any of the following circumstances exists, the court shall hold a hearing to determine whether the criminal proceedings should be reinstated, the treatment should be modified, or the defendant should be referred to the conservatorship investigator of the county:

a) The defendant is charged with an additional misdemeanor allegedly committed during the pretrial diversion and that reflects the defendant's propensity for violence;

b) The defendant is charged with an additional felony allegedly committed during the pretrial diversion;

c) The defendant is engaged in criminal conduct rendering the defendant unsuitable for diversion; or,

d) Based on the opinion of a qualified mental health expert, the defendant is performing unsatisfactorily in the assigned program or the defendant is gravely disabled. (Pen. Code, § 1001.36, subd. (g).)

10) Provides that, if the defendant has performed satisfactorily in diversion, at the end of the period of diversion, the court shall dismiss the defendant's criminal charges that were the subject of the criminal proceedings at the time of the initial diversion. (Pen. Code, § 1001.36,

subd. (h).)

11) States that, upon successful completion of diversion, if the court dismisses the charges, the arrest upon which the diversion was based shall be deemed never to have occurred, and the court shall order access to the record of the arrest restricted, except as specified. The defendant who successfully completes diversion may indicate in response to any question concerning the defendant's prior criminal record that the defendant was not arrested or diverted for the offense, except as specified. (Pen. Code, § 1001.36, subd. (h).)

12) States that a record pertaining to an arrest resulting in successful completion of diversion, or any record generated as a result of the defendant's application for or participation in diversion, shall not, without the defendant's consent, be used in any way that could result in the denial of any employment, benefit, license, or certificate. (Pen. Code, § 1001.36, subd. (i).)

13) Requires that the defendant shall be advised that, regardless of the defendant's completion of diversion, both of the following apply:

    a) The arrest upon which the diversion was based may be disclosed by the DOJ to any peace officer application request and the defendant is not relieved of the obligation to disclose the arrest in response to any direct question contained in any questionnaire or application for a position as a peace officer; and

    b) An order to seal records pertaining to an arrest has no effect on a criminal justice agency's ability to access and use those sealed records and information regarding sealed arrests. (Pen. Code, § 1001.36, subd. (j).)

14) Provides that a finding that the defendant suffers from a mental disorder, any progress reports concerning the defendant's treatment, or any other records related to a mental disorder that were created as a result of participation in, or completion of, diversion may not be used in any other proceeding without the defendant's consent, except as specified. (Pen. Code, § 1001.36, subd. (k).)

15) Permits specified individuals to request that a court, after notice and a hearing, issue a gun violence restraining order (GVRO) enjoining a person from having a firearm, for a period of time between one to five years, upon a finding that the person poses a significant danger of causing personal injury to themselves or another by having a firearm. (Pen. Code, §§ 18170 et seq.)

16) Provides that any person subject to a domestic violence restraining order (DVRO) shall not own, possess, purchase, or receive a firearm or ammunition while that order is in effect. (Fam. Code, § 6389, subd. (a).)

17) Provides that the following individuals shall not purchase or receive, or attempt to purchase or receive, or have in his or her possession, custody, or control a firearm or any other deadly weapon:

    a) Any person who has been adjudicated by a court of any state to be a danger to others as a result of a mental disorder or mental illness, or who has been adjudicated to be a mentally

disordered sex offender;

b) Any person who has been found not guilty by reason of insanity;

c) Any person found by a court to be mentally incompetent to stand trial;

d) Any person who has been placed under conservatorship by a court because they are gravely disabled as a result of a mental disorder or impairment by chronic alcoholism;

e) Any person who has been taken into custody, assessed and admitted into a facility, as provided in Section 5150 of the Welfare and Institutions Code because that person is a danger to themselves or to others; and,

f) Any person who has been certified for intensive treatment as a result of mental disorder or impairment by chronic alcoholism because that person is a danger to themselves or to others. (Welf. & Inst. Code, § 8103, subds. (a)-(g).)

18) States that whenever a person listed above, is found to own, have in their possession or under their control, any firearm whatsoever, or any other deadly weapon, the firearm or other deadly weapon shall be confiscated by any law enforcement agency or peace officer, who shall retain custody of the firearm or other deadly weapon. (Welf. & Inst. Code, § 8102, subd. (a).)

19) Provides that every person who owns or possesses or has under their custody or control, or purchases or receives, or attempts to purchase or receive, any firearm or any other deadly weapon in violation of these provisions shall be punished by imprisonment in the county jail for 16 months, two, or three years pursuant to realignment or in a county jail for not more than one year. (Welf. & Inst. Code, § 8103 subd. (i).)

20) Provides that any person who has been convicted of a felony under the laws of the United States, the State of California, or any other state, government, or country, and who owns, purchases, receives, or has in possession or under custody or control any firearm is guilty of a felony. (Pen. Code, § 29800, subd. (a)(1).)

21) Prohibits any person convicted of a specified misdemeanor domestic violence offense from owning, purchasing, receiving, or having in their possession or under custody or control, any firearm. (Pen. Code, § 29805 subd. (b).)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "The vast number of people who suffer from mental illness do not act out violently or commit crimes. However, individuals who have been charged with specified criminal offenses who choose to participate in a mental health diversion program, should also adhere to post-conviction gun restrictions to the same extent as those convicted of the same crime."

2) **Mental Health Diversion:** Diversion is the suspension of criminal proceedings for a prescribed time period with certain conditions. A defendant may not be required to admit guilt as a prerequisite for placement in a pretrial diversion program. If diversion is successfully completed, the criminal charges are dismissed and the defendant may, with certain exceptions, legally answer that he or she has never been arrested or charged for the diverted offense. If diversion is not successfully completed, the criminal proceedings resume, however, a hearing to terminate diversion is required.

   In order to be eligible for pretrial mental health diversion, the defendant must suffer from a mental disorder, that played a significant role in the commission of the charged offense, and in the opinion of a qualified mental health expert, the defendant's symptoms motivating the criminal behavior would respond to mental health treatment. The defendant must consent to diversion, waive their right to a speedy trial, and must agree to comply with treatment as a condition of diversion. The court must be satisfied that the defendant will not pose an unreasonable risk of danger to public safety if treated in the community. (Pen. Code, § 1001.36, subd. (b)(1).) A defendant can participate in mental health diversion for felony and misdemeanor offenses; but the defendant may not be charged with specified crimes, including murder and offenses requiring sex offender registration. (Pen. Code, § 1001.36, subd. (b)(2).)

   Courts have discretion to refuse to grant diversion even though the defendant meets all of the requirements. (J. Couzens, *Memorandum RE: Mental Health Diversion (Penal Code §§ 1001.35-1001.36) (AB 1810 & SB 215) [revised]* (Nov. 14, 2018), p. 4.) If the defendant performs unsatisfactorily on diversion, because the defendant fails to participate in treatment or engages in criminal conduct, the court may reinstate criminal proceeding. If criminal proceeding are reinstated, the case would be resolved through the criminal system in the ordinary course of business. (Pen. Code, § 1001.36.)

   If the defendant has performed satisfactorily on diversion, at the end of the period of diversion, the court shall dismiss the defendant's criminal charges that were the subject of the criminal proceedings at the time of the initial diversion. A court may conclude that the defendant has performed satisfactorily if the defendant has substantially complied with the requirements of diversion, has avoided significant new violations of law unrelated to the defendant's mental health condition, and has a plan in place for long-term mental health care. (Pen. Code, § 1001.36.)

   This bill would require any person who is charged with a felony or specified misdemeanor offenses that is granted mental health diversion to be prohibited from owning or possessing a firearm or deadly weapon while they are in diversion, if the person is a danger to themselves or others, by virtue of owning a firearm. Given that eligibly for mental health diversion requires a finding that the person is not a risk to public safety if treated in the community, a court may be more inclined to grant diversion if it could restrict a person's ability to own firearms.

3) **Existing Law Permits Law Enforcement to Seek GVROs**: The process to obtain an emergency GVRO is designed to address situations where a person presents a current danger to themselves or others by virtue of owning or possessing a firearm. An application for an emergency GVRO can be made orally and processed immediately. (Pen. Code, § 18170.) Current law allows an immediate family member of a person or a law enforcement officer to

request a court, after notice and a hearing, to issue a GVRO enjoining the subject of the petition from having in his or her custody or control, owning, purchasing, possessing, or receiving a firearm or ammunition for a period of time from one to five years. (*Ibid.*) The criteria and burden of proof for obtaining a GVRO is similar to the one proposed in this bill to issue a firearm prohibition order during the period of mental health diversion.

4) **Existing Law Requires Relinquishment of a Firearm by a Person Subject to a DVRO:** To the extent this bill is aimed at people who commit misdemeanor domestic violence offenses, existing law requires relinquishment of a firearm by a person subject to a DVRO. (Fam. Code, § 6389.) Upon issuance of a restraining order, the court is required to order the respondent to relinquish any firearm in their immediate possession or control. (Fam. Code, § 6389, subd. (c)(1).) A conviction is not a prerequisite for an issuance of a DVRO and nothing about a person's participation in mental health diversion would prohibit a court from issuing a DVRO against an individual. (See Fam. Code, § 6320 [permitting the issuance of a DVRO at the discretion of the court, upon on a showing of good cause].)

5) **Argument in Support**: According to the *California District Attorneys Association* (CDAA), "Mental health diversion was adopted in 2018 with the express purpose of increasing diversion of individuals with mental disorders while protecting public safety. Since then, counties have seen a significant increase in the number of criminal defendants who suffer from mental illness choosing to be diverted under this statute. However, under current law if a defendant successfully completes diversion, the criminal case is dismissed and no post-conviction firearm restriction applies."

6) **Argument in Opposition**: According to the *California Public Defenders Association* (CPDA), "Under existing section 1001.36, when a person is accused of a crime they may, *even if innocent of that crime*, agree to pause the case, accept mental health services as approved by the court and, if they comply with those services for up to two years, seek dismissal of their case. (§ 1001.36.)

"Section 1001.36 serves a vital role by allowing Californians to accept mental health services without pleading to an offense they did not commit, thereby addressing the root causes of any conduct that brought them to the attention of the court, enhancing public safety, and avoiding the long-term stigmatization associated with mental health treatment and criminal proceedings. [...]

"In so doing, AB 455 turns the presumption of innocence on its head, and places Californians who accept treatment for conditions like PTSD, battered-woman syndrome, depression, alcohol use, or drug use into a category reserved for those whose guilt has been proven beyond a reasonable doubt to a jury."

7) **Related Legislation**:

a) AB 667 (Mainschein), would increase the renewal period to a maximum of 10 years, instead of 5, for GVROs if the subject of the petition poses a significant danger of self-harm or harm to another in the near future by having a firearm. AB 667 is pending hearing in this Committee.

b) AB 1412 (Hart), would permit individuals with borderline personality disorder to participate in mental health diversion. AB 1412 is pending hearing in this Committee.

8) **Prior Legislation**:

a) AB 1121 (Bauer-Kahan), of the 2019-2020 Legislative Session, would have prohibited a person who is granted pretrial diversion based on a mental health disorder from owning or possessing a firearm, or other dangerous or deadly weapon, and included hearing procedures to reinstate the person's right to own a firearm. AB 1121 was held on the Assembly Appropriation's Suspense File.

b) AB 12 (Irwin), Chapter 724, Statutes of 2019, extends the duration of a gun violence restraining order issued after notice and hearing and renewals to a maximum of five years.

c) AB 1810 (Budget Committee), Chapter 34, Statutes of 2018, established mental health diversion.

d) AB 1968 (Low), Chapter 861, Statutes of 2018, requires that a person who has been taken into custody, assessed, and admitted to a designated facility because he or she is a danger to himself, herself, or others, as a result of a mental health disorder more than once within a one-year period be prohibited from owning a firearm for the remainder of his or her life, subject to the right to challenge the prohibition at periodic hearings.

e) AB 3129 (Rubio), Chapter 883, Statutes of 2018, prohibits a person who is convicted of misdemeanors relating to domestic violence against possessing a firearm.

f) SB 755 (Wolk), of the 2013-2014 Legislative Session, would have prohibited a person who has been ordered by a court to obtain assisted outpatient treatment from purchasing or possessing any firearm or other deadly weapon while subject to assisted outpatient treatment. SB 755 was vetoed by the Governor.

g) AB 1014 (Skinner), Chapter 872, Statutes of 2014, authorized a law enforcement officer or immediate family member of a person, to seek, and a court to issue, a GVRO as specified, prohibiting a person from having in his/her custody or control, owning, purchasing, possessing, or receiving any firearms or ammunition, as specified

REGISTERED SUPPORT / OPPOSITION:

Support

California District Attorneys Association (Sponsor)
California State Sheriffs' Association
San Mateo County District Attorney's Office

Opposition

California Attorneys for Criminal Justice
California Public Defenders Association (CPDA)

Dbsa California

1 Private Individual

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

Amended Mock-up for 2023-2024 AB-455 (Quirk-Silva (A) , Papan (A))

Mock-up based on Version Number 99 - Introduced 2/6/23
Submitted by: Staff Name, Office Name

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

SECTION 1. Section 1001.36 of the Penal Code is amended to read:

1001.36. (a) On an accusatory pleading alleging the commission of a misdemeanor or felony offense not set forth in subdivision (d), the court may, in its discretion, and after considering the positions of the defense and prosecution, grant pretrial diversion to a defendant pursuant to this section if the defendant satisfies the eligibility requirements for pretrial diversion set forth in subdivision (b) and the court determines that the defendant is suitable for that diversion under the factors set forth in subdivision (c).

(b) A defendant is eligible for pretrial diversion pursuant to this section if both of the following criteria are met:

(1) The defendant has been diagnosed with a mental disorder as identified in the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders, including, but not limited to, bipolar disorder, schizophrenia, schizoaffective disorder, or post-traumatic stress disorder, but excluding antisocial personality disorder, borderline personality disorder, and pedophilia. Evidence of the defendant's mental disorder shall be provided by the defense and shall include a diagnosis or treatment for a diagnosed mental disorder within the last five years by a qualified mental health expert. In opining that a defendant suffers from a qualifying disorder, the qualified mental health expert may rely on an examination of the defendant, the defendant's medical records, arrest reports, or any other relevant evidence.

(2) The defendant's mental disorder was a significant factor in the commission of the charged offense. If the defendant has been diagnosed with a mental disorder, the court shall find that the defendant's mental disorder was a significant factor in the commission of the offense unless there is clear and convincing evidence that it was not a motivating factor, causal factor, or contributing factor to the defendant's involvement in the alleged offense. A court may consider any relevant and credible evidence, including, but not limited to, police reports, preliminary hearing transcripts, witness statements, statements by the defendant's mental health treatment provider, medical records, records or reports by qualified medical experts, or evidence that the defendant displayed symptoms consistent with the relevant mental disorder at or near the time of the offense.

(c) For any defendant who satisfies the eligibility requirements in subdivision (b), the court must consider whether the defendant is suitable for pretrial diversion. A defendant is suitable for pretrial diversion if all of the following criteria are met:

(1) In the opinion of a qualified mental health expert, the defendant's symptoms of the mental disorder causing, contributing to, or motivating the criminal behavior would respond to mental health treatment.

(2) The defendant consents to diversion and waives the defendant's right to a speedy trial, unless a defendant has been found to be an appropriate candidate for diversion in lieu of commitment pursuant to clause (iv) of subparagraph (B) of paragraph (1) of subdivision (a) of Section 1370 and, as a result of the defendant's mental incompetence, cannot consent to diversion or give a knowing and intelligent waiver of the defendant's right to a speedy trial.

(3) The defendant agrees to comply with treatment as a condition of diversion, unless the defendant has been found to be an appropriate candidate for diversion in lieu of commitment for restoration of competency treatment pursuant to clause (iv) of subparagraph (B) of paragraph (1) of subdivision (a) of Section 1370 and, as a result of the defendant's mental incompetence, cannot agree to comply with treatment.

(4) The defendant will not pose an unreasonable risk of danger to public safety, as defined in Section 1170.18, if treated in the community. The court may consider the opinions of the district attorney, the defense, or a qualified mental health expert, and may consider the defendant's treatment plan, the defendant's violence and criminal history, the current charged offense, and any other factors that the court deems appropriate.

(d) A defendant may not be placed into a diversion program, pursuant to this section, for the following current charged offenses:

(1) Murder or voluntary manslaughter.

(2) An offense for which a person, if convicted, would be required to register pursuant to Section 290, except for a violation of Section 314.

(3) Rape.

(4) Lewd or lascivious act on a child under 14 years of age.

(5) Assault with intent to commit rape, sodomy, or oral copulation, in violation of Section 220.

(6) Commission of rape or sexual penetration in concert with another person, in violation of Section 264.1.

(7) Continuous sexual abuse of a child, in violation of Section 288.5.

(8) A violation of subdivision (b) or (c) of Section 11418.

(e) At any stage of the proceedings, the court may require the defendant to make a prima facie showing that the defendant will meet the minimum requirements of eligibility for diversion and that the defendant and the offense are suitable for diversion. The hearing on the prima facie showing shall be informal and may proceed on offers of proof, reliable hearsay, and argument of counsel. If a prima facie showing is not made, the court may summarily deny the request for diversion or grant any other relief as may be deemed appropriate.

