California State Assembly

PUBLIC SAFETY

REGINALD BYRON JONES-SAWYER SR.
CHAIR

1020 N Ste, Room 111
(916) 319-3744
FAX: (916) 319-3745

AGENDA

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

REGULAR ORDER OF BUSINESS

PART II

AB 1028 (McKinnor) through AB 1368 (Lackey)

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

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

AB 1028 (McKinnor) – As Introduced February 15, 2023

SUMMARY: Eliminates the duty of a health care practitioner to report assaultive or abusive conduct to law enforcement when they suspect a patient has suffered physical injury caused by such conduct. Specifically, **this bill**:

1) Limits a health practitioner's duty to make a report of injuries to law enforcement to instances where a wound or injury is self-inflicted or caused by a firearm.

2) Requires a health care practitioner, who in their professional capacity or within the scope of their employment, knows or reasonably suspects that their patient is experiencing any form of domestic violence or sexual violence, to provide brief counseling, education, or other support, and offer a "warm handoff" or referral to domestic violence or sexual violence advocacy services before the end of treatment, to the extent that it is medically possible.

3) Provides that the health practitioner can satisfy the above requirement when the brief counseling, education, or other support is provided by, and warm hand off or referral is offered by, a member of the health care team.

4) Allows the health practitioner to offer a warm handoff and referral to other available victim services, including, but not limited to, legal aid, community-based organizations, behavioral health, crime victim compensation, forensic evidentiary exams, trauma recovery centers, family justice centers, and law enforcement to patients who are suspected to have suffered any non-accidental injury.

5) Defines "warm handoff" as including but not being limited to, the health practitioner establishing direct and live connection through a call with survivor advocate, in-person on site survivor advocate, in-person on-call survivor advocate, or some other form of teleadvocacy.

6) Provides the patient may decline the "warm hand-off."

7) Provides that a "referral" may include, but is not limited to, the health practitioner sharing information about how a patient can get in touch with a local or national survivor advocacy organization, information about how the organization could be helpful for the patient, what the patient could expect when contacting the survivor organization, the survivor advocacy organizations contact information.

8) Provides that nothing limits or overrides the ability of a health care practitioner to alert law enforcement to an imminent or serious threat to health or safety of an individual or the public, pursuant to the privacy rules of the federal Health Insurance Portability and

Accountability Act of 1996 (HIPPA).

9) Allows reporting of assaultive or abusive conduct when a patient requests.

10) Gives health care practitioners immunity from criminal or civil liability arising from any required or authorized report.

11) Contains legislative findings and declarations.

12) Makes conforming cross-references.

EXISTING LAW:

1) Requires a health practitioner, as defined, to make a report to law enforcement when they suspect a patient has suffered physical injury that is either self-inflicted, caused by a firearm, or caused by assaultive or abusive conduct, as specified. (Pen. Code, § 11160.)

2) Punishes the failure of a health care practitioner to submit a mandated report by imprisonment in a county jail not exceeding six months, or by a fine not exceeding $1,000, or by both. (Pen. Code, § 11162.)

3) Provides that a health practitioner who makes a report in accordance with these duties shall not incur civil or criminal liability as a result of any report. (Pen. Code, § 11161.9, subd. (a).)

4) States that neither the physician-patient privilege nor the psychotherapist patient privilege apply in any court or administrative proceeding with regards to the information required to be reported. (Pen. Code, § 11163.2)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "AB 1028 will ensure survivors can access healthcare services by creating a survivor-centered, trauma-informed approach and limit non-consensual and potentially dangerous referrals to law enforcement. In addition, if a health provider knows or suspects a patient is experiencing any kind of domestic and sexual violence, not just physical, they will be required to offer a referral to a local domestic violence and sexual violence advocacy program or the National Domestic Violence hotline. This change will increase access to healthcare and ensure that survivors are provided the agency and information they need to be safe and healthy."

2) **Duty of Health Care Practitioners to Report Injuries**: Penal Code section 11160 requires a health care practitioner who treats a person brought in to a health care facility or clinic who is suffering from specified injuries to report that fact immediately, by telephone and in writing, to the local law enforcement authorities. The duty to report extends to physicians and surgeons, psychiatrists, psychologists, dentists, medical residents, interns, podiatrists, chiropractors, licensed nurses, dental hygienists, optometrists, marriage and family therapists, clinical social workers, professional clinical counselors, emergency medical technicians, paramedics, and others. The duty to report is triggered when a health practitioner knows or

reasonably suspects that the patient is suffering from a wound or other physical injury that is the result of assaultive or abusive conduct caused by another person, or when there is a gunshot wound or injury regardless of whether it is self-inflicted or one caused by another person. Health practitioners are required to report if these triggering conditions are met, regardless of patient consent. Failure to make the required report is a misdemeanor.

This bill would eliminate the duty of a health care practitioner to report known or suspected assaultive or abusive conduct. However, this bill specifies that nothing in its provisions limits or overrides the ability of a health care provider to report assaultive or abusive conduct at the patient's request, or to alert law enforcement to an imminent and serious threat to health or safety of an individual pursuant to HIPPA.