(f) As used in this chapter, the following terms have the following meanings:

(1) "Pretrial diversion" means the postponement of prosecution, either temporarily or permanently, at any point in the judicial process from the point at which the accused is charged until adjudication, to allow the defendant to undergo mental health treatment, subject to all of the following:

(A) (i) The court is satisfied that the recommended inpatient or outpatient program of mental health treatment will meet the specialized mental health treatment needs of the defendant.

(ii) The defendant may be referred to a program of mental health treatment utilizing existing inpatient or outpatient mental health resources. Before approving a proposed treatment program, the court shall consider the request of the defense, the request of the prosecution, the needs of the defendant, and the interests of the community. The treatment may be procured using private or public funds, and a referral may be made to a county mental health agency, existing collaborative courts, or assisted outpatient treatment only if that entity has agreed to accept responsibility for the treatment of the defendant, and mental health services are provided only to the extent that resources are available and the defendant is eligible for those services.

(iii) If the court refers the defendant to a county mental health agency pursuant to this section and the agency determines that it is unable to provide services to the defendant, the court shall accept a written declaration to that effect from the agency in lieu of requiring live testimony. That declaration shall serve only to establish that the program is unable to provide services to the defendant at that time and does not constitute evidence that the defendant is unqualified or unsuitable for diversion under this section.

(B) The provider of the mental health treatment program in which the defendant has been placed shall provide regular reports to the court, the defense, and the prosecutor on the defendant's progress in treatment.

(C) The period during which criminal proceedings against the defendant may be diverted is limited as follows:

(i) If the defendant is charged with a felony, the period shall be no longer than two years.

(ii) If the defendant is charged with a misdemeanor, the period shall be no longer than one year.

(D) Upon request, the court shall conduct a hearing to determine whether restitution, as defined in subdivision (f) of Section 1202.4, is owed to any victim as a result of the diverted offense and, if owed, order its payment during the period of diversion. However, a defendant's inability to pay restitution due to indigence or mental disorder shall not be grounds for denial of diversion or a finding that the defendant has failed to comply with the terms of diversion.

(2) "Qualified mental health expert" includes, but is not limited to, a psychiatrist, psychologist, a person described in Section 5751.2 of the Welfare and Institutions Code, or a person whose knowledge, skill, experience, training, or education qualifies them as an expert.

(g) If any of the following circumstances exists, the court shall, after notice to the defendant, defense counsel, and the prosecution, hold a hearing to determine whether the criminal proceedings should be reinstated, whether the treatment should be modified, or whether the defendant should be conserved and referred to the conservatorship investigator of the county of commitment to initiate conservatorship proceedings for the defendant pursuant to Chapter 3 (commencing with Section 5350) of Part 1 of Division 5 of the Welfare and Institutions Code:

(1) The defendant is charged with an additional misdemeanor allegedly committed during the pretrial diversion and that reflects the defendant's propensity for violence.

(2) The defendant is charged with an additional felony allegedly committed during the pretrial diversion.

(3) The defendant is engaged in criminal conduct rendering the defendant unsuitable for diversion.

(4) Based on the opinion of a qualified mental health expert whom the court may deem appropriate, either of the following circumstances exists:

(A) The defendant is performing unsatisfactorily in the assigned program.

(B) The defendant is gravely disabled, as defined in subparagraph (B) of paragraph (1) of subdivision (h) of Section 5008 of the Welfare and Institutions Code. A defendant shall only be conserved and referred to the conservatorship investigator pursuant to this finding.

(h) If the defendant has performed satisfactorily in diversion, at the end of the period of diversion, the court shall dismiss the defendant's criminal charges that were the subject of the criminal proceedings at the time of the initial diversion. A court may conclude that the defendant has performed satisfactorily if the defendant has substantially complied with the requirements of diversion, has avoided significant new violations of law unrelated to the defendant's mental health condition, and has a plan in place for long-term mental health care. If the court dismisses the charges, the clerk of the court shall file a record with the Department of Justice indicating the disposition of the case diverted pursuant to this section. Upon successful completion of diversion, if the court dismisses the charges, the arrest upon which the diversion was based shall be deemed never to have occurred, and the court shall order access to the record of the arrest restricted in

accordance with Section 1001.9, except as specified in subdivisions (j) and (k). The defendant who successfully completes diversion may indicate in response to any question concerning the defendant's prior criminal record that the defendant was not arrested or diverted for the offense, except as specified in subdivision (j).

(i) ~~Except as provided in subdivision (i) of Section 8103 of the Welfare and Institutions Code, a~~ **A** record pertaining to an arrest resulting in successful completion of diversion, or any record generated as a result of the defendant's application for or participation in diversion, shall not, without the defendant's consent, be used in any way that could result in the denial of any employment, benefit, license, or certificate.

(j) The defendant shall be advised that, regardless of the defendant's completion of diversion, all of the following apply:

(1) The arrest upon which the diversion was based may be disclosed by the Department of Justice to any peace officer application request and that, notwithstanding subdivision (i), this section does not relieve the defendant of the obligation to disclose the arrest in response to any direct question contained in any questionnaire or application for a position as a peace officer, as defined in Section 830.

(2) An order to seal records pertaining to an arrest made pursuant to this section has no effect on a criminal justice agency's ability to access and use those sealed records and information regarding sealed arrests, as described in Section 851.92.

~~(3) The defendant may be prohibited from possessing or receiving a firearm as provided in subdivision (i) of Section 8103 of the Welfare and Institutions Code.~~

(k) A finding that the defendant suffers from a mental disorder, any progress reports concerning the defendant's treatment, **including but not limited to any finding that the defendant be prohibited from owning controlling a firearm because they are a danger to themselves or others pursuant to subdivision (m)**, or any other records related to a mental disorder that were created as a result of participation in, or completion of, diversion pursuant to this section or for use at a hearing on the defendant's eligibility for diversion under this section may not be used in any other proceeding without the defendant's consent, unless that information is relevant evidence that is admissible under the standards described in paragraph (2) of subdivision (f) of Section 28 of Article I of the California Constitution. However, when determining whether to exercise its discretion to grant diversion under this section, a court may consider previous records of participation in diversion under this section.

(l) The county agency administering the diversion, the defendant's mental health treatment providers, the public guardian or conservator, and the court shall, to the extent not prohibited by federal law, have access to the defendant's medical and psychological records, including progress reports, during the defendant's time in diversion, as needed, for the purpose of providing care and treatment and monitoring treatment for diversion or conservatorship.

(m) (1) The prosecution may request an order from the court that the defendant be prohibited from owning or possessing a firearm until they successfully complete diversion, because they are a danger to themselves or others, pursuant to subdivision (i) of Section 8103 of the Welfare and Institutions Code.

(2) The prosecution shall bear the burden of proving, by clear and convincing evidence, the following are true:

(i) The defendant poses a significant danger of causing personal injury to themselves or another by having in their custody or control, owning, purchasing, possessing, or receiving a firearm.

(ii) The prohibition is necessary to prevent personal injury to the defendant, or any other person because less restrictive alternatives either have been tried and found to be ineffective, or are inadequate or inappropriate for the circumstances of the defendant.

(3) If the court finds that the prosecution has not met that burden, the court shall not order that the person is prohibited. If the court finds that the prosecution has met the burden, it shall order that the person is prohibited and shall inform the person that they are prohibited from owning controlling a firearm until they successfully complete diversion because they are a danger to themselves or others.

SEC. 2. Section 8103 of the Welfare and Institutions Code is amended to read:

8103. (a) (1) A person who after October 1, 1955, has been adjudicated by a court of any state to be a danger to others as a result of a mental disorder or mental illness, or who has been adjudicated to be a mentally disordered sex offender, shall not purchase or receive, or attempt to purchase or receive, or have possession, custody, or control of a firearm or any other deadly weapon unless there has been issued to the person a certificate by the court of adjudication upon release from treatment or at a later date stating that the person may possess a firearm or any other deadly weapon without endangering others, and the person has not, subsequent to the issuance of the certificate, again been adjudicated by a court to be a danger to others as a result of a mental disorder or mental illness.

(2) The court shall notify the Department of Justice of the court order finding the individual to be a person described in paragraph (1) as soon as possible, but not later than one court day after issuing the order. The court shall also notify the Department of Justice of any certificate issued as described in paragraph (1) as soon as possible, but not later than one court day after issuing the certificate.

(b) (1) A person who has been found, pursuant to Section 1026 of the Penal Code or the law of any other state or the United States, not guilty by reason of insanity of murder, mayhem, a violation of Section 207, 209, or 209.5 of the Penal Code in which the victim suffers intentionally inflicted great bodily injury, carjacking or robbery in which the victim suffers great bodily injury, a

violation of Section 451 or 452 of the Penal Code involving a trailer coach, as defined in Section 635 of the Vehicle Code, or any dwelling house, a violation of paragraph (1) or (2) of subdivision (a) of Section 262 or paragraph (2) or (3) of subdivision (a) of Section 261 of the Penal Code, a violation of Section 459 of the Penal Code in the first degree, assault with intent to commit murder, a violation of Section 220 of the Penal Code in which the victim suffers great bodily injury, a violation of Section 18715, 18725, 18740, 18745, 18750, or 18755 of the Penal Code, or of a felony involving death, great bodily injury, or an act which poses a serious threat of bodily harm to another person, or a violation of the law of any other state or the United States that includes all the elements of any of the above felonies as defined under California law, shall not purchase or receive, or attempt to purchase or receive, or have possession, custody, or control of any firearm or any other deadly weapon.

(2) The court shall notify the Department of Justice of the court order finding the person to be a person described in paragraph (1) as soon as possible, but not later than one court day after issuing the order.

(c) (1) A person who has been found, pursuant to Section 1026 of the Penal Code or the law of any other state or the United States, not guilty by reason of insanity of any crime other than those described in subdivision (b) shall not purchase or receive, or attempt to purchase or receive, or have possession, custody, or control of any firearm or any other deadly weapon unless the court of commitment has found the person to have recovered sanity, pursuant to Section 1026.2 of the Penal Code or the law of any other state or the United States.

(2) The court shall notify the Department of Justice of the court order finding the person to be a person described in paragraph (1) as soon as possible, but not later than one court day after issuing the order. The court shall also notify the Department of Justice when it finds that the person has recovered their sanity as soon as possible, but not later than one court day after making the finding.

(d) (1) A person found by a court to be mentally incompetent to stand trial, pursuant to Section 1370 or 1370.1 of the Penal Code or the law of any other state or the United States, shall not purchase or receive, or attempt to purchase or receive, or have possession, custody, or control of any firearm or any other deadly weapon, unless there has been a finding with respect to the person of restoration to competence to stand trial by the committing court, pursuant to Section 1372 of the Penal Code or the law of any other state or the United States.

(2) The court shall notify the Department of Justice of the court order finding the person to be mentally incompetent as described in paragraph (1) as soon as possible, but not later than one court day after issuing the order. The court shall also notify the Department of Justice when it finds that the person has recovered competence as soon as possible, but not later than one court day after making the finding.

(e) (1) A person who has been placed under conservatorship by a court, pursuant to Section 5350 or the law of any other state or the United States, because the person is gravely disabled as a result of a mental disorder or impairment by chronic alcoholism, shall not purchase or receive, or attempt to purchase or receive, or have possession, custody, or control of any firearm or any other deadly

weapon while under the conservatorship if, at the time the conservatorship was ordered or thereafter, the court that imposed the conservatorship found that possession of a firearm or any other deadly weapon by the person would present a danger to the safety of the person or to others. Upon placing a person under conservatorship, and prohibiting firearm or any other deadly weapon possession by the person, the court shall notify the person of this prohibition.

(2) The court shall notify the Department of Justice of the court order placing the person under conservatorship and prohibiting firearm or any other deadly weapon possession by the person as described in paragraph (1) as soon as possible, but not later than one court day after placing the person under conservatorship. The notice shall include the date the conservatorship was imposed and the date the conservatorship is to be terminated. If the conservatorship is subsequently terminated before the date listed in the notice to the Department of Justice or the court subsequently finds that possession of a firearm or any other deadly weapon by the person would no longer present a danger to the safety of the person or others, the court shall notify the Department of Justice as soon as possible, but not later than one court day after terminating the conservatorship.

(3) All information provided to the Department of Justice pursuant to paragraph (2) shall be kept confidential, separate, and apart from all other records maintained by the Department of Justice, and shall be used only to determine eligibility to purchase or possess firearms or other deadly weapons. A person who knowingly furnishes that information for any other purpose is guilty of a misdemeanor. All the information concerning any person shall be destroyed upon receipt by the Department of Justice of notice of the termination of conservatorship as to that person pursuant to paragraph (2).

(f) (1) (A) A person who has been (i) taken into custody as provided in Section 5150 because that person is a danger to themselves or to others, (ii) assessed within the meaning of Section 5151, and (iii) admitted to a designated facility within the meaning of Sections 5151 and 5152 because that person is a danger to themselves or others, shall not own, possess, control, receive, or purchase, or attempt to own, possess, control, receive, or purchase, any firearm for a period of five years after the person is released from the facility.

(B) A person who has been taken into custody, assessed, and admitted as specified in subparagraph (A), and who was previously taken into custody, assessed, and admitted as specified in subparagraph (A) one or more times within a period of one year preceding the most recent admittance, shall not own, possess, control, receive, or purchase, or attempt to own, possess, control, receive, or purchase, any firearm for the remainder of their life.

(C) A person described in this paragraph, however, may own, possess, control, receive, or purchase, or attempt to own, possess, control, receive, or purchase any firearm if the superior court has, pursuant to paragraph (5), found that the people of the State of California have not met their burden pursuant to paragraph (6).

(2) (A) (i) For each person subject to this subdivision, the facility shall, within 24 hours of the time of admission, submit a report to the Department of Justice, on a form prescribed by the Department

of Justice, containing information that includes, but is not limited to, the identity of the person and the legal grounds upon which the person was admitted to the facility.

(ii) Any report submitted pursuant to this paragraph shall be confidential, except for purposes of the court proceedings described in this subdivision and for determining the eligibility of the person to own, possess, control, receive, or purchase a firearm.

(B) Facilities shall submit reports pursuant to this paragraph exclusively by electronic means, in a manner prescribed by the Department of Justice.

(3) Prior to, or concurrent with, the discharge, the facility shall inform a person subject to this subdivision that they are prohibited from owning, possessing, controlling, receiving, or purchasing any firearm for a period of five years or, if the person was previously taken into custody, assessed, and admitted to custody for a 72-hour hold because they were a danger to themselves or to others during the previous one-year period, for life. Simultaneously, the facility shall inform the person that they may request a hearing from a court, as provided in this subdivision, for an order permitting the person to own, possess, control, receive, or purchase a firearm. The facility shall provide the person with a copy of the most recent "Patient Notification of Firearm Prohibition and Right to Hearing Form" prescribed by the Department of Justice. The Department of Justice shall update this form in accordance with the requirements of this section and distribute the updated form to facilities by January 1, 2020. The form shall include information regarding how the person was referred to the facility. The form shall include an authorization for the release of the person's mental health records, upon request, to the appropriate court, solely for use in the hearing conducted pursuant to paragraph (5). A request for the records may be made by mail to the custodian of records at the facility, and shall not require personal service. The facility shall not submit the form on behalf of the person subject to this subdivision.

(4) The Department of Justice shall provide the form upon request to any person described in paragraph (1). The Department of Justice shall also provide the form to the superior court in each county. A person described in paragraph (1) may make a single request for a hearing at any time during the five-year period or period of the lifetime prohibition. The request for hearing shall be made on the form prescribed by the department or in a document that includes equivalent language.

(5) A person who is subject to paragraph (1) who has requested a hearing from the superior court of the county of their residence for an order that they may own, possess, control, receive, or purchase firearms shall be given a hearing. The clerk of the court shall set a hearing date and notify the person, the Department of Justice, and the district attorney. The people of the State of California shall be the plaintiff in the proceeding and shall be represented by the district attorney. Upon motion of the district attorney, or on its own motion, the superior court may transfer the hearing to the county in which the person resided at the time of their detention, the county in which the person was detained, or the county in which the person was evaluated or treated. Within seven days after the request for a hearing, the Department of Justice shall file copies of the reports described in this section with the superior court. The reports shall be disclosed upon request to the person and to the district attorney. The court shall set the hearing within 60 days of receipt of the request for a hearing. Upon showing good cause, the district attorney shall be entitled to a

continuance not to exceed 30 days after the district attorney was notified of the hearing date by the clerk of the court. If additional continuances are granted, the total length of time for continuances shall not exceed 60 days. The district attorney may notify the county behavioral health director of the hearing who shall provide information about the detention of the person that may be relevant to the court and shall file that information with the superior court. That information shall be disclosed to the person and to the district attorney. The court, upon motion of the person subject to paragraph (1) establishing that confidential information is likely to be discussed during the hearing that would cause harm to the person, shall conduct the hearing in camera with only the relevant parties present, unless the court finds that the public interest would be better served by conducting the hearing in public. Notwithstanding any other law, declarations, police reports, including criminal history information, and any other material and relevant evidence that is not excluded under Section 352 of the Evidence Code shall be admissible at the hearing under this section.

(6) The people shall bear the burden of showing by a preponderance of the evidence that the person would not be likely to use firearms in a safe and lawful manner.

(7) If the court finds at the hearing set forth in paragraph (5) that the people have not met their burden as set forth in paragraph (6), the court shall order that the person shall not be subject to the five-year prohibition or lifetime prohibition, as appropriate, in this section on the ownership, control, receipt, possession, or purchase of firearms, and that person shall comply with the procedure described in Chapter 2 (commencing with Section 33850) of Division 11 of Title 4 of Part 6 of the Penal Code for the return of any firearms. A copy of the order shall be submitted to the Department of Justice. Upon receipt of the order, the Department of Justice shall delete any reference to the prohibition against firearms from the person's state mental health firearms prohibition system information.

(8) If the district attorney declines or fails to go forward in the hearing, the court shall order that the person shall not be subject to the five-year prohibition or lifetime prohibition required by this subdivision on the ownership, control, receipt, possession, or purchase of firearms. A copy of the order shall be submitted to the Department of Justice. Upon receipt of the order, the Department of Justice shall, within 15 days, delete any reference to the prohibition against firearms from the person's state mental health firearms prohibition system information, and that person shall comply with the procedure described in Chapter 2 (commencing with Section 33850) of Division 11 of Title 4 of Part 6 of the Penal Code for the return of any firearms.

(9) This subdivision does not prohibit the use of reports filed pursuant to this section to determine the eligibility of persons to own, possess, control, receive, or purchase a firearm if the person is the subject of a criminal investigation, a part of which involves the ownership, possession, control, receipt, or purchase of a firearm.

(10) If the court finds that the people have met their burden to show by a preponderance of the evidence that the person would not be likely to use firearms in a safe and lawful manner and the person is subject to a lifetime firearm prohibition because the person had been admitted as specified in subparagraph (A) of paragraph (1) more than once within the previous one-year period,

the court shall inform the person of their right to file a subsequent petition no sooner than five years from the date of the hearing.

(11) A person subject to a lifetime firearm prohibition is entitled to bring subsequent petitions pursuant to this subdivision. A person shall not be entitled to file a subsequent petition, and shall not be entitled to a subsequent hearing, until five years have passed since the determination on the person's last petition. A hearing on subsequent petitions shall be conducted as described in this subdivision, with the exception that the burden of proof shall be on the petitioner to establish by a preponderance of the evidence that the petitioner can use a firearm in a safe and lawful manner. Subsequent petitions shall be filed in the same court of jurisdiction as the initial petition regarding the lifetime firearm prohibition.

(g) (1) (A) A person who has been certified for intensive treatment under Section 5250, 5260, or 5270.15 shall not own, possess, control, receive, or purchase, or attempt to own, possess, control, receive, or purchase, any firearm for a period of five years.

(B) Any person who meets the criteria contained in subdivision (e) or (f) who is released from intensive treatment shall nevertheless, if applicable, remain subject to the prohibition contained in subdivision (e) or (f).

(2) (A) For each person certified for intensive treatment under paragraph (1), the facility shall, within 24 hours of the certification, submit a report to the Department of Justice, on a form prescribed by the department, containing information regarding the person, including, but not limited to, the legal identity of the person and the legal grounds upon which the person was certified. A report submitted pursuant to this paragraph shall only be used for the purposes specified in paragraph (2) of subdivision (f).

(B) Facilities shall submit reports pursuant to this paragraph exclusively by electronic means, in a manner prescribed by the Department of Justice.

(3) Prior to, or concurrent with, the discharge of each person certified for intensive treatment under paragraph (1), the facility shall inform the person of that information specified in paragraph (3) of subdivision (f).

(4) A person who is subject to paragraph (1) may petition the superior court of the county of their residence for an order that they may own, possess, control, receive, or purchase firearms. At the time the petition is filed, the clerk of the court shall set a hearing date within 60 days of receipt of the petition and notify the person, the Department of Justice, and the district attorney. The people of the State of California shall be the respondent in the proceeding and shall be represented by the district attorney. Upon motion of the district attorney, or on its own motion, the superior court may transfer the petition to the county in which the person resided at the time of their detention, the county in which the person was detained, or the county in which the person was evaluated or treated. Within seven days after receiving notice of the petition, the Department of Justice shall file copies of the reports described in this section with the superior court. The reports shall be disclosed upon request to the person and to the district attorney. The district attorney shall be

entitled to a continuance of the hearing to a date of not less than 30 days after the district attorney was notified of the hearing date by the clerk of the court. If additional continuances are granted, the total length of time for continuances shall not exceed 60 days. The district attorney may notify the county behavioral health director of the petition, and the county behavioral health director shall provide information about the detention of the person that may be relevant to the court and shall file that information with the superior court. That information shall be disclosed to the person and to the district attorney. The court, upon motion of the person subject to paragraph (1) establishing that confidential information is likely to be discussed during the hearing that would cause harm to the person, shall conduct the hearing in camera with only the relevant parties present, unless the court finds that the public interest would be better served by conducting the hearing in public. Notwithstanding any other law, any declaration, police reports, including criminal history information, and any other material and relevant evidence that is not excluded under Section 352 of the Evidence Code, shall be admissible at the hearing under this section. If the court finds by a preponderance of the evidence that the person would be likely to use firearms in a safe and lawful manner, the court may order that the person may own, control, receive, possess, or purchase firearms, and that person shall comply with the procedure described in Chapter 2 (commencing with Section 33850) of Division 11 of Title 4 of Part 6 of the Penal Code for the return of any firearms. A copy of the order shall be submitted to the Department of Justice. Upon receipt of the order, the Department of Justice shall delete any reference to the prohibition against firearms from the person's state mental health firearms prohibition system information.

(h) (1) For all persons identified in subdivisions (f) and (g), facilities shall report to the Department of Justice as specified in those subdivisions, except facilities shall not report persons under subdivision (g) if the same persons previously have been reported under subdivision (f).

(2) Additionally, all facilities shall report to the Department of Justice upon the discharge of persons from whom reports have been submitted pursuant to subdivision (f) or (g). However, a report shall not be filed for persons who are discharged within 31 days after the date of admission.

~~(i) (1) A person who completes mental health diversion pursuant to Section 1001.36 of the Penal Code in a case charging any felony, or a misdemeanor violation of Section 273.5 of the Penal Code, shall not thereafter purchase or receive, or attempt to purchase or receive, or have custody or control of, any firearm or any other deadly weapon.~~

~~(2) A person who completes mental health diversion pursuant to Section 1001.36 of the Penal Code in a case charging a misdemeanor described in Section 29805 of the Penal Code, except as otherwise provided in paragraph (1), shall not purchase or receive, or attempt to purchase or receive, or have custody or control of, any firearm or any other deadly weapon for a period of 10 years after mental health diversion is completed.~~

~~(3) The court shall notify the Department of Justice of the court order finding the person to be a person described in paragraph (1) as soon as possible, but not later than one court day after issuing the order.~~

(i) (1) A person who has been found by a court to be prohibited from owning or controlling

a firearm because they are a danger to themselves or others, and granted pretrial mental health diversion pursuant to subdivision (m) of Section 1001.36 of the Penal Code, shall not shall not own, possess, control, receive, or purchase, or attempt to own, possess, control, receive, or purchase, any firearm until the person successfully completes diversion.

(2) The court shall notify the Department of Justice of the court order finding the individual to be a person described in paragraph (1) as soon as possible, but not later than one court day after issuing the order. The court shall also notify the Department of Justice that the person has successfully completed diversion as soon as possible, but not later than one court day after completion.

(3) Any information submitted pursuant to this subdivision shall be confidential, except for purposes of determining the eligibility of the person to own, possess, control, receive, or purchase a firearm. All the information shall be destroyed upon receipt by the Department of Justice of notice by the court that the person successfully completed diversion pursuant to paragraph (2).

(j) Every person who owns or possesses or has custody or control of, or purchases or receives, or attempts to purchase or receive, any firearm or any other deadly weapon in violation of this section shall be punished by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code or in a county jail for not more than one year.

(k) "Deadly weapon," as used in this section, has the meaning prescribed by Section 8100.

(l) Any notice or report required to be submitted to the Department of Justice pursuant to this section shall be submitted in an electronic format, in a manner prescribed by the Department of Justice.

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

Date of Hearing: March 28, 2023
Consultant: Elizabeth Potter

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

AB 458 (Jones-Sawyer) – As Amended March 7, 2023

SUMMARY: Requires specified educational standards to become a peace officer. Specifically, **this bill**:

1) Requires an officer to attain either of the following degrees prior to receiving a basic certificate beginning on January 1, 2028:

   a) A modern policing degree from a California Community College; or,

   b) A bachelor's degree or other advanced degree from an accredited college or university.

2) Provides that any person who is employed as peace officer or is currently enrolled in basic academy as of December 31, 2027 does not need to obtain a degree.

EXISTING LAW:

1) Establishes the Commission on Peace Officer Standards and Training (POST) to set minimum standards for the recruitment and training of peace officers, develop training courses and curriculum, and establish a professional certificate program that awards different levels of certification based on training, education, experience, and other relevant prerequisites. (Pen. Code, §§ 830-832.10; 13500 *et seq.*)

2) States the powers of POST, including among others, to develop and implement programs to increase the effectiveness of law enforcement, to secure the cooperation of state-level peace officers, agencies, and bodies having jurisdiction over systems of public higher education in continuing the development of college-level training and education programs. (Pen. Code, §§ 830-832.10; 13500 *et seq.*)

3) Requires any person designated as a peace officer, notwithstanding designated exceptions, or any peace officer employed by an agency that participates in a POST program must be at least 21 years of age at the time of appointment. (Gov. Code, § 1031.4, subd. (a).)

4) Provides that any person, who as of December 31, 2021, is currently enrolled in a basic academy or is employed as a peace officer by a public entity in California is not subject to the age requirement of 21 years of age. (Gov. Code, § 1031.4, subd. (b).)

5) Requires representatives from POST, stakeholders from law enforcement, the California State University, and community organizations to serve as advisors to the office of the Chancellor of the Community Colleges to develop a modern policing degree program. (Pen. Code, § 13511.1, subd (a).)

6) Requires the office of the Chancellor of the Community Colleges to report recommendations to the Legislature outlining a plan to implement the modern policing degree program on, or by, June 1, 2023. (Pen. Code, § 13511.1, subd (a).)

7) Requires the report to the Legislature to include the following:

   a) Focus on courses pertinent on law enforcement including, but not limited to, psychology, communications, history, ethnic studies, law, and courses determined to develop necessary critical thinking skills and emotional intelligence;

   b) Allowances for prior law enforcement experience, appropriate work experience, postsecondary education experience, or military experience;

   c) Both the modern policing degree program and bachelor's degree program in the discipline of their choosing as minimum education requirements for employment as a peace officer.

   d) Recommendations to adopt financial assistance for students of historically underserved and disadvantaged communities with barriers to higher education access to fulfill the minimum requirements to be adopted for employment as a peace officer. (Pen. Code, § 13511.1, subd (a)(1-4).)

8) Requires POST to approve and adopt the education criteria for peace officers within two years from the submission of the report to the Legislature. (Pen. Code, § 13511.1, subd (c).)

9) Requires POST to adopt rules establishing minimum standards relating to the recruitment, training and fitness of state and local law enforcement officers. (Pen. Code, §§ 13510 & 13510.5.)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "Decades of data showcases more mature and better educated officers perform better in the academy, receive higher supervisor evaluations, have fewer disciplinary problems and accidents, are assaulted less often, and miss fewer days of work than their counterparts. With the support of law enforcement, community advocates, and higher education experts, Assemblymember Jones-Sawyer's AB 89, the PEACE Act (2021), was signed into law. This set in motion the framework for a modern policing degree program and financial aid program for low-income students from underrepresented, disadvantaged communities. The vital work accomplished as a result of the PEACE Act ensures the modern policing profession is accessible and that the workforce reflects the communities they serve. As such, this bill, AB 458, codifies in statute that incoming recruits are equipped with the present-day responsibilities of law enforcement by ensuring they either hold a modern policing degree or bachelor's degree."

2) **The Peace Officers Education and Age Conditions for Employment (PEACE) Act**: AB 89 (Jones-Sawyer), Chapter 405, Statutes of 2021, enacted the PEACE Act. The PEACE Act changed the age requirement from 18 years of age to 21 years of age to become a California

peace officer. The PEACE Act requires the office of the Chancellor of California Community Colleges to develop a modern policing degree program with POST and other stakeholders and submit a report on the recommendations to the Legislature outlining a plan to implement the program on or before June 1, 2023.

According to the analysis from AB 89, the author stated, "Excessive force at the hands of law enforcement that leads to grave injury or death not only tears apart families and communities but erodes trust in law enforcement. This data-driven bill relies on years of study and new understandings of brain development to ensure that only those officers capable of high level decision-making and judgment in tense situations are entrusted with working in our communities and correctional facilities. By requiring new peace officer candidates to be more mature and highly educated, the PEACE Act not only professionalizes policing, but also creates a culture that is significantly less reliant on excessive force. The PEACE Act will transform departments across the state and mark a transition in addressing the root causes behind excessive use of force."

As excessive use of force by peace officers has come into question, the training and education of peace officers has also come into question. A joint study by the Riverside Sheriff's association and UC Riverside stated that "Although not one of the more common topics discussed in police shootings research, the level of education possessed by officers has found its way into other police-related topics such as an officer's commitment to the profession, ability to effectively communicate with others, officer attitude, ability to relate to others, and use of force generally. In their study examining officer education, experience, and use of force, Paoline and Terrill (2007) have provided a comprehensive overview of the literature regarding the effects of education in police work In their own research, Paoline and Terrill found that officers with some higher education (i,e,, some college versus high school diploma) and a 4-year degree were less likely to resort to verbal coercion than officers with a high school education. Moreover, officers with a bachelor's degree were less likely to use physical force than officers with only a high school education." (Law Journal Library - HeinOnline.org, Kposowa, J. P. (2008). *Police officer characteristics and the likelihood of using deadly force. Criminal justice and behavior*, 2008, at p.6)

This bill would require, beginning January 1, 2028, a peace officer to obtain a modern policing degree or a bachelor's degree prior to receiving their basic certificate, unless that peace officer is currently employed or enrolled in basic training as of December 31, 2027.

3) **Argument in Support**: According to the Peace Officers Research Association of California (PORAC), "Representing 75,000 public safety members and 930 public safety associations. We are pleased to support AB 458 relating to peace officers.

"Current law requires the Chancellor of the California Community Colleges, in consultation with specified entities, to develop a modern policing degree program and to prepare and submit a report to the Legislature by no later than June 1, 2023, outlining a plan to implement the program. Current law requires peace officers in this state to meet specified minimum standards, including age and education requirements. Commencing on January 1, 2028, this bill would require a peace officer to attain a modern policing degree, as specified, or a bachelor's or other advanced degree from an accredited college or university prior to receiving a basic certificate from the commission."

4) **Prior Legislation**:

a) AB 89 (Jones-Sawyer), Chapter 405, Statutes of 2021, raised the minimum age for peace officers to 21 and requires the Commission on Peace Officer Standards and Training (POST) and educational stakeholders develop a modern policing degree program.

b) AB 2229 (L. Rivas), Chaptered by Secretary of State - Chapter 959, Statutes of 2022, reenacts the requirement that peace officers be found to be free from any physical, emotional, or mental condition that might adversely affect the exercise of their powers, including bias against race or ethnicity, gender, nationality, religion, disability, or sexual orientation.

c) AB 655 (Kalra), Chaptered by Secretary of State - Chapter 854, Statutes of 2022, required background checks to determine whether a person seeking to be employed as a peace officer exhibits unlawful bias by engaging in a hate group.

d) SB 960 (Skinner), Chaptered by Secretary of State. Chapter 825, Statutes of 2022, removed provisions of existing law requiring peace officers to either be a citizen of the United States or be a permanent resident who is eligible for and has applied for citizenship.

e) AB 846 (Burke), Chapter 322, Statutes of 2020, provided that evaluations of peace officers shall include an evaluation of bias against race or ethnicity, gender, nationality, religion, disability, or sexual orientation

REGISTERED SUPPORT / OPPOSITION:
Support

Peace Officers Research Association of California (PORAC)

Opposition

None

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

Date of Hearing: March 28, 2023
Counsel: Liah Burnley

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

AB 523 (Vince Fong) – As Introduced February 7, 2023

SUMMARY: Expands the crime of organized retail theft to include merchandise stolen from a merchant's cargo.

EXISTING LAW:

1) States that a person who commits any of the following acts is guilty of organized retail theft:

   a) Acts in concert with one or more persons to steal merchandise from one or more merchant's premises or online marketplace with the intent to sell, exchange, or return the merchandise for value;

   b) Acts in concert with two or more persons to receive, purchase, or possess merchandise as defined, knowing or believing it to have been stolen;

   c) Acts as an agent of another individual or group of individuals to steal merchandise from one or more merchant's premises or online marketplaces as part of an organized plan to commit theft; or,

   d) Recruits, coordinates, organizes, supervises, directs, manages, or finances another to undertake any of these acts or any other statute defining theft of merchandise. (Pen. Code, § 490.4, subd. (a).)