A report by Futures Without Violence, a co-sponsor of this bill, notes with regards to mandated reporting laws:

> Most U.S. states have enacted mandatory reporting laws, which require the reporting of specified injuries and wounds, and very few have mandated reporting laws specific to suspected abuse or domestic violence for individuals being treated by a health care professional. Mandatory reporting laws are distinct from elder abuse or vulnerable adult abuse and child abuse reporting laws, in that the individuals to be protected are not limited to a specific group, but pertain to all individuals to whom specific health care professionals provide treatment or medical care, or those who come before the health care facility. The laws vary from state-to-state, but generally fall into four categories: states that require reporting of injuries caused by weapons; states that mandate reporting for injuries caused in violation of criminal laws, as a result of violence, or through non-accidental means; states that specifically address reporting in domestic violence cases; and states that have no general mandatory reporting laws.

(*Compendium of State and U.S. Territory Statutes and Policies on Domestic Violence and Health Care*, Fourth Ed. 2019 at pp.2-3, available https://www.futureswithoutviolence.org/wp-content/uploads/Compendium-4th-Edition-2019-Final.pdf.)

A survey of state laws on reporting nationwide shows:

> [O]nly two states have laws that specifically require mandated reporting of DV specifically (not just injuries) to law enforcement and that five states have exceptions for reporting injuries due to domestic violence. New Hampshire's statute excuses a person from reporting if the victim is over 18, has been the victim of a sexual assault offense or abuse (defined in RSA 173-B:1), and objects to the release of any information to law enforcement. However, this exception does not apply if the victim of sexual assault or abuse is also being treated for a gunshot wound or other serious bodily injury. Oklahoma's statute does not require reporting domestic abuse if the victim is over age 18 and is not incapacitated, unless the victim requests that the report be made orally or in writing. In all cases what is reported to be domestic abuse shall clearly and legibly be documented by the health care provider and any treatment provided. Pennsylvania's statute states that failure to report such injuries when the act caused bodily injury (defined in §

2301) is not an offense if the victim is an adult; the injury was inflicted by an individual who is the current or former spouse or sexual or intimate partner; has been living as a spouse or who shares biological parenthood; the victim has been informed of the physician's duty to report and that report cannot be made without the victim's consent; the victim does not consent to the report; and the victim has been provided with a referral to the appropriate victim service agency. Tennessee's statute excuses health care practitioners from reporting if the person is 18 years of age or older; objects to the release of any identifying information to law enforcement officials; and is a victim of a sexual assault offense or domestic abuse (defined in § 36-3-601). The exception does not apply and the injuries shall be reported if the injuries incurred by the sexual assault or domestic abuse victim are considered by the treating healthcare professional to be life threatening, or the victim is being treated for injuries inflicted by strangulation, a knife, pistol, gun, or other deadly weapon. Colorado's statute provides an exception for reporting if the injuries are resulting from domestic violence and if the victim is at least 18 and does not wish the injury to be reported. This exception does not apply if the injury is from a firearm, knife, ice pick, or other sharp object. Compendium of State and U.S. Territory Statutes and Policies on Domestic Violence and Health Care Futures Without Violence Kentucky, North Dakota, and Washington also require that victims of domestic violence be given educational information related to support services. Kentucky's statute states that professionals (including health professionals) must provide the victim with educational materials on domestic violence support services if the professional has cause to believe the patient has experienced domestic or dating violence. North Dakota's statute requires that health professionals provide victims with information on support services when a report on domestic or sexual violence has been made. Washington's statute requires that hospitals inform the patient of resources to ensure their safety if the patient has stated that their bullet, gunshot, or stab wound was the result of domestic violence. (*Compendium, supra*, at pp. 5-6.)

It should be noted that the duty to report known or suspected child abuse and neglect under the Child Abuse and Neglect Reporting Act, is separate from a health care practitioner's duty to report injuries generally. (See Pen. Code, § 11164 et. seq.) This bill does not eliminate the duty of health care practitioners under that Act. Similarly, the duty to report known or suspected abuse of an elder or a dependent adult is also separate from a health care provider's general duty to report injury. (See Welf. & Inst. Code, § 15360.) This bill also does not eliminate the duty of health care practitioners under those provisions of law.

3) **Argument in Support**: According to the *California Partnership to End Domestic Violence*, a co-sponsor of this bill, "California law currently mandates that health professionals, when treating patients for physical injuries known or suspected to have been a result of violence, including domestic and sexual violence, make an immediate report to law enforcement. Although a well-intentioned attempt to ensure health care providers take domestic violence seriously and address it with their patients, mandatory reporting to law enforcement by health providers has no evidence of positive outcomes for survivors.

"The evidence suggests, however, that medical mandated reporting puts survivors in more danger. In a survey done by the National Domestic Violence Hotline, among DV survivors who had experienced mandatory reporting, 83.3% of survivors stated that mandatory

reporting made their experience much worse, somewhat worse, or did nothing to improve the situation.