2) Punishes organized retail theft, as follows:

   a) If violations of the provisions directed at acting in concert or as an agent are committed on two or more separate occasions within a one-year period, and if the aggregated value of the merchandise stolen, received, purchased, or possessed within that period exceeds $950, the offense is punishable as an alternate felony-misdemeanor (a "wobbler");

   b) Any other violation of the provisions directed at acting in concert or as an agent is punishable as a misdemeanor by imprisonment in a county jail not exceeding one year; and,

   c) A violation of the recruiting, coordinating, organizing, supervising, directing, managing, or financing provision is punishable as a wobbler. (Pen. Code, § 490.4, subd. (b).)

3) States that every person who steals, takes, carries, leads, or drives away the personal property of another, or who fraudulently appropriates property which has been entrusted to them, or who knowingly and designedly, by any false or fraudulent representation or pretense,

defrauds any other person of money, labor or real or personal property, is guilty of theft. (Pen. Code, § 484, subd. (a).)

4) Provides that every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, floating home, railroad car, locked or sealed cargo container, house car, inhabited camper, locked vehicle, aircraft, or mine with attempt to commit theft or any felony is guilty of burglary. (Pen. Code, § 459.)

5) Defines grand theft as theft of money, labor, real or personal property of a value exceeding $950. (Pen. Code, § 487.)

6) Provides that the value of the money, labor, real property, or personal property taken exceeds $950 over the course of distinct but related acts, the value of the money, labor, real property, or personal property taken may properly be aggregated to charge a count of grand theft, if the acts are motivated by one intention, one general impulse, and one plan. (Pen. Code, § 487, subd. (e).)

7) Provides that every person who steal, takes, or carries away cargo of another, if the cargo is taken of a value exceeding $950, is guilty of grand theft. (Pen. Code, § 487h, subd. (a).)

8) Defines "cargo" as any goods, wares, products or manufactured merchandise that has been loaded into a trailer, railcar, or cargo container, awaiting or in transit. (Pen. Code § 487h, subd. (b).)

9) Defines "cargo container" as a receptacle with strong enough for repeated use, designed to facilitate the carriage of goods, fitted for handling from one mode of transport to another, designed to be easy to fill and empty, and having a cubic displacement of 1,000 cubic feet or more. (Pen. Code, § 458.)

10) Provides that every person who destroys any part of a railroad, including any structure or fixture attached to or connected with any railroad, is guilty of a misdemeanor punishable by imprisonment in the county jail not exceeding one year, or a felony, punishable by imprisonment in county jail for a period of 16 months, two, or three years. (Pen. Code, § 489, subd. (c)(1).)

11) Makes it a felony, punishable by imprisonment in a county jail for a term of two, three, or four years, to obstruct a railroad track. (Pen. Code, § 218.1.)

12) Makes trespass on a railroad or any transit related property a misdemeanor. (Pen. Code, § 369i.)

13) Provides that any railroad police officer, as specified, are peace officers whose authority extends to any place in the State for the purpose of performing their primary duty or when making an arrest. (Pen. Code, § 830.33, subd. (e).)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "Theft is on the rise, and the costs are passed onto Californians. Businesses are hit in their stores, and also up and down the supply chain – from trains to cargo containers. AB 523 modernizes the state's response to organized retail theft to include where other acts of theft are committed. Protecting the supply chain strengthens the state's economy and guarantees families have access to day-to-day essentials."

2) **Organized Retail Theft**: AB 1065 (Jones-Sawyer), Chapter 803, Statutes of 2018, among other things, created the crime of organized retail theft and expanded jurisdictional rules for theft offenses. AB 1065 had a sunset date of January 1, 2021. AB 331 (Jones-Sawyer), Chapter 113, Statutes of 2021, re-established the crime of organized retail theft through 2025.

   This bill would unnecessarily enlarge the organized retail theft statute, which was intended to cover the limited circumstances of theft of merchandise from a merchant's premises or online marketplace with the intent to sell, exchange, or return the merchandise for value. The supply chain is not a retailer. Moreover, property in cargo is not in all cases "merchandise."

3) **Existing Law Allows for Increased Penalties for Cargo Theft**: To the extent this bill is aimed at increasing penalties for thefts, there are currently a number of laws that prosecutors can use to charge cargo theft that call for increased penalties. Grand theft of property (including cargo) valued over $950 is already chargeable as a felony offense, punishable by imprisonment in county jail for a period of 16 months, two or three years. (Pen. Code, § 489, subd. (c)(1).) Also, any person who steals, takes, or carries away cargo of another, if the cargo is taken of a value exceeding $950, is guilty of grand theft. (Pen. Code, § 487h, subd. (a).) And, any person who enters any railroad car or locked or sealed cargo container with attempt to commit theft or any felony is guilty of burglary, which is a felony, punishable by imprisonment in county jail for a period of 16 months, two or three years. (Pen. Code, §§ 459; 461, subd. (b).)

   In instances where the property stolen from cargo is less than $950, the crime is punishable by a fine not exceeding $1,000 or by imprisonment in the county jail not exceeding 6 months, or both. (Pen. Code, § 490.) If a person trespasses on a railroad or any transit related property during the commission of the offense, they can be charged with an additional misdemeanor. (Pen. Code, § 369i.) If a person trespasses on a railroad with intent to commit robbery, they can be subject to imprisonment of a term of not more than twenty years under federal law. (18 U.S.C. § 1991.)

   Existing law also allows for increased penalties for thefts less than $950, for example by aggregation of theft offenses. Repeated acts of theft can be aggregated and prosecuted as one felony if they are conducted pursuant to one intention, one general impulse, and one plan. (*People v. Bailey* (1961) 55 Cal.2d 514, 518-519 (*Bailey*).)

   Moreover, under California law, if two or more persons conspire to commit any crime, even misdemeanor petty theft, they can be charged with a felony for the conspiracy itself. Thus, any time there is more than one person involved in any act of cargo theft the offense can be charged as felony conspiracy, regardless of the value of the items stolen. (Pen. Code, § 182.)

In sum, cargo theft is already a crime and there are already many legal options for charging cargo thefts with increased penalties.

4) **Railroad Cargo Theft**: According to background materials provided by the author, "Representatives from the Union Pacific Railroad indicated that rail thefts experienced a 160% increase in 2021 compared to 2020. The throttling of the supply chain, compounded by increased gas prices, climbing inflation, and rising interest rates put additional pressure on the economy. Unfortunately, this also spurred increased activity in the illicit market: household goods and electronics were the most stolen commodities in 2022."

In California, railroad police officers have general peace officer authority. (Pen. Code, § 830.33, subd. (e).) Under federal law, railroad police have interstate authority; they can enforce the laws of any jurisdiction in which the rail carrier owns property to protect patrons of the rail carrier, property, equipment and facilities, personnel, equipment and material moving by rail, and property moving in interstate or foreign commerce in the possession of the rail carrier. (49 U.S.C. § 28101.)

The Union Pacific Police Department is the law enforcement agency of Union Pacific's (UP) railroad. The first UP special agents were hired during the "Hell on Wheels" era to protect cargo from train robbers in the Wild West. (*Union Pacific Special Agents: The Badges Behind the Shield,* UP (April 2016). https://www.up.com/aboutup/community/inside_track/badges-04-11-2016.htm [as of March 8, 2023].) According to UP, the Union Pacific Police Department has primary jurisdiction over crimes committed against the railroad. The department is responsible for all UP locations across 32,000 miles of track in 23 states. (*Ibid.*) UP police have full police authority and are responsible for crimes that include trespassing on railroad rights of way, theft of railroad property, threats of terrorism and derailments, well as investigate public safety incidents which occur on railroad property. They often work with local, state, and federal law enforcement agencies on issues concerning the railroad. (*Ibid.*) Union Pacific special agents and local law enforcement officers have overlapping jurisdictions, but UP railroad property is the Union Pacific Police Department's responsibility. (*Ibid.*)

In December 20, 2021, UP sent a letter to Los Angeles County District Attorney George Gascón, regarding train thefts and security concerns. The letter states, in part:

> "Since December 2020, UP has experienced an over 160% increase in criminal rail theft in Los Angeles County. In several months during that period, the increase from the previous year surpassed 200%. In October 2021 alone, the increase was 356% over compared to October 2020. Not only do these dramatic increases represent retail product thefts – they include increased assaults and armed robberies of UP employees performing their duties moving trains. …
>
> "This increased criminal activity over the past twelve months accounts for approximately $5 million in claims, losses and damages to UP. And that value does not include respective losses to our impacted customers. Nor does it capture the larger operating or commercial impacts to the UP

network or supply chain system in Los Angeles County.

> "In response to this increased, organized, and opportunistic criminal activity, UP by its own effort and cost enlisted additional and existing Special Agents across the UP system to join our local efforts with LAPD, LASD and CHP to help prevent the ongoing thefts. We have also utilized and are further exploring the use of additional technologies to help us combat these criminals through drones, specialized fencing, trespass detection systems, and other measures."

(*Letter from Union Pacific Railroad* (Dec. 20, 2021) <https://www.up.com/cs/groups/public/@uprr/@newsinfo/documents/up_pdf_nativedocs/pdf_up_la_district_atty_211221.pdf>.)

Notably, UP's train thefts started right around the time it laid off thousands of workers. According to UP's annual reports to the federal Surface Transportation Board, the company ended 2019 with 23,096 employees. In 2020, that number fell to 20,334. And that number fell again to 18,408 in the third quarter of 2021. (*Quarterly Wage A&B Data*, Surface Transportation Board. <https://www.stb.gov/reports-data/economic-data/quarterly-wage-ab-data/>.) According to the Los Angeles Times, former UP employees and police say budgetary issues have slashed the ranks of the company's force, leaving as few as half a dozen in the region. *('Like A Third World Country': Gov. Newsom Decries Rail Thefts amid Push to Beef up Enforcement,* Los Angeles Times (Jan. 20, 2022) <https://www.latimes.com/california/story/2022-01-20/los-angeles-rail-theft-supply-chain-crunch-limited-security>.) "Union Pacific from Yuma, Ariz., to L.A. has six people patrolling…" and "thefts started about seven months ago as the police presence ebbed." (*Ibid.*) UP's employment numbers remain low, despite record profits for the rail operator. UP reported a net income of $6.5 billion for 2021. (*Union Pacific Reports Fourth Quarter and Full Year 2021 Results,* UP (Jan. 2022) <https://www.up.com/media/releases/4q21-earnings-nr210120.htm>.)

In response to UP's letter, Los Angeles District Attorney George Gascón stated:

> *"In response to your letter, we conducted a thorough review of cases submitted for filing consideration over the last three years in which UP is listed as a victim. In order to appropriately respond to your concerns, we wanted to know the actual data behind your claims, so we can address the issues. Here are the numbers: In 2019, 78 cases were presented for filing. In 2020, 56 cases were presented for filing. And in a sharp decline, in 2021, 47 such cases were presented for filing consideration, and over 55% were filed by my Office. The charges filed included both felony and misdemeanor offenses alleging burglary, theft, and receiving stolen property. Of the 20 cases that were declined for filing, 10 were not filed due to the insufficiency of the evidence presented to prove the case beyond a reasonable doubt, which is our ethical standard to file a criminal case. The other 10 declined matters involved offenses such as allegations of unhoused individuals within 20 feet of the railroad tracks and simple possession of drugs for personal use—not allegations of burglary, theft, or tampering. Although homelessness is a serious issue, it is not one that we can fix through*

expending resources of the criminal legal system.

"To be clear, felony and misdemeanor cases are filed where our Office is presented with enough evidence to prove that a crime was committed. We understand how vital the rail system is to Los Angeles County and the entire nation and want to work with you in a productive manner to ensure that those who tamper with or steal from UP are held accountable. As more Americans engage in e-commerce and rely on our transportation infrastructure to receive goods, it is important that our work to ensure the safety of this system is collaborative. Part of this collaboration involves taking preventative steps to ensure that cargo containers are secure or locked. Furthermore, UP has its own law enforcement officers who are responsible for patrolling and keeping areas safe. However, according to LAPD Deputy Chief Al Labrada, UP does little to secure or lock trains and has significantly decreased law enforcement staffing. It is very telling that other major railroad operations in the area are not facing the same level of theft at their facilities as UP. We can ensure that appropriate cases are filed and prosecuted; however, my Office is not tasked with keeping your sites secure and the District Attorney alone cannot solve the major issues facing your organization."

(*Letter from George Gascón, Los Angeles County District Attorney*, (Jan. 21, 2022) <https://da.lacounty.gov/sites/default/files/pdf/Letter-to-Union-Pacific-012122.pdf>.)

Further, railroad police such as UP work with both local, state and federal law enforcement agencies. (*Policing America's Railroads,* Mission Critical Communications (Sept. 2014)<https://www.npstc.org/download.jsp?tableId=37&column=217&id=3198&file=RR_Police_IO_Mission_Critical_Comm_Sept_2014.pdf> .) Thus, UP police can seek federal assistance and prosecution under federal law.

5) **Argument in Support**: According to *California Trucking Association, "*Due to the pandemic and transition to at home working life, the demand for ordering online goods mailed directly to a residence has risen to unexpected levels. This has resulted in record levels of packages being delivered to Californian's doorsteps every day. The surge in consumer demand also brings an alarming rate of organized package theft hurting both carriers delivering the goods and consumers receiving their packages on time.

"Package thefts at a Union Pacific Railyard in Los Angeles highlighted the need to hold offenders responsible for their actions. Many of our members utilize the railyards to transport their customer's packages into, out of, or within California. The goods movement sector is already experiencing delivery delays due to supply chain woes, and replacing stolen packages will contribute to congestion."

6) **Argument in Opposition**: According to *California Public Defenders Association* (CPDA) "AB 528 would add 'cargo; to the definition of 'organized retail theft' in Penal Code section 490.4, subdivision (a)(1). This would be an unwarranted departure from the existing definition of that crime, which has remained unchanged ever since Section 490.4's inception by AB 1065 (Stats. 2019, Ch. 803), effective January 1, 2019. 'Organized retail theft' has always been defined as theft (or related offenses, and under specified circumstances), from

'one or more merchant's *premises or online marketplace*.' (Italics added).

"When the original Penal Code section 490.4 was about to sunset, it was re-enacted without relevant change, by AB 331 (Stats. 2021, Ch. 113), as urgency legislation effective July 21, 2021. The definition of 'organized retail theft' was unchanged.

"The change proposed by AB 523, the addition of 'cargo' to that definition, is unwarranted for two reasons. The first reason is that the legislature had already separately outlawed the theft of cargo whose value exceeds $950, in Penal Code section 487h. Adding 'cargo' to the definition of 'organized retail theft' would result in considerable overlap of the two sections, thus making the Penal Code even more confusing and hard to apply than it already is.

"The second reason is more important: adding 'cargo' to the definition of 'organized retail theft' would substantially change the evil at which Penal Code section 490.4 is carefully tailored to reach and would sweep in offenses that were not originally intended.

"Currently, Penal Code section 490.4 is aimed at premises and online marketplaces. It provides increased penalties for gangs or groups who swarm into a place of business to steal en mass; or who, even if only one person enters, plan as a group to commit theft in a place of business; or who commit similar computer offenses.

"But 'cargo' is defined as 'any goods, wares, products, or manufactured merchandise that has been loaded into a trailer, railcar, or cargo container, awaiting or in transit.' (Penal Code section 487h, subdivision (b).) This does not require a premises where retail business is conducted, nor an online marketplace; it thus departs substantially from the place of business that Penal Code section 490.4 is tailored to protect."

7) **Related Legislation**: AB 329 (Ta), would expand the territorial jurisdiction in which the Attorney General can prosecute specified theft offenses and associated offenses connected together in their commission to include cargo theft. AB 329 failed passage in this Committee.

8) **Prior Legislation**:

   a) AB 2543 (Fong), of the 2021-2022 Legislative Session, would have made burglary with regard to a railroad car or a cargo container punishable by imprisonment in a county jail for two, four, or six years. AB 2543 was not heard in this committee at the request of the author.

   b) AB 2769 (O'Donnell), of the 2021-2022 Legislative Session, would have made burglary of a cargo container, railroad car, or cargo, where the property stolen or damaged is valued over $950, a felony offense. AB 2769 was not heard in this committee at the request of the author.

   c) AB 1065 (Jones-Sawyer), Chapter 803, Statutes of 2018, created the crime of organized retail theft, established a property crimes task force, and expanded jurisdictional provisions for theft offenses.

   d) AB 2805 (Olsen), of the 2015-2016 Legislative Session, would have created a cargo theft prevention working group coordinated by the California Highway Patrol. AB 2805 was

vetoed.

e) SB 24 (Oropeza), Chapter 607, Statutes of 2009, eliminated the sunset date on cargo theft, and clarified that the elements of cargo theft are the same as other forms of grand theft.

f) AB 1814 (Oropeza), Chapter 515, Statutes of 2004, created a specific statute providing that the theft of cargo of a value in excess of $400 is grand theft and contained a sunset date of January 1, 2010.