"Domestic and sexual violence can have long term negative health outcomes, so it is crucial that survivors are able to access health care. Mandatory reporting laws have been shown to keep survivors from seeking care, and when survivors do see a health provider, they often don't feel comfortable bringing up their experiences of violence. This results in unaddressed health issues and missed opportunities to connect survivors to crucial advocacy services.

"Fear of involving law enforcement is a main reason survivors decide not to tell their health provider about domestic violence, or even seek care in the first place. According to a survey by the National Domestic Violence Hotline that documented survivors' experiences with law enforcement, of survivors who chose to involve law enforcement by calling 911, only 20% said they felt safer - 80% said they had no change in safety or felt even less safe. There are many reasons why survivors don't want to involve police: fear of angering their partner and increasing severity of violence, not wanting their partner to be arrested, being arrested for defending themselves, exposing themselves and their families to involvement with child welfare systems, and more. Mandatory reporting laws also discourage immigrant survivors from seeking health care; research has shown that contact with law enforcement produces a chilling effect in asking for help or fear of reprisal from federal immigration authorities.

"While medical mandated reporting to law enforcement for firearm wounds is common in many states, California is one of only three states that still have such broad and harmful requirements to report explicitly for domestic and sexual violence-related injuries without patient consent. Health providers have an important role in addressing violence, yet some actively avoid discussing domestic and sexual violence out of fear of having to make a report to law enforcement.

"Extensive research has been done on what survivors of domestic and sexual violence want from health care professionals: self determination and autonomy, validation and compassion, confidentiality and trust, and informed providers who are able to offer resources and health promotion strategies.

"AB 1028 will ensure that survivors can seek health care without fear of non-consensual law enforcement involvement and with the assurance that their health provider will be able to prioritize their wellness, healing, safety, and self-determination. Health providers will be able to address domestic and sexual violence in a confidential and trusting manner, and ensure access to advocacy services. Survivors will be offered a warm connection to a trained, confidential advocate who will work with them to address their different safety needs such as emergency safety planning, housing, legal support, counseling, restraining orders, and safer access to the legal system."

4) **Argument in Opposition**: According to the *San Diego County District Attorney's Office*, "Mandated reporting laws for suspicious injuries including domestic violence have been in existence since the 1990s and have served their purpose well. These laws recognize the ugly truth about the dynamic of intimate partner violence, and that it is a crime of power and control, fear, and isolation. The escalation of a small push or slap can turn quickly into violent beatings and attacks with weapons, and even cause death. Fear, shame, embarrassment, loyalty, or exhaustion often prevents victims from calling for help or

reporting the abuse. Most victims don't even report the abuse when they have been seriously injured. Domestic violence is most often not an isolated event, but rather part of a larger experience of violence and control within an intimate partner relationship.

"The current mandated reporting law is a safety net for victims of domestic violence when their abuser is so controlling that they don't want to call for help themselves. The current laws establish a minimum standard of care for health care providers and recognize that without intervention, violence often escalates in both frequency and severity result in repeat visits to healthcare systems or death.

"Health care providers serve as gatekeepers to identify and report abuse where the family members and the abused themselves may not. These reporting laws ensure that a victim is protected, even if the abuser stands in the lobby of the hospital, demanding the victim lie about the abuse. A physician is duty bound to report suspicious injuries under the current law if they reasonably suspect the injuries were as a result of "abusive or assaultive conduct." This current language is broad enough, yet specific enough, and encompasses enough of the dangerous conduct that we as a society want "checked" on by a larger community response including law enforcement, advocacy services, and social services.

"California has long protected it's most vulnerable by legislating mandated reporting for domestic violence and child abuse, and more recently elder abuse. This bill eliminates physician-mandated reporting for any physical injury due to domestic violence other than the small percentage of domestic violence cases that result in injuries from firearms. This means that domestic violence victims who are bruised, attacked, stabbed, strangled, tortured, or maimed or are injured with weapons other than firearms, would not receive the current protection the law affords.

"Additionally, the bill doesn't follow California's trend of broadening the duty to report and protect our most vulnerable victims. We have mandated reporting for child abuse, mandated reporting for domestic violence, and mandated reporting for elder abuse. The elder abuse mandated reporting laws previously only required reports of report physical abuse, but they have expanded to financial and mental abuse, neglect, and isolation. This progression shows California is more protective of its vulnerable, not less. Why would we go backwards?

"An example of how this bill would drastically diminish the victim voice includes the following: imagine an attempted murder case where a domestic violence abuser strangled the victim to the point of unconsciousness and stabbed the victim repeatedly and brings the victim to the hospital, hovers over the victim, directs the victim what to do and say, not to report that it was abuse, either impliedly or expressly, and silences the victim even in the lobby of the emergency room. This bill would leave this victim with no protection by the health care provider who stands at the ready to help and report the suspicious injuries to law enforcement when that victim says, "I don't know who did this to me."