REGISTERED SUPPORT / OPPOSITION:

Support

Calchamber
California Association of Highway Patrolmen
California Retailers Association
California State Sheriffs' Association
California Trucking Association
El Dorado County Chamber of Commerce
Elk Grove Chamber of Commerce
Folsom Chamber of Commerce
Lincoln Area Chamber of Commerce
National Insurance Crime Bureau
Peace Officers Research Association of California (PORAC)
Rancho Cordova Chamber of Commerce
Rocklin Area Chamber of Commerce
Roseville Chamber of Commerce
United Chamber Advocacy Network
Yuba Sutter Chamber of Commerce

Opposition

California Public Defenders Association (CPDA)
Californians for Safety and Justice
Initiate Justice
San Francisco Public Defender

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

Date of Hearing: March 28, 2023
Counsel: Cheryl Anderson

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

AB 567 (Ting) – As Amended March 16, 2023

As Proposed to be Amended in Committee

SUMMARY: Extends automatic conviction record relief to misdemeanor convictions where the sentence has been successfully completed following a revocation of probation. Specifically, **this bill**:

1) Extends automatic record relief to misdemeanor convictions where the sentence has been successfully completed following a revocation of probation.

2) Provides that upon request from the subject of the record, the Department of Justice (DOJ) shall provide confirmation that relief was granted.

EXISTING LAW EFFECTIVE JULY 1, 2023:

1) Requires the DOJ, as of July 1, 2023, and subject to an appropriation in the annual Budget Act, on a monthly basis, to review the records in the statewide criminal justice databases, and based on information in the state summary criminal history repository and the Supervised Release File, identify persons with convictions that meet specified criteria and are eligible for automatic conviction record relief. (Pen. Code § 1203.425, subd. (a)(1)(A).)

2) States that a person is eligible for automatic conviction relief if they meet all of the following conditions:

    a) The person is not required to register pursuant to the Sex Offender Registration Act;

    b) The person does not have an active record for local, state, or federal supervision in the Supervised Release File;

    c) Based upon the information available in the department's record, including disposition dates and sentencing terms, it does not appear that the person is currently serving a sentence for any offense and there is no indication of any pending criminal charges; and,

    d) The conviction occurred on or after January 1, 1973, and meets either of the following criteria:

        i) The defendant was sentenced to probation and, based upon the disposition date and the term of probation specified in the department's records, appears to have completed their term of probation without revocation; or,

ii) The defendant was convicted of an infraction or misdemeanor, was not granted probation, and, based upon the disposition date and the term specified in the department's records, the defendant appears to have completed their sentence, and at least one calendar year has elapsed since the date of judgment. (Pen. Code § 1203.425, subd. (a)(1)(B)(iv)(I)); or

e) The conviction occurred on or after January 1, 2005, the defendant was convicted of a felony other than one for which the defendant completed probation without revocation, and based upon the disposition date and the sentence specified in the DOJ's records, appears to have completed all terms of incarceration, probation, mandatory supervision, postrelease community supervision, and parole, and a period of four years has elapsed since the date on which the defendant completed probation or supervision for that conviction and during which the defendant was not convicted of a new felony offense. This does not apply to a conviction of a serious or a violent felony, or a felony offense requiring sex offender registration. (Pen. Code § 1203.425, subd. (a)(1)(B)(iv)(II).)

3) Requires the DOJ to grant relief, including dismissal of a conviction, to a person who is eligible, without requiring a petition or motion by a party for that relief if the relevant information is present in the DOJ's electronic records. (Pen. Code § 1203.425, subd. (a)(2)(A).)

4) Requires the DOJ, as of July 1, 2022, and subject to an appropriation in the annual Budget Act, on a monthly basis, to electronically submit a notice to the superior court having jurisdiction over the criminal case, informing the court of all cases for which a complaint was filed in that jurisdiction and for which relief was granted. (Pen. Code § 1203.425, subd. (a)(3)(A).)

5) Prohibits, as of January 1, 2023, the court from disclosing information concerning a conviction granted relief, to any person or entity, in any format, except to the person whose conviction was granted relief or a criminal justice agency. (Pen. Code § 1203.425, subd. (a)(3)(A).)

6) Allows the prosecuting attorney or probation department to, no later than 90 calendar days before the date of a person's eligibility for relief, to file a petition to prohibit the DOJ from granting automatic relief, based on a showing that granting the relief would pose a substantial threat to public safety. (Pen. Code § 1203.425, subd. (b)(1)).)

7) Requires the court to notify the defendant of the petition and conduct a hearing within 45 days. (Pen. Code § 1203.425, subd. (b)(2).)

8) Provides that if the court grants the petition, the court must furnish a disposition report to DOJ. (Pen. Code § 1203.425, subd. (b)(6).)

9) States that if relief is denied, but subsequently granted under a different provision, as specified, the court must submit a disposition report to the DOJ. (Pen. Code § 1203.425, subd. (b)(7).)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "AB 1076 (Ting) in 2019 opened doors for people with records facing housing and employment barriers by automating eligible arrest and conviction relief for those who met specified requirements. AB 567 ensures the relief we have put in place are being interpreted and implemented correctly. Everybody deserves a second chance, and it's our responsibility to make sure that paths we set forward are clear."

2) **Automatic Conviction Record Relief**: In 2019, the Legislature passed AB 1076 (Ting), Chapter 578, Statutes of 2019. AB 1076, as relevant here, established a procedure in which persons could have certain convictions dismissed and have such information withheld from disclosure, all without having to file a petition with the court. (Pen. Code, § 1203.425.) The purpose of AB 1076 was to remove barriers to housing and employment for convicted and arrested individuals in order to foster their successful reintegration into the community.

   AB 200 (Budget Committee), Chapter 58, Statutes of 2022, delayed the implementation date of AB 1076 related to prohibiting dissemination of criminal records for which relief was granted to January 1, 2023. SB 731 (Durazo), Chapter 814, Statutes of 2022, expanded automatic arrest record and conviction relief to additional felony offenses, and delayed the effective date to July 1, 2023.

   Under existing law effective July 1, 2023, automatic relief applies to a defendant who was convicted of a felony on or after January 1, 2005, and who has successfully completed their sentence (including any term of probation) after having had their probation revoked. SB 763 (Durazo), of the 2023-2024 Legislative Session, would apply this relief to convictions occurring on or after January 1, 1973.

   Under existing law effective July 1, 2023, automatic conviction record relief does not apply to a defendant who has a misdemeanor conviction, and who has successfully completed their sentence (including any term of probation) after having had their probation revoked.

   This bill would expand automatic record relief to include misdemeanor convictions occurring on or after January 1, 1973, in which the person, although having had probation revoked, thereafter successfully completes their sentence and any probation.

   This bill would also require the DOJ to provide confirmation that relief was granted if the subject of the criminal records requests it.

3) **Argument in Support**: According to *Californians for Safety and Justice*, the sponsor of this bill, "In 2019, Governor Newsom signed AB 1076 (Ting), which requires the California Department of Justice (DOJ) to automate arrest and conviction relief for specified records dating back to January 1, 1973. To ensure that all impacted Californians benefit from the relief, AB 567 would clarify the author's original intent in AB 1076."

4) **Argument in Opposition**: None on file

5) **Related Legislation**: SB 763 (Durazo) , would apply automatic conviction record relief to specified felony convictions occurring on or after January 1, 1973, instead of on or after January 1, 2005. SB 763 is pending hearing in the Senate Public Safety Committee on April

11, 2023.

6) **Prior Legislation**:

a) SB 731 (Durazo), Chapter 814, Statutes 2022, as relevant here, expanded automatic arrest record and conviction relief to additional felony offenses, as specified.

b) AB 1038 (Ting), of the 2021-2022 Legislative Session, would have required DOJ, on a monthly basis, to review the records in the statewide criminal justice databases and to identify persons who are eligible for arrest record relief or automatic conviction record relief by having their arrest records, or their criminal conviction records, withheld from disclosure or modified, as specified, for all convictions that occurred on or after January 1, 1973, rather than just those that occurred on or after January 1, 2021. The provisions of this bill would have been operative on July 1, 2022, subject to an appropriation in the annual Budget Act. AB 1038 was not heard in the Senate Public Safety Committee.

c) SB 118 (Committee on Budget and Fiscal Review), Chapter 29, Statutes of 2020, adjusted the timeline for implementation of AB 1076 (Ting), Chapter 578, Statutes of 2019.

d) AB 88 (Committee on Budget), of the 2019-2020 Legislative Session, would have adjusted the timeline for implementation of AB 1076 (Ting), Chapter 578, Statutes of 2019. AB 88 died on the Senate inactive file.

e) AB 1076 (Ting), Chapter 578, Statutes of 2019, requires the DOJ, as of January 1, 2021, and subject to an appropriation, to review its criminal justice databases on a weekly basis, identify persons who are eligible for relief by having either their arrest records or conviction records withheld from disclosure, with specified exceptions, and required the DOJ to grant that relief to the eligible person without a petition or motion to being filed on the person's behalf.

REGISTERED SUPPORT / OPPOSITION:

Support

California for Safety and Justice (Sponsor)
California Public Defenders Association (CPDA)

Opposition

None

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

Amended Mock-up for 2023-2024 AB-567 (Ting (A))

Mock-up based on Version Number 98 - Amended Assembly 3/16/23
Submitted by: Cheryl Anderson, Assembly Public Safety

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

SECTION 1. Section 1203.425 of the Penal Code, as amended by Section 3 of Chapter 842 of the Statutes of 2022, is amended to read:

1203.425. (a) (1) (A) Commencing July 1, 2023, and subject to an appropriation in the annual Budget Act, on a monthly basis, the Department of Justice shall review the records in the statewide criminal justice databases, and based on information in the state summary criminal history repository and the Supervised Release File, shall identify persons with convictions that meet the criteria set forth in subparagraph (B) and are eligible for automatic conviction record relief.

(B) A person is eligible for automatic conviction relief pursuant to this section if they meet all of the following conditions:

(i) The person is not required to register pursuant to the Sex Offender Registration Act.

(ii) The person does not have an active record for local, state, or federal supervision in the Supervised Release File.

(iii) Based upon the information available in the department's record, including disposition dates and sentencing terms, it does not appear that the person is currently serving a sentence for an offense and there is no indication of pending criminal charges.

(iv) The conviction meets either of the following criteria:

(I) The conviction occurred on or after January 1, 1973, and meets either of the following criteria:

(ia) The defendant was sentenced to probation and, based upon the disposition date and the term of probation specified in the department's records, appears to have completed their term of probation without revocation.

(ib) The defendant was convicted of an infraction or misdemeanor other than one eligible under sub-subclause (ia), and, based upon the disposition date and the term specified in the department's records, the defendant appears to have completed their sentence, and at least one calendar year has elapsed since the date of judgment.

(II) The conviction occurred on or after January 1, 2005, the defendant was convicted of a felony other than one for which the defendant completed probation without revocation, and based upon the disposition date and the sentence specified in the department's records, appears to have completed all terms of incarceration, probation, mandatory supervision, postrelease community supervision, and parole, and a period of four years has elapsed since the date on which the defendant completed probation or supervision for that conviction and during which the defendant was not convicted of a new felony offense. This subclause does not apply to a conviction of a serious felony defined in subdivision (c) of Section 1192.7, a violent felony as defined in Section 667.5, or a felony offense requiring registration pursuant to Chapter 5.5 (commencing with Section 290) of Title 9 of Part 1.

(2) (A) Except as specified in subdivision (b), the department shall grant relief, including dismissal of a conviction, to a person identified pursuant to paragraph (1) without requiring a petition or motion by a party for that relief if the relevant information is present in the department's electronic records.

(B) The state summary criminal history information shall include, directly next to or below the entry or entries regarding the person's criminal record, a note stating "relief granted," listing the date that the department granted relief and this section. This note shall be included in all statewide criminal databases with a record of the conviction.

(C) Except as otherwise provided in paragraph (4) and in Section 13555 of the Vehicle Code, a person granted conviction relief pursuant to this section shall be released from all penalties and disabilities resulting from the offense of which the person has been convicted.

~~(D) Once relief is granted for a record, subsequent events, including new criminal records related to the subject of the record, shall have no bearing on relief already granted under this section.~~

(3) (A) Commencing July 1, 2022, and subject to an appropriation in the annual Budget Act, on a monthly basis, the department shall electronically submit a notice to the superior court having jurisdiction over the criminal case, informing the court of all cases for which a complaint was filed in that jurisdiction and for which relief was granted pursuant to this section. Commencing on January 1, 2023, for any record retained by the court pursuant to Section 68152 of the Government Code, except as provided in paragraph (4), the court shall not disclose information concerning a conviction granted relief pursuant to this section or Section 1203.4, 1203.4a, 1203.41, or 1203.42, to any person or entity, in any format, except to the person whose conviction was granted relief or a criminal justice agency, as defined in Section 851.92.

(B) If probation is transferred pursuant to Section 1203.9, the department shall electronically submit a notice as provided in subparagraph (A) to both the transferring court and any subsequent receiving court. The electronic notice shall be in a mutually agreed upon format.

(C) If a receiving court reduces a felony to a misdemeanor pursuant to subdivision (b) of Section 17, or dismisses a conviction pursuant to law, including, but not limited to, Section 1203.4, 1203.4a, 1203.41, 1203.42, 1203.43, or 1203.49, it shall furnish a disposition report to the department with the original case number and CII number from the transferring court. The department shall electronically submit a notice to the superior court that sentenced the defendant. If probation is transferred multiple times, the department shall electronically submit a notice to all other involved courts. The electronic notice shall be in a mutually agreed upon format.

(D) If a court receives notification from the department pursuant to subparagraph (B), the court shall update its records to reflect the reduction or dismissal. If a court receives notification that a case was dismissed pursuant to this section or Section 1203.4, 1203.4a, 1203.41, or 1203.42, the court shall update its records to reflect the dismissal and shall not disclose information concerning a conviction granted relief to any person or entity, in any format, except to the person whose conviction was granted relief or a criminal justice agency, as defined in Section 851.92.

(4) Relief granted pursuant to this section is subject to the following conditions:

(A) Relief granted pursuant to this section does not relieve a person of the obligation to disclose a criminal conviction in response to a direct question contained in a questionnaire or application for employment as a peace officer, as defined in Section 830.

(B) Relief granted pursuant to this section does not relieve a person of the obligation to disclose the conviction in response to a direct question contained in a questionnaire or application for public office, for enrollment as a provider of in-home supportive services and waiver personal care services pursuant to Article 7 (commencing with Section 12300) of Chapter 3 of Part 3 of Division 9 of the Welfare and Institutions Code or pursuant to Section 14132.95, 14132.952, 14132.956, or 14132.97 of the Welfare and Institutions Code, or for contracting with the California State Lottery Commission.

(C) Relief granted pursuant to this section has no effect on the ability of a criminal justice agency, as defined in Section 851.92, to access and use records that are granted relief to the same extent that would have been permitted for a criminal justice agency had relief not been granted.

(D) Relief granted pursuant to this section does not limit the jurisdiction of the court over a subsequently filed motion to amend the record, petition or motion for postconviction relief, or collateral attack on a conviction for which relief has been granted pursuant to this section.

(E) Relief granted pursuant to this section does not affect a person's authorization to own, possess, or have in the person's custody or control a firearm, or the person's susceptibility to conviction under Chapter 2 (commencing with Section 29800) of Division 9 of Title 4 of Part 6, if the criminal conviction would otherwise affect this authorization or susceptibility.

(F) Relief granted pursuant to this section does not affect a prohibition from holding public office that would otherwise apply under law as a result of the criminal conviction.

(G) Relief granted pursuant to this section does not release a person from the terms and conditions of any unexpired criminal protective order that has been issued by the court pursuant to paragraph (1) of subdivision (i) of Section 136.2, subdivision (j) of Section 273.5, subdivision (l) of Section 368, or subdivision (k) of Section 646.9. These protective orders shall remain in full effect until expiration or until any further order by the court modifying or terminating the order, despite the dismissal of the underlying conviction.

(H) Relief granted pursuant to this section does not affect the authority to receive, or take adverse action based on, criminal history information, including the authority to receive certified court records received or evaluated pursuant to Section 1522, 1568.09, 1569.17, or 1596.871 of the Health and Safety Code, or pursuant to any statutory or regulatory provisions that incorporate the criteria of those sections.

(I) Relief granted pursuant to this section does not make eligible a person who is otherwise ineligible under state or federal law or regulation to provide, or receive payment for providing, in-home supportive services and waiver personal care services pursuant to Article 7 (commencing with Section 12300) of Chapter 3 of Part 3 of Division 9 of the Welfare and Institutions Code, or pursuant to Section 14132.95, 14132.952, 14132.956, or 14132.97 of the Welfare and Institutions Code.

(J) In a subsequent prosecution of the defendant for any other offense, the prior conviction may be pleaded and proved and shall have the same effect as if the relief had not been granted.