"My county is the second largest in the state, and the 4th largest District Attorney's office in the nation. We see roughly 17,000 domestic violence incidents per year, and a subset of those only come to our attention because of the good work of health care providers doing their duty to report suspicious injuries. Domestic violence is already one of the most under reported crimes because of the dynamics of power and control within an intimate partner relationship.

Why would we remove the very protection that helps give these victims a voice?"

5) **Related Legislation**: AB 391 (Jones-Sawyer), would require non-mandated reporters of suspected child abuse to provide their name and phone number before a child abuse allegation can be transmitted to a local child protective services agency for investigation. AB 391 is pending in the Assembly Appropriations Committee.

6) **Prior Legislation**: AB 2790 (Wicks), of the 2021-2022 Legislative session, was nearly identical to this bill. AB 2790 was held in the Senate Appropriations Committee.

REGISTERED SUPPORT / OPPOSITION:

Support

Academy on Violence and Abuse
Alliance for Boys and Men of Color
American College of Obstetricians and Gynecologists District Ix
Asian Americans for Community Involvement
Bay Area Legal Aid
California Lgbtq Health and Human Services Network
California Pan - Ethnic Health Network
California Partnership to End Domestic Violence
Citizens for Choice
Communities United for Restorative Youth Justice (CURYJ)
Community Solutions for Children, Families, and Individuals
Culturally Responsive Domestic Violence Network (CRDVN)
Deafhope
Ella Baker Center for Human Rights
Family Violence Appellate Project
Family Violence Law Center
Freefrom
Futures Without Violence
Haven Women's Center of Stanislaus
Initiate Justice
Korean American Family Services, INC.
La Defensa
Los Angeles Dependency Lawyers, INC.
Los Angeles LGBT Center
Loyola Law School, the Sunita Jain Anti-trafficking Initiative
Lumina Alliance
National Association of Social Workers, California Chapter
Ohio Domestic Violence Network
San Francisco Public Defender
Sheedy Consulting, LLC
The Collective Healing and Transformation Project
The Health Alliance for Violence Intervention
The W. Haywood Burns Institute
UC Irvine School of Law, Domestic Violence Clinic
Woman INC

Young Women's Freedom Center
Youth Leadership Institute

Opposition

Alliance for Hope International
California District Attorneys Association
California Sexual Assault Forensic Examiner Association
San Diegans Against Crime
San Diego County District Attorney's Office
San Diego Deputy District Attorneys Association
Yolo County District Attorney

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

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

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

AB 1034 (Wilson) – As Amended March 2, 2023

SUMMARY: Prohibits a law enforcement officer or agency from using facial recognition technology in connection with a law enforcement agency's body-worn camera or data collected from an officer camera. Specifically, **this bill**:

1) Prohibits a law enforcement agency or law enforcement officer from installing, activating, or using any biometric surveillance system in connection with an officer camera or data collected by an officer camera.

2) Provides that, in addition to any other sanctions, penalties, or remedies provided by law, a person may bring an action for equitable or declaratory relief in a court of competent jurisdiction against a law enforcement agency or law enforcement officer that violates the law, as specified.

3) Provides that the ban on the use of a biometric surveillance system, as defined, in connection with an officer camera does not preclude a law enforcement agency or law enforcement officer from using a mobile fingerprint scanning device during a lawful detention to identify a person who does not have proof of identification if this use is lawful and does not generate or result in the retention of any biometric data or surveillance information.

4) Defines "biometric data" as a physiological, biological, or behavioral characteristic that can be used, singly or in combination with each other or with other information, to establish individual identity.

5) Defines "biometric surveillance system" as any computer software or application that performs facial recognition or other biometric surveillance.

6) Defines "facial recognition or other biometric surveillance" as either of the following, alone or in combination:

   a) An automated or semi-automated process that captures or analyzes biometric data of an individual to identify or assist in identifying an individual; or,

   b) An automated or semi-automated process that generates, or assists in generating, surveillance information about an individual based on biometric data.

7) Provides that "facial recognition or other biometric surveillance" does not include the use of automated or semiautomated process for the purpose of redacting a recording for release or disclosure outside the law enforcement agency to protect the privacy of a subject depicted in the recording, if the process does not generate or result in the retention of any biometric data

or surveillance information.

8) Defines "law enforcement agency" as any police department, sheriff's department, district attorney, county probation department, transit agency police department, school district police department, the police department of any campus of the University of California, the California State University, or a community college, the Department of the California Highway Patrol, and the Department of Justice.

9) Defines "law enforcement officer" as an officer, deputy, employee, or agent of a law enforcement agency.

10) Defines "officer camera" as a body-worn camera or similar device that records or transmits images or sound and is attached to the body or clothing of, or carried by, a law enforcement officer.

11) Defines "surveillance information" as either of the following, alone or in combination:

    a) Any information about a known or unknown individual including, but not limited to, a person's name, date of birth, gender, or criminal background; or

    b) Any information derived from biometric data, including, but not limited to, assessments about an individual' sentiment, state of mind, or level of dangerousness.

12) Defines "use" as either of the following, alone or in combination:

    a) The direct use of a biometric surveillance system by a law enforcement officer or law enforcement agency; or

    b) A request, agreement, or practice by a law enforcement officer or law enforcement agency that another law enforcement agency or other third party use a biometric surveillance system on behalf of the requesting officer or agency.

13) Provides a sunset date of January 1, 2034.

14) Includes legislative findings and declarations.

EXISTING LAW:

1) Provides that all people are by nature free and independent and have inalienable rights, including privacy. (Cal. Const., Art. I, § 1.)

2) Declares that it is the intent of the Legislature to establish policies and procedures to address issues related to the downloading and storing 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).)

3) 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).)

4) 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).)

5) 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).)

6) 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).)

7) 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).)

8) 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).)

9) 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).)

10) 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 that is managed internally, or an online cloud database which is managed by a third-party vendor. (Pen. Code, § 832.18, subd. (b)(6).)

11) 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).)

12) 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).)

13) 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, subd. (a).)

14) Prohibits a public agency from selling, sharing, or transferring ALPR information, except to another public agency, and only as otherwise permitted by law. (Civil Code, § 1798.90.55, subd. (b).)

15) Prohibits a local agency from acquiring cellular communications interception technology unless approved by its legislative body at a regularly scheduled public meeting, as specified. (Gov. Code, § 53166, subd. (c)(1).)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "Police body cameras were promised as a guard against police misconduct. Biometric surveillance, such as facial recognition, would break this promise, transforming a tool for police accountability into a vehicle for mass surveillance.

"The deployment of face recognition on body cameras would make face recognition ubiquitous throughout the state, inevitably resulting in additional unnecessary encounters between police and Californians as a result of both accurate and false matches, which would lead to people being wrongfully arrested, injured, and even killed by police.

"Face recognition systems are incompatible with body camera systems. The nature of body camera footage – captured by shaky cameras with wide angle lenses that warp people's faces – raises the possibility of false matches and dangerous mistakes. Outside the body camera context, face recognition software has been found to be notoriously inaccurate with Black and Asian faces. As things stand, there are already five known cases of Black men being wrongly arrested as the result of facial recognition misuse and errors by law enforcement.

"But police use of facial recognition is dangerous, regardless of its accuracy. The widespread use of face recognition on police body cameras would be tantamount to requiring every Californian to show their photo ID card to every police officer they pass. Fear of mass police surveillance also could have a chilling effect on protests. Officer-based biometric

surveillance across the state would discourage people from seeking medically necessary reproductive healthcare or gender-affirming care in California.

"Given the rise of legislative attacks on abortion access and trans people across the country, California should be taking steps to increase health and safety, not greenlighting surveillance systems that capture and track identities and movements. We know once these systems are built, they are abused to target marginalized people here in the state, or by out-of-state governments who do not share California values.

"For three years, a now-expired state law prohibiting body camera face surveillance successfully helped prevent the misidentification and wrongful imprisonment of Californians, safeguarded our freedom of speech, impeded creation of dangerous biometric databases, and protected our privacy. This bill would restore those protections under California law."

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 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.

In contrast, AB 642 (Ting) 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. AB 642 does not include any limitation on the source of the input image to be identified against the database of persons. Police could use traffic cameras, CCTV, and images from BWCs or dashcams. AB 642 would permit more input images from more sources than this bill would ban—the two bills are reconcilable.

5) **Argument in Support**: According to *Asian Americans Advancing Justice*, "Our support for AB 1034 is deeply rooted in the events that led to our founding in 1972, and our long-standing opposition to racist police targeting of Asian Americans and the dehumanization engendered by these experiences. Indeed, our earliest major case, *Chann v. Scott*, challenged the San Francisco Police Department's policy of targeting Chinese youth with routine and dragnet police sweeps throughout the Chinatown neighborhood. The primary goal of these sweeps was to collect photographic and biometric dossiers on the city's Chinese and Asian youth, using what was at the time considered state-of-the-art technology. Then, as now, police used such data collection as a tool to surveil and harass a group of people whom they considered threats based primarily on their race, ethnic identity or national origin, without regard to the harms this caused to targeted communities who were simply trying to go about their everyday lives.

"Allowing police to incorporate facial recognition technology (FRT) into officer body cameras, or applying FRT to the footage such cameras collect, would open a technological Pandora's Box that cannot easily be slammed shut. And it would have harmful and disproportionate impacts on communities of color that already bear the brunt of many unwarranted police interactions and police violence.