(K) (i) Relief granted pursuant to this section does not affect the authority to receive, or take adverse action based on, criminal history information, including the authority to receive certified court records received or evaluated pursuant to Article 1 (commencing with Section 44000) of Chapter 1, Article 3 (commencing with Section 44240) and Article 8 (commencing with Section 44330) of Chapter 2, Article 1 (commencing with Section 44420) of Chapter 3, Article 3 (commencing with Section 44930) of Chapter 4, Article 1 (commencing with Section 45100) and Article 6 (commencing with Section 45240) of Chapter 5, of Part 25 of Division 3 of Title 2 of the Education Code, or pursuant to any statutory or regulatory provisions that relate to, incorporate, expand upon or interpret the authority of those provisions.

(ii) Notwithstanding clause (i) or any other law, information for a conviction for a controlled substance offense listed in Section 11350 or 11377, or former Section 11500 or 11500.5, of the Health and Safety Code that is more than five years old, for which relief is granted pursuant to this section, shall not be disclosed.

(L) Relief granted pursuant to this section does not release the defendant from the terms and conditions of any unexpired criminal protective orders that have been issued by the court pursuant to paragraph (1) of subdivision (i) of Section 136.2, subdivision (j) of Section 273.5,

subdivision (l) of Section 368, or subdivision (k) of Section 646.9. These protective orders shall remain in full effect until expiration or until any further order by the court modifying or terminating the order, despite the dismissal of the underlying accusation or information.

(5) This section shall not limit petitions, motions, or orders for relief in a criminal case, as required or authorized by any other law, including, but not limited to, Sections 1016.5, 1203.4, 1203.4a, 1203.4b, 1203.41, 1203.42, 1203.49, and 1473.7. This section shall not limit petitions for a certificate of rehabilitation or pardon pursuant to Chapter 3.5 (commencing with Section 4852.01) of Title 6 of Part 3.

(6) Commencing July 1, 2022, and subject to an appropriation in the annual Budget Act, the department shall annually publish statistics for each county regarding the total number of convictions granted relief pursuant to this section and the total number of convictions prohibited from automatic relief pursuant to subdivision (b), on the OpenJustice Web portal, as defined in Section 13010.

(7) Upon request from the subject of the record, the department shall provide confirmation that relief was granted pursuant to this section.

(b) (1) The prosecuting attorney or probation department may, no later than 90 calendar days before the date of a person's eligibility for relief pursuant to this section, file a petition to prohibit the department from granting automatic relief pursuant to this section, based on a showing that granting that relief would pose a substantial threat to the public safety. If probation was transferred pursuant to Section 1203.9, the prosecuting attorney or probation department in either the receiving county or the transferring county shall file the petition in the county of current jurisdiction.

(2) The court shall give notice to the defendant and conduct a hearing on the petition within 45 days after the petition is filed.

(3) At a hearing on the petition pursuant to this subdivision, the defendant, the probation department, the prosecuting attorney, and the arresting agency, through the prosecuting attorney, may present evidence to the court. Notwithstanding Sections 1538.5 and 1539, the hearing may be heard and determined upon declarations, affidavits, police investigative reports, copies of state summary criminal history information and local summary criminal history information, or any other evidence submitted by the parties that is material, reliable, and relevant.

(4) The prosecutor or probation department has the initial burden of proof to show that granting conviction relief would pose a substantial threat to the public safety. In determining whether granting relief would pose a substantial threat to the public safety, the court may consider any relevant factors including, but not limited to, either of the following:

(A) Declarations or evidence regarding the offense for which a grant of relief is being contested.

(B) The defendant's record of arrests and convictions.

(5) If the court finds that the prosecutor or probation department has satisfied the burden of proof, the burden shifts to the defendant to show that the hardship of not obtaining relief outweighs the threat to the public safety of providing relief. In determining whether the defendant's hardship outweighs the threat to the public safety, the court may consider any relevant factors including, but not limited to, either of the following:

(A) The hardship to the defendant that has been caused by the conviction and that would be caused if relief is not granted.

(B) Declarations or evidence regarding the defendant's good character.

(6) If the court grants a petition pursuant to this subdivision, the court shall furnish a disposition report to the Department of Justice pursuant to Section 13151, stating that relief pursuant to this section was denied, and the department shall not grant relief pursuant to this section. If probation was transferred pursuant to Section 1203.9, the department shall electronically submit a notice to the transferring court, and, if probation was transferred multiple times, to all other involved courts.

(7) A person denied relief pursuant to this section may continue to be eligible for relief pursuant to law, including, but not limited to, Section 1203.4, 1203.4a, 1203.4b, or 1203.41. If the court subsequently grants relief pursuant to one of those sections, the court shall furnish a disposition report to the Department of Justice pursuant to Section 13151, stating that relief was granted pursuant to the applicable section, and the department shall grant relief pursuant to that section. If probation was transferred pursuant to Section 1203.9, the department shall electronically submit a notice that relief was granted pursuant to the applicable section to the transferring court and, if probation was transferred multiple times, to all other involved courts.

(c) At the time of sentencing, the court shall advise a defendant, either orally or in writing, of the provisions of this section and of the defendant's right, if any, to petition for a certificate of rehabilitation and pardon.

(d) This section shall become operative on July 1, 2023.

Date of Hearing: March 28, 2023
Counsel: Andrew Ironside

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

AB 642 (Ting) – As Amended March 2, 2023

SUMMARY: Sets minimum standards for use of facial recognition technology (FRT) by law enforcement, including requiring law enforcement agencies to have a written policy for FRT use, allowing for FRT use to identify both individuals who are suspects in a crime and those that are not, and providing that an FRT-generated match of an individual may not be the sole basis for probable cause for an arrest, search, or affidavit for a warrant. Specifically, **this bill**:

1) Requires a law enforcement agency that operates FRT to meet both of the following requirements commencing on July 1, 2024:

   a) Only FRT systems with algorithms that have been evaluated under the National Institute of Standards and Technology Face Recognition Vender Test Program and have demonstrated an accuracy score of at least 98% true positives within two or more data sets relevant to investigative applications on a program report shall be used; and

   b) Requires the agency to have a written policy for FRT use, as specified.

2) Requires the agency to have a written policy that includes, without limitation, all of the following:

   a) A requirement that FRT use be limited to specifically authorized personnel who have received certified training in the use of FRT from the Commission on Peace Officer Standards and Training;

   b) A requirement that a manager be assigned to oversee the FRT program;

   c) A policy that describes the parameters of acceptable inputs to be used for queries of available databases and that prohibits the use of sketches or other manually produced images;

   d) An acceptable use policy that includes specific allowances and restriction on use for all of the following:

      i) To identify a suspect in alleged criminal behavior where reasonable suspicion exists that a crime has been or is being committed and the person whose image is being analyzed is the person who has committed or is committing that crime;

      ii) To identify a victim or witness to a crime;

iii) To identify an unidentified deceased person;

iv) To identify a person who is missing, incapacitated, or unable to identify themselves;

v) To identify a person who is lawfully detained and has not produced valid identification;

vi) To investigate a credible threat of violence; and,

vii) To mitigate an imminent threat to public safety.

e) A prohibited use policy that prohibits both of the following:

i) The use of FRT to identify an individual solely because of their race, color, religious beliefs, sexual orientation, gender, disability, national origin, or membership in any other class protected by law against discrimination; and

ii) The use of FRT to identify an individual solely engaged in the exercise of a constitutionally protected right, including, without limitation, speech, public assembly, or the practice of religion, when the person has not violated any law, unless necessary to identify a victim or witness of a serious or violent felony, or to defend against an imminent or immediate threat to death or serious bodily injury.

f) A requirement that a record of all FRT queries be maintained by the agency.

3) Provides that FRT is an investigative tool to be used as an aid in identifying persons and generating investigative leads.

4) Provides that an FRT-generated match shall not, under any circumstances, provide the sole basis for probable cause for an arrest, search, or affidavit for a warrant.

5) Requires any law enforcement agency that uses FRT to post both of the following on their internet website:

a) A copy of the agency's FRT policy, as specified; and,

b) Commencing on January 1, 2025, and annually thereafter, an annual report summarizing FRT usage for the previous calendar year.

6) Provides that the admissibility of an FRT query result as evidence in any court proceeding is governed by existing law.

7) Defines "facial recognition technology" or "FRT" as a system that compares an input image of an unidentified human face against a database of known persons and, based on biometric data, generates possible matches to aid in identifying the person in the input image.

8) Provides that FRT does not include any access control system used by a law enforcement agency that uses biometric inputs to confirm the identity of employees or other approved

persons for the purpose of controlling access to any secured place, device, or system.

9) Defines "law enforcement agency" as any department or agency of the state or any political subdivision thereof that employs any peace officer, as defined.

EXISTING LAW:

1) Declares that it is the intent of the Legislature to establish policies and procedures to address issues related to the downloading and storage data recorded by a body-worn camera worn by a peace officer; these policies and procedures shall be based on best practices. (Pen. Code, § 832.18, subd. (a).)

2) Encourages agencies to consider best practices in establishing when data should be downloaded to ensure the data is entered into the system in a timely manner, the cameras are properly maintained and ready for the next use, and for purposes of tagging and categorizing the data. (Pen. Code, § 832.18, subd. (b).)

3) Encourages agencies to consider best practices in establishing specific measures to prevent data tampering, deleting, and copying, including prohibiting the unauthorized use, duplication, or distribution of body-worn camera data. (Pen. Code, § 832.18, subd. (b)(3).)

4) Encourages agencies to consider best practices in establishing the length of time that recorded data is to be stored. States that nonevidentiary data including video and audio recorded by a body-worn camera should be retained for a minimum of 60 days, after which it may be erased, destroyed, or recycled. Provides that an agency may keep data for more than 60 days to have it available in case of a civilian complaint and to preserve transparency. (Pen. Code, § 832.18, subd. (b)(5)(A).)

5) States that evidentiary data including video and audio recorded by a body-worn camera should be retained for a minimum of two years under any of the following circumstances:

   a) The recording is of an incident involving the use of force by a peace officer or an officer-involved shooting;

   b) The recording is of an incident that leads to the detention or arrest of an individual; or,

   c) The recording is relevant to a formal or informal complaint against a law enforcement officer or a law enforcement agency. (Pen. Code, § 832.18, subd. (b)(5)(B).)

6) States that the recording should be retained for additional time as required by law for other evidence that may be relevant to a criminal prosecution. (Pen. Code, § 832.18, subd. (b)(5)(C).)

7) Instructs law enforcement agencies to work with legal counsel to determine a retention schedule to ensure that storage policies and practices are in compliance with all relevant laws and adequately preserve evidentiary chains of custody. (Pen. Code, § 832.18, subd. (b)(5)(D).)

8) Encourages agencies to adopt a policy that records or logs of access and deletion of data from body-worn cameras should be retained permanently. (Pen. Code, § 832.18, subd. (b)(5)(E).)

9) Encourages agencies to include in a policy information about where the body-worn camera data will be stored, including, for example, an in-house server which is managed internally, or an online cloud database which is managed by a third-party vendor. (Pen. Code, § 832.18, subd. (b)(6).)

10) Instructs a law enforcement agency using a third-party vendor to manage the data storage system, to consider the following factors to protect the security and integrity of the data: Using an experienced and reputable third-party vendor; entering into contracts that govern the vendor relationship and protect the agency's data; using a system that has a built-in audit trail to prevent data tampering and unauthorized access; using a system that has a reliable method for automatically backing up data for storage; consulting with internal legal counsel to ensure the method of data storage meets legal requirements for chain-of-custody concerns; and using a system that includes technical assistance capabilities. (Pen. Code, § 832.18, subd. (b)(7).)

11) Encourages agencies to include in a policy a requirement that all recorded data from body-worn cameras are property of their respective law enforcement agency and shall not be accessed or released for any unauthorized purpose. Encourages a policy that explicitly prohibits agency personnel from accessing recorded data for personal use and from uploading recorded data onto public and social media Internet websites, and include sanctions for violations of this prohibition. (Pen. Code, § 832.18, subd. (b)(8).)

12) Requires that a public agency that operates or intends to operate an Automatic License Plate Recognition (ALPR) system to provide an opportunity for public comment at a public meeting of the agency's governing body before implementing the program. (Civil Code, § 1798.90.55.)

13) Prohibits a local agency from acquiring cellular communications interception technology unless approved by its legislative body. (Gov. Code, § 53166, subd. (c)(1).)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "I authored AB 1215 in 2019 which banned the use of biometric surveillance through police body cameras. The bill only passed with a three year moratorium that expired January 1, 2023. Consequently, current law has absolutely no parameters set regarding law enforcement's use of facial recognition technology. It is critical that we ensure there are safeguards in place in order to avoid another year of unregulated use. We can't go another year with no protections. AB 642 is a response to a battle that we cannot afford to risk losing. The bill includes critical safeguards such as codifying an accuracy level, oversight and reporting, and prohibits law enforcement from using a match alone to arrest someone, to request a warrant, to violate someone's constitutional rights, and to discriminate against protected characteristics. Most importantly, this bill does not prohibit nor deter local governments from choosing to ban the use of facial

recognition technology."

2) **Facial Recognition Technology:** Facial recognition technology is capable of identifying an individual by comparing a digital image of the person's face to a database of known faces, typically by measuring distinct facial features and characteristics. Early versions of the technology were pioneered in the 1960s and 1970s, but true facial recognition technology as we understand it today did not come about until the early 1990s. In 1993, the United States military developed the Facial Recognition Technology (FERET) program, which aimed to create a database of faces and recognition algorithms to assist in intelligence gathering, security and law enforcement. ("Facial Recognition Technology (FERET).") The National Institute of Standards and Technology, United States Department of Commerce. https://www.nist.gov/programs-projects/face-recognition-technology-feret).) Since that time, advances in computer technology and machine learning have led to faster and more accurate recognition software, including real-time face detection in video footage and emotional recognition.

   Today, facial recognition technology is used in a variety of applications. It is often a prominent feature in social media platforms, such as Facebook, Snapchat and TikTok. For instance, DeepFace, a "deep learning" facial recognition system created by Facebook, helps the platform identify photos of users so they can review or share the content. (See "Facebook is backing away from facial recognition. Meta isn't." (Nov. 3, 2021) https://www.vox.com/recode/22761598/facebook-facial-recognition-meta.) Snapchat employs similar technology to allow users to share content augmented by "filters," which can add features or alter an image of the user's face. Facial recognition technology has also seen increasing use as a method of ID verification, such as with Apple's Face ID and Google's Android "Ice Cream Sandwich" systems.

   As facial recognition technology has become more widespread, so have concerns about its shortcomings and potential for misuse. Many critics highlight that the use of facial recognition systems result in serious privacy violations, and that mechanisms to protect against the unwanted sale or dissemination of personal biometric data are insufficient. (Schwartz, *Resisting the Menace of Face Recognition*, Electronic Frontier Foundation (Oct. 26, 2021) https://www.eff.org/deeplinks/2021/10/resisting-menace-face-recognition.) Others suggest that the technology is still too inaccurate and unreliable to be used in such a broad array of applications. For instance, studies suggest that while facial recognition systems have had increasing success identifying cis-gendered individuals, these systems get it wrong more than one-third of the time if the face belongs to a transgender person. (*Facial Recognition Software Has a Gender Problem*, National Science Foundation (Nov. 1, 2019) https://www.nsf.gov/discoveries/disc_summ.jsp?cntn_id=299486.) However, even among cis-gendered individuals, research shows that facial recognition systems can be significantly less accurate when identifying women than when identifying men. (Buolamwini et al., *Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification* PMLR 81:77-91, 2018 http://proceedings.mlr.press/v81/buolamwini18a/buolamwini18a.pdf.) Additionally, a growing body of research demonstrates that facial recognition systems are significantly less accurate in identifying individuals with dark complexions, particularly women (Najibi, *Racial Discrimination in Face Recognition Technology*, Harvard University Graduate School of Arts and Sciences Blog (Oct. 24, 2020) https://sitn.hms.harvard.edu/flash/2020/racial-discrimination-in-face-recognition-

technology/.)

3) **Law Enforcement Uses of Facial Recognition Systems:** Despite growing concerns, law enforcement agencies at the federal, state and local level continue to use facial recognition programs. A recent Government Accountability Office report revealed that 20 federal agencies employ such programs, 10 of which intend to expand them over the coming years. (*Facial Recognition Technology: Federal Law Enforcement Agencies Should Better Assess Privacy and Other Risks*, United States Government Accountability Office. (June 3, 2021) https://www.gao.gov/products/gao-21-518.) One study found that one in four law enforcement agencies across the country can access some form of FRT, and that half of American adults – more than 117 million people – are in a law enforcement face recognition network. (Garvie et al., *The Perpetual Line-Up: Unregulated Police Face Recognition in America*, Georgetown Law Center on Privacy and Technology (Oct. 18, 2016) https://www.perpetuallineup.org/.) Very few of these agencies have a formal facial recognition policy, but one such agency, the New York Police Department, defines the scope of its policy as follows: "Facial recognition technology enhances the ability to investigate criminal activity and increases public safety. The facial recognition process does not by itself establish probable cause to arrest or obtain a search warrant, but it may generate investigative leads through a combination of automated biometric comparisons and human analysis." (*Facial Recognition Technology Patrol Guide*, City of New York Police Department (Mar. 12, 2020) https://www1.nyc.gov/assets/nypd/downloads/pdf/nypd-facial-recognition-patrol-guide.pdf.) Proponents of facial recognition technology see it as a useful tool in helping identify criminals. It was reportedly utilized to identify the man charged in the deadly shooting at The Capital Gazette's newsroom in Annapolis, Maryland in 2018. (Singer, *Amazon's Facial Recognition Wrongly Identifies 28 Lawmakers, A.C.L.U. Says*, New York Times, (July 26, 2018) https://www.nytimes.com/2018/07/26/technology/amazon-aclu-facial-recognition-congress.html?login=facebook.)