"First, current FRT software has a damning track record of disproportionately misidentifying – and thereby wrongfully incriminating – people of color in particular (as well as women and youths). In fact, the American Civil Liberties Union (ACLU) of California, along with an independent expert from UC Berkeley who later verified the results, tested the FRT software marketed to law enforcement agencies in California, by using it to analyze photos of all 120 members of the State Legislature in 2019. One out of five lawmakers – 26 in total and more than half of whom are lawmakers of color – were mistakenly matched with people in a database made up of 25,000 public arrest photos. Even more alarmingly, Axon, a prominent body camera manufacturer, and Microsoft respectively refused to add facial recognition to its body camera systems or allow a California law enforcement agency to use its facial recognition software with officer body cameras, both groups attributing their decision to notable ethics concerns. These observed error rates are significantly higher among people of color as compared to people of European descent.

"These findings were documented in the December 2019 study, *Face Recognition Vendor Test (FRVT) Part 3: Demographic Effects*, conducted by the National Institute of Standards and Technology under the U.S. Department of Commerce, with their findings regarding false positives specifically revealing the following: "With domestic law enforcement images, the highest false positives are in American Indians, with elevated rates in African American and Asian populations."

"Traditionally marginalized communities, including Black and AMEMSA communities, are particularly vulnerable to generalized surveillance given the prevailing bias that such communities are susceptible to and have a propensity for violent and criminal behavior. Many of California's Black and AMEMSA and other marginalized communities have had troubling histories of being subject to generalized surveillance, including more recently communities at the heart of the Supreme Court's recent decision in *FBI v. Fazaga*, where federal authorities planted an informant posing as a Muslim convert to spy on Muslim communities and mosques across Orange County. Recent law enforcement targeting of Chinese American scientists and researchers, under programs like the U.S. Department of Justice's "China Initiative," poses similar risks to East Asian communities. Given this history of racist law enforcement surveillance of AAPI and AMEMSA communities, law enforcement adoption of FRT risks imposing a serious chilling effect on First Amendment activities as well as community activities related to health and safety.

"It is high time that we center the well-being of vulnerable communities who are already disproportionately harmed by over-policing and surveillance, racial profiling, and violent or fatal police encounters, as well as U.S. Immigration and Customs Enforcement (ICE) involvement, detention, and deportation. ALC believes that Californians are safer – and their civil rights protected – when the law bars all uses of FRT in our state. AB 1034 would provide this protection to Californians, and especially those Californians in most need of protection, including the low-income and immigrant communities that we serve. For these reasons, we proudly support AB 1034."

6) **Argument in Opposition**: 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."

7) **Related Legislation**:

   a) AB 642 (Ting), would authorize law enforcement to use facial recognition technology to identify a witness to a crime or 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 the crime. AB 642 will be heard today in this committee.

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.

8) **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, requires 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, but contained a sunset date of January 1, 2023.

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

Access Reproductive Justice
ACLU California Action
Asian Americans Advancing Justice - Asian Law Caucus
California Latinas for Reproductive Justice
California Public Defenders Association (CPDA)
Citizens for Choice
Communities United for Restorative Youth Justice (CURYJ)
Courage Campaign
Electronic Frontier Foundation
Ella Baker Center for Human Rights
If/when/how: Lawyering for Reproductive Justice
Initiate Justice
Lawyers Committee for Civil Rights of The San Francisco Bay Area
Media Alliance
Mediajustice
National Action Network
Oakland Privacy
Orange County Rapid Response Network
People's Budget Orange County
Policylink
Resilience Orange County
San Francisco Public Defender - Racial Justice Committee
San Francisco Public Defender's Office
Secure Justice
St. James Infirmary
Stop the Musick Coalition
Tenth Amendment Center
Training in Early Abortion for Comprehensive Healthcare
Transforming Justice Orange County
Transgender, Gendervariant, Intersex Justice Project
Urge: Unite for Reproductive & Gender Equity

Opposition

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
Los Angeles County Sheriff's Department
Los Angeles School Police Officers Association
Murrieta Police Officers' Association
Newport Beach Police Association

Palos Verdes Police Officers Association
Placer County Deputy Sheriffs' Association
Pomona Police Officers' Association
Riverside Police Officers Association
Riverside Sheriffs' Association
Santa Ana Police Officers Association
Upland Police Officers Association

Analysis Prepared by: Andrew Ironside / 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 1047 (Maienschein) – As Introduced February 15, 2023

PULLED BY THE AUTHOR

Analysis Prepared by: Mureed Rasool / 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 1067 (Jim Patterson) – As Introduced February 15, 2023

SUMMARY: Increases the penalties for fleeing the scene of an accident resulting in the death of another person from an alternate felony-misdemeanor with a maximum punishment of four years in state prison, to an alternate felony-misdemeanor having a maximum punishment of six years in the state prison. Makes the permissible fine ranging from $1,000 to $10,000 mandatory where the accident resulted in death or permanent, serious injury, except the court may reduce it based on the defendant's ability to pay and in the interests of justice.

EXISTING LAW:

1) Requires the driver of a vehicle involved in an accident resulting in injury to another person to stop at the scene of the accident and to fulfill specified requirements, including providing identifying information and rendering assistance. (Veh. Code, § 20001, subd. (a).)

2) Provides that, except as specified, fleeing the scene of an accident resulting in injury to another, is punishable by 16 months, two, or three years in state prison or, by imprisonment in a county jail not to exceed one year, or by a fine of not less than $1,000 nor more than $10,000, or by both a fine and imprisonment. (Veh. Code, § 20001, subd. (b)(1).)

3) Provides that fleeing the scene of an accident which results in permanent, serious injury or death to another, is punishable by imprisonment in the state prison for two, three, or four years, or in a county jail for not less than 90 days nor more than one year, or by a fine ranging between $1,000 and $10,000, or by both a fine and imprisonment. (Veh. Code, § 20001, subd. (b)(2).)

4) Allows the court, in the interests of justice, to reduce or eliminate the minimum term of imprisonment required for a conviction of fleeing the scene of an accident causing death or permanent, serious injury. (Veh. Code, § 20001, subd. (b)(2).)

5) Requires the court to take into consideration the defendant's ability to pay in imposing the minimum fine required. In the interests of justice, the court may reduce the amount of the fine below the required minimum. (Veh. Code, § 20001, subd. (b)(3).)

6) States that a person who flees the scene of an accident after committing gross vehicular manslaughter or gross vehicular manslaughter while intoxicated, upon conviction for that offense, shall be punished by an additional term of five years in the state prison. This additional term runs consecutive to the punishment for the vehicular manslaughter. (Veh. Code, § 20001, subd. (c).)

7) Defines "permanent, serious injury" as the loss or permanent impairment of function of a bodily member or organ. (Veh. Code, § 20001, subd. (d).)

8) Defines "gross vehicular manslaughter" as the unlawful killing of a human being, without malice aforethought, in driving a vehicle in the commission of an unlawful act, not amounting to a felony, and with gross negligence; or in driving a vehicle in the commission of a lawful act which might produce death, in an unlawful manner, and with gross negligence. Gross vehicular manslaughter is punishable by either imprisonment in a county jail for not more than one year, or in the state prison for two, four, or six years. (Pen. Code, §§ 192, subd. (c)(1), 193, subd. (c)(1).)

9) Defines "gross vehicular manslaughter" while intoxicated as the unlawful killing of a human being without malice aforethought, in the driving of a vehicle, where the driver was under the influence of drugs or alcohol, and the killing was either the proximate result of an unlawful act not amounting to a felony, and with gross negligence, or the proximate result of a lawful act that might produce death, in an unlawful manner, and with gross negligence. Gross vehicle manslaughter while intoxicated is punishable by imprisonment in the state prison for four, six, or ten years. (Pen. Code, § 191.5, subds. (a) & (c)(1).)

10) Provides that if the defendant has any prior vehicular manslaughter convictions or at least two prior driving under the influence convictions, the punishment for "gross vehicular manslaughter" while intoxicated is 15-years-to-life in state prison. (Pen. Code, § 191.5, subd. (d).)

11) Provides for additional punishment of three years when great bodily injury (GBI) is inflicted during the commission of a felony not having bodily harm as an element of the offense. The additional punishment increases to five years if the victim becomes comatose due to brain injury or suffers permanent paralysis or if the victim is 70 years of age or older. The punishment is up to six years if the victim is a child under five years of age. (Pen. Code, § 12022.7, subds. (a)-(d).)

12) Makes the GBI enhancement inapplicable to murder or manslaughter. (Pen. Code, § 191.5, subd. (g).)

13) Provides that an act or omission that is punishable in different ways may be punished under either of such provisions, but in no case shall the act or omission be punished under more than one provision. (Pen. Code, § 654.)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "AB 1067, Gavin's Law will close the loophole in the law,that inadvertently encourages drivers to flee the scene of an accident – particularly if they are under the influence – rather than stay at the scene to render aid or call 911."

2) **Fleeing the Scene of an Accident Resulting in Injury**: Vehicle Code section 20001 is commonly known as "hit and run." To prove a violation of hit and run resulting in

permanent, serious injury or death the prosecution must establish that: (1) the defendant was involved in a vehicle accident while driving; (2) the accident caused permanent, serious injury or death to another; (3) the defendant knew that they were involved in an accident that injured another person, or knew from the nature of the accident that it was probable that another person had been injured; and, (4) the defendant willfully failed to perform one or more duties, including immediately stopping at the scene, providing reasonable assistance to any injured person, to provide specified identifying information, and showing driver's license upon request. (See CALCRIM No. 2140.)

"The purpose of [the statute] is to prevent the driver of an automobile from leaving the scene of an accident in which he participates or is involved without proper identification and to compel necessary assistance to those who may be injured. The requirements of the statute are operative and binding on all drivers involved in an accident regardless of any question of their negligence respectively." (*People v. Scofield* (1928) 203 Cal. 703, 708.) In other words, it is not necessary to drive impaired, recklessly or negligently. These duties apply regardless of the fault of the accident.