   The inaccuracy, biases and potential privacy intrusions inherent in many facial recognition systems used by law enforcement have led to criticism from civil rights advocates, especially in California. In March 2020, the ACLU, on behalf of a group of California residents, filed a class action lawsuit against Clearview AI, claiming that the company illegally collected biometric data from social media and other websites, and applied facial recognition software to the databases for sale to law enforcement and other companies. (*Clearview AI class-action may further test CCPA's private right of action*, JD Supra (Mar. 12, 2020) https://www.jdsupra.com/legalnews/clearview-ai-class-action-may-further-14597/.) An investigation by Buzzfeed in 2021 found that 140 state and local law enforcement agencies in California had used or tried Clearview AI's system. (*Your Local Police Department Might Have Used This Facial Recognition Tool To Surveil You. Find Out Here.* Buzzfeed News, (Apr. 6, 2021) https://www.buzzfeednews.com/article/ryanmac/facial-recognition-local-police-clearview-ai-table.)

   The controversy surrounding law enforcement use of facial recognition has led many California cities to ban the technology, including San Francisco, Oakland, Berkeley, Santa Cruz and Alameda. Despite the ban in San Francisco, officers there may have skirted the city's ban by outsourcing an FRT search to another law enforcement agency. (Cassidy, *Facial recognition tech used to build SFPD gun case, despite city ban*, San Francisco Chronicle (Sept. 24, 2020) < https://www.sfchronicle.com/bayarea/article/Facial-recognition-tech-used-to-build-SFPD-gun-15595796.php> [last visited Mar. 23, 2023].)

In September 2021, the Los Angeles Times reported that the Los Angeles Police Department had used facial recognition software nearly 30,000 times since 2009, despite years of "vague and contradictory information" from the department "about how and whether it uses the technology." According to the Times, "The LAPD has consistently denied having records related to facial recognition, and at times denied using the technology at all." Responding to the report, the LAPD claimed that the denials were just mistakes, and that it was no secret that the department used such technology. Although the department could not determine how many leads from the system developed into arrests, it asserted that "the technology helped identify suspects in gang crimes where witnesses were too fearful to come forward and in crimes where no witnesses existed." (*Despite past denials, LAPD has used facial recognition software 30,000 times in last decade, records show*, Los Angeles Times, (Sept. 21, 2020) https://www.latimes.com/california/story/2020-09-21/lapd-controversial-facial-recognition-software.)

4) **Facial Recognition Technology Legislation in California:** In 2019, the Legislature passed Assembly Bill 1215 (Ting), Chapter 579, Statutes of 2019, which banned the use of facial recognition technology and other biometric surveillance systems in connection with cameras worn or carried by law enforcement, including body-worn cameras (BWC), for the purpose of identifying individuals using biometric data. This ban covered both the direct use of biometric surveillance by a law enforcement officer or agency, as well as a request or agreement by an officer or agency that another officer or agency, or a third party, use a biometric surveillance system on behalf of the requesting party. The ban also included narrow exceptions for processes that redact a recording prior to disclosure in order to protect the privacy of a subject, and the use of a mobile fingerprint-scanning device to identify someone without proof of identification during a lawful detention, as long as neither of these functions result in the retention of biometric data or surveillance information. AB 1215 included a sunset date of January 1, 2023.

   SB 1038 (Bradford), of the 2021-2022 Legislature, would have extended the ban on biometric surveillance and facial recognition systems in connection with cameras worn or carried by officers indefinitely. At its core, the question involved balancing the purported investigatory benefits of facial recognition technology against its demonstrated privacy risks, technical flaws and racial and gender biases. Committee staff did not identify or receive any evidence demonstrating that the ban on facial recognition technology used in connection with BWC had significantly hampered law enforcement efforts in the two years since it became operative. (Sen. Com. on Public Saf., com. on Sen. Bill No. 1038 (2021-2022 Reg. Sess.).) SB 1038 failed passage in the Senate.

   This year, the Legislature is asked once again to determine whether the investigatory benefits of facial recognition technology outweigh the risk to the communities served by law enforcement. This bill would set minimum standards for use of facial recognition technology by law enforcement, including requiring a law enforcement agency to have written policy governing FRT use, allowing for FRT use to identify both individuals who are suspects in a crime and those that are not, and providing that an FRT-generated match of an individual may not be the sole basis for probable cause for an arrest, search, or affidavit for a warrant. It does not include any limitation on the source of the input image submitted for comparison against the database of persons. Police could use traffic cameras, CCTV, and images from BWCs or dashcams.

In contrast, AB 1034 (Wilson) would prohibit a law enforcement officer or agency from installing, activating, or using a biometric surveillance system solely in connection with a law enforcement agency's body-worn camera or any other camera. This bill would allow for input images from more sources than AB 1034 would ban—the two bills are reconcilable.

5) **Broad Application:** This bill would require that law enforcement agencies develop acceptable use policies that include specific allowances and restrictions on use for certain people or under broad circumstances. However, the use policy provision states that those specific allowances and restrictions on use are not limited to the persons and circumstances identified in the bill—the list is "without limitation." This bill would prohibit use in only two circumstances: to identify an individual solely because their race color, religious beliefs, sexual orientation, gender, disability, national origin, or membership in any other protected class; or to identify an individual engaged in the exercise of a constitutionally protected right.

   Other than those prohibitions, there is nothing to prevent a law enforcement agency from expanding use to include people not identified in the bill. The bill already allows FRT use to identify people not even suspected of any criminal conduct, such as victims and witnesses. What is to prevent a law enforcement agency from developing, in the name of generating investigative leads, an acceptable use policy for FRT to identify the friends and family of a person who police have reasonable suspicion to believe has committed a crime?

   Moreover, this bill provides that law enforcement may use FRT to identify a suspect if an officer has reasonable suspicion that *a crime* has been or is being committed. It also allows law enforcement to use FRT to identify the victim or witness to *a crime*. Under current law, "crime" means "an act committed or omitted in violation of a law forbidding or commanding it," which results in death, imprisonment, fine, or removal from office. (Pen. Code, § 15.) A crime could be a felony, a misdemeanor, or an infraction. It could be a violation of state law or local code or ordinance. Therefore, under this bill, law enforcement could use FRT to identify a person that an officer has reasonable suspicion to believe has taken more than 25 copies of the current issue of a free or complimentary newspaper. (Pen. Code, §§ 187, 647, 490.7, subd. (b).)

   Law enforcement could use FRT to identify the witnesses to and victims of those crimes, too. Under this bill, could law enforcement use facial recognition to identify the publisher of a free or complimentary newspaper who has had more than 25 copies of a current issue taken by someone? If so, would that implicate the First Amendment right to freedom of speech and freedom of the press?

6) **Reasonable Suspicion to Use FRT**: This bill provides that law enforcement may use FRT when they have reasonable suspicion to believe that the person either has committed or is committing a crime. Reasonable suspicion exists "when the detaining officer can point to specific articulable facts that, considered in light of the totality of the circumstances, provide some objective manifestation that the person detained may be involved in criminal activity." (*People v. Souza* (1994) 9 Cal.4th 224, 231, citing *U.S. v. Cortez* (1981) 449 U.S. 411, 417-418.) If, during the detention, a reasonable person would believe that the individual is armed and dangerous, the officer may also conduct a brief patdown (or "frisk") of an individual's outer clothing for weapons. (*Terry v. Ohio* (1968) 392 U.S. 1, 21.). A brief detention based on reasonable suspicion, and the possible subsequent patdown for weapons, is known as a

Terry stop.

The U.S. Supreme Court has not yet decided whether law enforcement may require an individual produce identification during a *Terry* stop. Law enforcement may request that a person stopped based on reasonable suspicion disclose their name during the stop. (See *Hiibel v. Sixth Judicial Dist. Court* (2004) 542 U.S. 177, 185.) However, a suspect is not required to provide identification to law enforcement during a *Terry* stop as a matter of law. In California, the authority to require a suspect to produce identification is limited.

The Ninth Circuit has ruled that requiring a person to provide identification upon request during a *Terry* stop violated the prohibition against unreasonable searches and seizures under the Fourth Amendment. (*Lawson v. Kolender* (9th Cir. 1981) 658 F.2d 1362, aff'd *Kolender v. Lawson* (1983) 461 U.S. 352.) Explaining the interests involved, the court said:

> Although the pat down can be a degrading experience, especially when conducted in public view, it is ephemeral and, in the absence of weapons, lacks collateral consequences. The potential for subsequent police action or abuse is not materially enhanced.
>
> In contrast, police knowledge of the identity of an individual they have deemed "suspicious" grants the police unfettered discretion to initiate or continue investigation of the person long after the detention has ended. Information concerning the stop, the arrest and the individual's identity may become part of a large scale data bank… We believe that the serious intrusion on personal security outweighs the mere possibility that identification may provide a link leading to arrest.

(*Id.* at p. 1368 [emphasis added].) The Ninth Circuit later held that using Penal Code section 148, which prohibits delaying or obstructing a police officer in the discharge of any duty, "to arrest a person for refusing to identify herself during a lawful *Terry* stop violates the Fourth Amendment's proscription against unreasonable searches and seizures." (*Martinelli v. Beaumont* (9th Cir. 1987) 820 F.2d 1491, 1494.)

Similarly, in *People v. Garcia*, the court ruled law enforcement may not frisk a suspect for the sole purpose of finding identification. (145 Cal.App.5th 782, 788.) The case arose after an officer stopped the defendant for riding his bike at night without a functioning headlamp, a violation of Vehicle Code section 21201(d). (*Id.* at p. 784.) The officer asked the defendant for identification, which the defendant denied having. (*Ibid.*) The officer then frisked the defendant and found methamphetamine. (*Id.* at pp. 785-86.) The sole justification for the frisk was the search for identification (*Id.* at p. 786.)

The court said that *Terry* "cannot be 'morphed' into a new rule to justify a search for ordinary evidence, here evidence of identification." (*Id.* at p. 784.) It continued:

> A fair reading of *Terry v. Ohio*…show[s] that the "frisk" allowable upon a proper showing was "only a frisk" for a dangerous weapon. It by no means authorizes a search for contraband, evidentiary material, or anything else in the absence of reasonable ground to arrest. Such a search is controlled by requirements of the Fourth Amendment, and probable cause is essential. Our own Supreme Court has unanimously so held. If stare decisis means anything (and it does) and if the word "only" means "only" (and it does),

> the trial court was required to grant [the motion to suppress the evidence resulting from the search]...
>
> We will never know what could have happened [had the officer done something different]. What we do know is this: There is no legal justification for a patdown search for identification.

(*Id.* at p. 788 [internal citations omitted].)

These decisions demonstrate some limitations on the right of law enforcement to demand identification from a person who they have stopped based on reasonable suspicion. This bill would circumvent those limitations by allowing for FRT any time reasonable suspicion exists.

Regardless, there is little question about which communities are most likely to be subject to FRT use by law enforcement based on reasonable suspicion. According to a recent report, "Relative to other racial/ethnic groups, Black individuals had the highest proportion of their stops reported as reasonable suspicion." (Racial and Identity Profiling Advisory Board (RIPA), Annual Report 2023 (Jan. 1, 2023) p. 8 <https://oag.ca.gov/system/files/media/ripa-board-report-2023.pdf> [last visited Mar. 23, 2023].) Both transgender men/boys and transgender women/girls reported substantially higher proportions of stops as reasonable suspicion—ranging from 42.9% to 45.4% of the total reported stops, respectively—than cisgender and gender nonconforming individuals (*Id.* at p. 40.) RIPA further found, "Individuals perceived to be LGBT had…a higher proportion of their stops reported as reasonable suspicion…than individual who officers did not perceive to be LGBT." (*Id.* at p. 41.)

7) **Argument in Support**: According to the *League of California Cities*, "Facial recognition technology is one of many tools utilized in identifying an individual by comparing a digital image of the person's face to a database of known faces, typically by measuring distinct facial features and characteristics. This technology does not by itself result in ultimate identification, but it may generate investigative leads necessary for combatting crime within our communities. Technology assists our law enforcement partners in doing their jobs more efficiently and ultimately improves public safety.

   "Cal Cities supports accountability on the part of law enforcement agencies concerning police technology and policies, as well as related oversight by local governing bodies. However, we do not support policies that restrict law enforcement agencies from utilizing technologies that would otherwise enhance their ability to prevent criminal activity in the communities they serve."

8) **Argument in Opposition**: According to *Secure Justice*, "We have many concerns with the AB 642 (Ting) approach to authorizing the use of facial recognition technology ("FRT") by law enforcement:

   - The bill does not differentiate between FRT for investigation and FRT for surveillance. The bill would allow forms of generalized surveillance if police had reasonable suspicion (picture a public protest against FRT that violates some ordinance). Generalized surveillance should be banned.

- The bill substitutes reasonable suspicion for probable cause as a standard which is basically no standard at all. Along with the failure to distinguish described above, California would be greenlighting mass surveillance via FRT, were this bill to be enacted as written.

- The bill does not distinguish between use in serious crimes or any crime, which can be something like jaywalking, loitering, or blocking a street during a nonviolent civil protest.

- The bill does not define its terms well in terms of useable databases, photos, etc. Are we using arrest databases, DMV databases, commercial data brokers or web photo scrapers like Clearview AI? Something else?

- The bill does not address immigration enforcement.

- The bill does not address real time use with body cameras, drones, or Real-Time Crime Centers.

- The bill does not address Brady issues, or what information must be turned over to the defense when used in a case.

- The bill does not provide for clear remedies for misuse. There is no accountability mechanism for misuse.

- The bill does not provide for audits or quality checks. FRT evolves all the time.

- The bill will legitimize use on many innocent people who might just be witnesses to a crime, a clear invasion of our state and human right to privacy, and possibly infringing upon First Amendment protected activity.

- The bill does not require police to establish a written record justifying use. Without a warrant requirement there is no public, written notice of use. As reasonable suspicion is essentially no standard at all, law enforcement has a blank check to use FRT without having to justify the use. Although the bill does require that a record of queries be maintained, without having to justify use such a record is meaningless and will ensure no accountability. In addition, there is no requirement that the record be made available to the public for scrutiny.

- The bill fails to address basic questions, such as what happens to the data? How long do they hold it? Can they sell it? Can they keep it and connect it with other data (social media handles, etc.) to build more profiles of individuals.

- What is the process for double checking the match? Double blind? Human? We already have four false FRT matches that led to an arrest – 100% of these unlawful arrests were of Black men. What steps are taken to protect against error?

"Expanding upon some of the above red flags:

"**Accuracy thresholds:** The bill requires police to use FRT systems that are 98% accurate but does not require that the police actually use that accuracy threshold. Some of the early jurisdictions that adopted Amazon's Rekognition (which had a high accuracy test result) turned down their own threshold to well below 98%. The system must be accurate, and the threshold test must be used to that accuracy level, otherwise the potential accuracy is meaningless.

"**Use Limits:** Although the bill provides an illustrative list of potential uses, it does not prohibit additional uses of FRT beyond those listed, aside from the use of FRT to target someone "solely" engaged in constitutionally protected activity, which is basically meaningless when there are so many state and local laws and regulations that law enforcement could point to as justifying the use of FRT when someone is legitimately exercising their First Amendment rights in a nonviolent manner.

"**Reasonable suspicion:** There are a couple problems with using reasonable suspicion and not probable cause (or higher). First, it means that FRT can be used without a crime being completed. If police believed kids are truant, or believed someone was intoxicated, they could use FRT (even if they were not actually truant or drunk). In most cases where FRT is currently used, police have a crime and want help identifying the person. Having probable cause of a crime must be a prerequisite for use. Second, reasonable suspicion is not a fixed standard. Under the totality of circumstances, law enforcement's belief that criminal activity is afoot would give way too much discretion to police. Reasonable suspicion is no protection at all. Anyone running in a high crime area could have FRT used on them (running in a high crime area justifies the reasonable suspicion standard according to the Supreme Court). Probable cause at least gets you that a crime has occurred, and that police can articulate the crime and investigative need of the FRT search.

"**Crime:** The bill does not limit what kind of crimes FRT can be used for – jaywalking? Loitering? The number of misdemeanor and petty offenses that are categorized as "crimes" create too big a list to allow FRT use in California.

"**Witnesses:** The bill would allow FRT to be used on innocent people who have no guilt attached. In fact, it would be easier to do a FRT match on a non-suspect than a suspect. In practice, this means that anyone around a crime will be in the system because they might be a witness. There is no requirement that police try some other less invasive means. It will mean that everyone on the scene will be scanned by FRT.

"**Lawfully detained:** We could envision a scenario where FRT is used to identify someone lawfully *arrested* because they are going to be placed into custody and have their photo taken at booking. But lawfully *detained* means the individual or group or individuals were stopped based on reasonable suspicion or even consent. That would mean an officer could stop you on the street, ask for consent to investigate, and then run an FRT search. Lawfully detained could be a traffic stop or any of a series of contacts that is less than an arrest. In fact, under this language police could stop someone "consensually," ask for identification, and then when the ID is refused, they run FRT because the individual was "lawfully detained".

"**Credible threat of violence**: The use of this phrase lowers reasonable suspicion even more

when there is violence alleged. For example, law enforcement has a hunch that an alleged gang member might be violent and with no reasonable suspicion or probable cause of a crime they could use FRT as the bill is written. As this phrase in (E) is separate from the "reasonable suspicion language in (A), it must have been included as an even lower standard, making a mockery of any "guardrails" being put into place with this bill.

"**Imminent threat to public safety**: This phrase is not defined. Almost anything could be an imminent threat to public safety without some definition. Is someone not wearing a mask as a Covid threat an imminent threat to public safety? Many would argue yes. The definition is dangerously vague.

"What the bill does not mention is equally as important as the red flags described above:

- What specifically must be reported in the annual reports?
- What are the ways to protect against racial bias and inaccuracy?
- Who audits FRT use, and will ensure compliance within the parameters of the bill and subsequent policy?
- When used as trial, how much information is provided to the defense?
- Where are the protections against generalized surveillance, protections for those seeking abortions, for immigrants, for those in their homes, or other protected places?
- What happens when it is misused (officer runs his ex-girlfriend's new boyfriend)? What happens when it is politicized (DA runs it against supporters of a challenger)? There are no remedies.

"Furthermore, we encourage you to review a report from Georgetown Law's Center on Privacy and Technology, which discusses in-depth the problems with using FRT in criminal investigations. Among their many findings:

"'Relying on the vast wealth of research and knowledge already present in computer science, psychology, forensic science, and legal disciplines, its key findings are:

- As currently used in criminal investigations, face recognition is likely an unreliable source of identity evidence.
- The algorithm and human steps in a face recognition search each may compound the other's mistakes.
- Since faces contain inherently biasing information such as demographics, expressions, and assumed behavioral traits, it may be impossible to remove the risk of bias and mistake.
- Face recognition has been used as probable cause to make arrests despite assurances to the contrary.
- Evidence derived from face recognition searches are already being used in criminal cases, and the accused have been deprived the opportunity to challenge it.
- The harms of wrongful arrests and investigations are real, even if they are hard to quantify.'"

9) **Related Legislation**:

a) AB 1034 (Wilson), would prohibit a law enforcement officer or agency from installing, activating, or using a biometric surveillance system in connection with a law enforcement agency's body-worn camera or any other officer camera. AB 1034 is being heard in this committee today.

b) AB 79 (Weber), would prohibit a peace officer from using deadly force against or intending to injure, intimidate, or disorient a person by utilizing any unmanned, remotely piloted, powered ground of flying equipment except under specified circumstances. AB 79 is pending hearing in this committee.

c) AB 793 (Bonta), would provide that a government entity may not seek, from any court, a compulsory process to enforce a reverse-location demand or a reverse-keyword demand, as defined. AB 793 is pending hearing in this committee.

d) AB 742 (Jackson), would prohibit the use of canines by peace officers for arrest and apprehension, or in any circumstances to bite a person, but permits their use of canines for search and rescue, explosives detection, and narcotics detection. AB 742 is pending hearing in the Assembly Appropriations Committee.

10) **Prior Legislation**:

a) SB 1038 (Bradford), would have deleted the January 1, 2023 sunset date on provisions of law that prohibit a law enforcement officer from installing, activating or using a biometric surveillance system in connection with a body-worn camera or data collected by a body-worn camera. SB 1038 died on the inactive file in the Senate.

b) AB 1281 (Chau), Chapter 268, Statutes of 2020, would require a business in California that uses facial recognition technology to disclose that usage in a physical sign that is clear and conspicuous at the entrance of every location that uses facial recognition technology.

c) AB 1215 (Ting), Chapter 579, Statutes of 2019, prohibited a law enforcement officer or agency from installing, activating, or using a biometric surveillance system in connection with a law enforcement agency's body-worn camera or any other camera.

d) SB 21 (Hill), of the 2017-2018 Legislative Session, would have required local law enforcement agencies to have a policy, approved by the local governing body, in place before using surveillance technology. SB 21 was held in the Assembly Appropriations Committee.

e) AB 69 (Rodriguez) Chapter 461, Statutes of 2015, requires law enforcement agencies to follow specified best practices when establishing policies and procedures for downloading and storing data from body-worn cameras.

f) SB 34 (Hill) Chapter 532, Statutes of 2015, imposed a variety of security, privacy and public hearing requirements on the use of automated license plate recognition systems, as

well as a private right of action and provisions for remedies.

REGISTERED SUPPORT / OPPOSITION:

Support

Arcadia Police Officers' Association
Burbank Police Officers' Association
California Coalition of School Safety Professionals
Claremont Police Officers Association
Corona Police Officers Association
Culver City Police Officers' Association
Deputy Sheriffs' Association of Monterey County
Fullerton Police Officers' Association
League of California Cities
Los Angeles School Police Officers Association
Murrieta Police Officers' Association
Newport Beach Police Association
Palos Verdes Police Officers Association
Placer County Deputy Sheriffs' Assocation
Pomona Police Officers' Association
Riverside Police Officers Association
Riverside Sheriffs' Association
Santa Ana Police Officers Association
Upland Police Officers Association

Opposition

ACLU California Action
Asian Americans Advancing Justice - Asian Law Caucus
California Association of Black Lawyers
California Public Defenders Association (CPDA)
Electronic Frontier Foundation
If/when/how: Lawyering for Reproductive Justice
Lawyers Committee for Civil Rights of The San Francisco Bay Area
Lawyers' Committee for Civil Rights of The San Francisco Bay Area
Media Alliance
Mediajustice
San Francisco Public Defender - Racial Justice Committee
Secure Justice
St. James Infirmary
Stop the Musick Coalition
Tenth Amendment Center

Analysis Prepared by: Andrew Ironside / PUB. S. / (916) 319-3744

Date of Hearing: March 28, 2023
Chief Counsel: Sandy Uribe

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

AB 667 (Maienschein) – As Introduced February 13, 2023

PULLED BY THE AUTHOR

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

Date of Hearing: March 28, 2023
Counsel: Mureed Rasool

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

AB 852 (Jones-Sawyer) – As Introduced February 14, 2023

SUMMARY: Requires a court, when determining what sentence to impose on a defendant, to consider the disparate impact on historically disenfranchised and system-impacted populations. Specifically, **this bill**:

1) States that it is the intent of the Legislature to rectify racial bias that, as documented by the California Reparations Task Force to Study and Develop Reparation Proposals for African Americans (Reparations Task Force), has historically permeated California's criminal justice system.

2) Mandates that a court, with discretion in fashioning a sentence, presiding over a criminal matter must consider the disparate impact on historically disenfranchised and system-impacted populations.

EXISTING LAW:

1) Provides that the purpose of sentencing is public safety achieved through punishment, rehabilitation, and restorative justice. (Pen. Code, § 1170, subd. (a)(1).)

2) States that when a sentence includes incarceration, its purpose is best served by terms proportionate to the seriousness of the offense and uniformity among offenders in similar situations. (Pen. Code, § 1170, subd. (a)(1).)

3) States that a court presiding over a criminal matter must consider alternatives to incarceration such as diversion, probation, and other specified methods. (Pen. Code, § 17.2.)

4) Reaffirms a commitment to reducing recidivism among criminal offenders by reinvesting criminal justice resources to support community-based corrections programs and evidence-based practices. (Pen. Code, § 17.5.)

5) Prohibits the state from imposing a longer or more severe sentence on the basis of race, ethnicity, or national origin. (Pen. Code, § 745, subd. (a)(4).)

6) Requires a court to consider discriminatory racial impact when determining whether to dismiss or strike an enhancement. (Pen. Code, § 1385, subd. (c)(2)(A).)

7) Declares the Legislature's commitment to reducing recidivism among criminal offenders. (Pen. Code, § 3450, subd. (b)(1).)

8) States that when an offense specifies three possible terms, the lower, the middle, and the upper term, the court may impose a sentence exceeding the middle term only when there are circumstances in aggravation which have been pled to or proved. (Pen. Code, § 1170, subd. (b)(2).)

9) Provides that a court, when sentencing a defendant, may consider among other things, the defendant's prior convictions, testimony from interested parties such as the defendant or victim, the probation report, and any further evidence introduced at the sentencing hearing. (Pen. Code, § 1170, subd. (b)(4).)

10) Requires the court, unless it finds the aggravating circumstances outweigh the mitigating circumstances such that imposition of the lower term would be contrary to the interests of justice, to impose the lower term any of the following was a contributing factor to committing the offense:

    a) The person experienced childhood trauma such as abuse, neglect, or sexual violence;

    b) The person was younger than 26 years of age when they committed the offense; or,

    c) Prior to or near the time of the commission was a domestic violence or human trafficking victim. (Pen. Code, § 1170, subd. (b)(6).)

11) Authorizes a court to suspend the imposition or execution of sentence and to place a defendant on probation. (Pen. Code, § 1170, subd. (a)(3).)

12) Declares that immigration consequences can be considered in the plea negotiating process. (Pen. Code, § 1016.2.)

13) Requires the prosecutor to consider, in the interests of justice, the avoidance of adverse immigration consequences in the plea negotiation process to reach a just resolution. (Pen. Code, 1016.3, subd. (b).)

14) Requires the Judicial Council to seek uniformity in sentencing by adopting criteria to be considered by the trial judge at the time of sentencing. (Pen. Code, § 1170.3.)

15) Requires the Judicial Council to collect racial and ethnicity data on criminal cases statewide as it relates to the disposition of the case and to report to Legislature annually thereon. (Pen. Code, § 1170.45.)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "California's criminal justice system has long held a bias against particular populations; especially communities of color. AB 852 requires state courts to consider the disparate impact on historically disenfranchised and system-impacted people when sentencing.

It also clarifies that the intent of the Legislature is to correct the racial bias that has historically been present in our criminal justice system as illuminated in the interim report developed by the California Task Force to Study and Develop Reparation Proposals for African Americans."

2) **Racial Disparities in Sentencing**: In 2010, the US Sentencing Commission (USSC) analyzed federal sentencing data to examine whether the length of sentences imposed on federal offenders varied by demographic characteristics. (USSC. *Demographic Differences in Sentencing: An Update to the 2012 Booker Report*. (Nov. 2017) (hereafter *USSC Sentencing Demographic Differences*) <https://www.ussc.gov/research/research-reports/demographic-differences-sentencing> [as of Mar. 23, 2023] at p. 2.) The analysis found, among other things, that Black male offenders received longer sentences than White male offenders, and that the sentence length gap was increasing. (*Ibid.*) Since then the USSC has twice updated its analysis and expanded its variables, such as violence in an offender's criminal history, in an attempt include factors that may explain the difference aside from racial bias. (*Ibid.*) The most recent report, after controlling for a wide variety of sentencing factors, found that Black male offenders continued to receive longer sentences than similarly situated White male offenders. (*Ibid.*) Black male offenders received sentences on average 19.1% longer than similarly situated White male offenders. (*Ibid.*)

Federal sentencing guidelines require judges to sentence within a guideline range that is based on a number of factors such as the defendant's background, character, and conduct. (USSC. *Primer on Departures and Variances*. (2022) <https://www.ussc.gov/guidelines/primers/departures-and-variances> [as of Mar. 23, 2023] at p. 1.) The guideline range allows for judges to depart from a prescribed sentence, referred to as a "departure;" and case law states that judges can vary from the guideline range so long as they stay within the statutory sentencing parameters, these are called "variances." (*Id.* at 1-2.) The federal sentencing data showed that Black male offenders were 21.2% less likely than their White male offender counterparts to receive a more lenient departure or variance from the judge. (*Id.* at 2.) In contrast, when guideline ranges were adhered to, there was only a 7.9% difference in sentence length between Black male and White male offenders. (*Ibid.*)

In California, the Judicial Council of California (Judicial Council) has been required to submit annual reports for nearly two decades to the Legislature detailing, among other things, sentencing data that looks into race and ethnicity. (Pen. Code, 1170.45.) In 2021, the Judicial Council report found that there was no statistically significant differences in sentence lengths for similarly situated offenders by race/ethnicity. (Judicial Council. *Dispositions of Criminal Cases According to the Race and Ethnicity of the Defendant: 2021 Report to the Legislature*. (Nov. 17, 2021) <https://www.courts.ca.gov/documents/lr-2021-criminal-dispositions-by-race-ethnicity_pc1170_45.pdf> [as of Mar. 23, 2023] at p. 15.) However, Black defendants were sentenced to go to prison at a rate of 36.5%, similarly situated White defendants had a rate of 28.2%, similarly situated Hispanic defendants had a rate of 35.4%, and similarly situated Asians had a rate of 27.9%. (*Ibid.*) These findings are generally consistent with prior reports in that race differences persisted after controlling for relevant legal and demographic factors. (*Id.* at 16.)

Although California has passed numerous laws to try to reduce its prison population and reform its justice system, the data above indicates there is more to be done. The Reparations Task Force chronicled the manner in which the justice system not just denied equal access,

but actively persecuted African Americans. (Reparations Task Force. *Interim Report*. (Jun. 2022) <https://oag.ca.gov/ab3121/reports> [as of Mar. 23, 2023] at p. 381-2.) To address the systemic problems existing today that have resulted from the systemic issues of the past, the Reparations Task Force has recommended, among many other things, that efforts be made to eliminate racial disparities in criminal sentencing of African Americans. (*Id.* at 23.) Currently, the sentence imposed on a defendant has to take into account numerous factors so that a just and appropriate sentence may be fashioned. Factors considered include immigration consequences, childhood trauma, age, mental or physical condition, racial discriminatory impact, among other things. (Pen. Code, §§ 745, 1016.3, 1170, 1385.) This bill would require a court to take a more complete perspective when determining a just and equitable sentence by considering the role history played in disenfranchising and impacting populations.

3) **Argument in Support**: According to the *California Public Defenders Association*, "Criminal sentencing law in California rests on the presumption that all people are treated equally by the law, with each sentence carefully considered and imposed only after an individualized assessment of the facts of the offense and the individual person before the court. Sadly, as every study to consider the issue has determined – that presumption is a myth. In fact, sentencing outcomes frequently turn on the accused's wealth, national origin, poverty, and skin-color.

"AB 852 addresses this problem, in part, by requiring a sentencing judge to consider the disparate impact on historically disenfranchised populations before imposing sentence. While we support AB 852 in principle, we respectfully note our belief that the legislature can and should do more. Funding meaningful alternatives to incarceration for justice-involved individuals, creating job-training programs for accused and formerly accused persons, decriminalizing or reducing reliance on incarceration whenever possible, reforming our mental health system, and requiring better policing and prosecutorial practices are all necessary components of a justice system that protects and helps all communities.

"Nonetheless, while requiring a judge to consider whether they may be continuing a statewide pattern of disparate sentencing for poor or marginalized groups before imposing sentence is certainly not the final step in meaningful reform, it is a step in the right direction."

4) **Related Legislation**: SB 94 (Cortese), would authorize an individual sentenced to death or life without parole to petition a court for resentencing if the offense occurred before June 5, 1990, or if they have served at least 20 years in custody. SB 94 is currently pending hearing in the Senate Public Safety Committee.

5) **Prior Legislation**:

   a) AB 2167 (Kalra), Chapter 775, Statutes of 2022, declared the intent of the Legislature that the disposition of any criminal case use the least restrictive means possible, and requires the court presiding over a criminal matter to consider alternatives to incarceration, including, without limitation, collaborative justice court programs, diversion, restorative justice, and probation

b) AB 1928 (McCarty), of the 2021-2022 Legislative Session, would have authorized the Counties of San Joaquin, Santa Clara, and Yolo to establish pilot programs to offer secured residential treatment for qualifying individuals suffering from substance use disorders (SUDs) who have been convicted of drug-motivated felony crimes. AB 1928 was held in the Assembly Appropriations Committee.

c) AB 2542 (Kalra), Chapter 317, Statutes of 2020, prohibits the state from seeking or upholding a conviction or sentence that is discriminatory based on race, ethnicity, or national origin as specified.

d) AB 3121 (Weber), Chapter 319, Statutes of 2020, established the California Task Force to Study and Develop Reparations Proposals for African Americans.

e) AB 109 (Blumenfield), Chapter 15, Statutes of 2011, declared a commitment to reducing recidivism among criminal offenders by reinvesting criminal justice resources to support community-based corrections programs and evidence-based practices.

REGISTERED SUPPORT / OPPOSITION:

Support

California Public Defenders Association (CPDA)

Opposition

None.

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Date of Hearing: March 28, 2023
Chief Counsel: Sandy Uribe

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

AB 977 (Rodriguez) – As Amended March 15, 2023

PULLED BY THE AUTHOR

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