Currently, the crime of fleeing the scene of an accident resulting in death or permanent, serious injury is an alternate felony-misdemeanor. The crime is punishable by up to one year in jail, or two, three or four years in prison. (Veh. Code, § 20001, subd. (b).) This bill would increase the punishment for fleeing the scene of an accident resulting in death to an alternate felony-misdemeanor punishable by up to of six years in the state prison. As noted above, for this increase to apply, the driver need not have been impaired, reckless, or negligent.

3) **Increased Penalties and Lack of Deterrent Effect:** According the U.S. Department of Justice, "Laws and policies designed to deter crime by focusing mainly on increasing the severity of punishment are ineffective partly because criminals know little about the sanctions for specific crimes. More severe punishments do not 'chasten' individuals convicted of crimes, and prisons may exacerbate recidivism." (National Institute of Justice, U.S. Department of Justice, Five Things about Deterrence (June 5, 2016) https://nij.ojp.gov/topics/articles/five-things-about-deterrence.) Rather than penalty increases, the NIJ, advocates for polices that "increase the perception that criminals will be caught and punished" because such perception is a vastly more powerful deterrent than increasing the punishment. (*Ibid.*)

In a 2014 report, the Little Hoover Commission also addressed the disconnect between science and sentencing – that is, putting away offenders for increasingly longer periods of time, with no evidence that lengthy incarceration, for many, brings any additional public safety benefit. (Little Hoover Commission, *Sensible Sentencing for a Safer California* (2014) at p. 4 https://lhc.ca.gov/sites/lhc.ca.gov/files/Reports/219/Report219.pdf.)

4) **Argument in Support**: According to *Nisei Farmers League*, "The potential sentence for leaving the scene of an incident is not enough to deter drivers, especially those who may be under the influence, from leaving the scene. When these drivers leave the scene, not only are they failing to render aid to any injured victim, but they are also removing evidence from the scene of a crime. Law enforcement officials are not able to conduct field sobriety tests of the driver, document his/her statement, or collect any other pertinent information and evidence, therefore hamstringing the entire investigation."

5) **Argument in Opposition**: According to the *San Francisco Public Defender's Office*, "The San Francisco Public Defender's Office takes seriously the devastation caused by traffic collisions, and is committed to supporting effective, evidence-based responses to harm and trauma. Here, academic research offers no support that the threat of longer jail or prison sentences, deters people from committing crimes ("[I]ncreased incarceration rates have no demonstrated effect on violent crime and in some instances may increase crime.") To the contrary, the data shows that enhancements increase racial disparities and drive over-incarceration, thus aggravating and exacerbating the root causes of crime." (Footnotes omitted.)

6) **Related Legislation**: AB 1551 (Gipson), would require the court to order the defendant to pay restitution in the form of child maintenance to each of the victim's children until each child reaches 18 years of age for specified crimes such as vehicular manslaughter while intoxicated. AB 1551 is pending hearing in this committee.

7) **Prior Legislation**:

   a) AB 582 (Patterson), of the 2021-2022 Legislative Session, was the same as this bill. AB 582 was held in the Assembly Appropriations Committee.

   b) AB 195 (Patterson), of the 2019-2020 Legislative Session, as amended in the Senate, was the same as this bill. AB 195 failed passage in the Senate Public Safety Committee.

   c) AB 2014 (E. Garcia), of the 2017-2018 Legislative Session, would have increased the penalty for fleeing the scene of an accident resulting in death or serious bodily injury from two, three, or four years in state prison to two, four, or six years in state prison. The hearing on AB 2014 was canceled in this committee at the request of the author.

REGISTERED SUPPORT / OPPOSITION:

Support

California District Attorneys Association
California State Sheriffs' Association
Fresno County District Attorneys Office
Nisei Farmers League
Tulare County Sheriff-coroner

104 Private Individuals

Opposition

San Francisco Public Defender

Analysis Prepared by: Cheryl Anderson / 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 1089 (Gipson) – As Introduced February 15, 2023

SUMMARY: Changes the definition of computer numerical control (CNC) machines and three-dimensional (3D) printers for purposes of regulating the manufacture of firearms. Requires persons to relinquish certain CNC machines and 3D printers. Expands firearm civil liability laws to include the use of CNC machines and 3D printers. Imposes strict civil liability on persons who unlawfully distribute 3D firearm manufacturing codes. Specifically, **this bill**:

1) Includes a "firearm manufacturing machine" in the definition of a "firearm-related product" for purposes of the Firearm Industry Responsibility Act.

2) Defines a "firearm manufacturing machine" as a three-dimensional printer or a CNC milling machine that is marketed or sold as, or reasonably designed or intended to be used to manufacture or produce a firearm.

3) Authorizes civil actions that impose strict liability on persons who knowingly distribute any digital firearm manufacturing code when a firearm produced by such a code is used to inflict personal injury or cause property damage.

4) Exempts military members from such civil actions if they distributed the digital firearm manufacturing code while on duty and acting within the scope of their employment. Also exempts law enforcement agencies, forensic laboratories, and state-licensed firearm manufacturers regardless of whether they were acting within the scope of their employment.

5) Defines "digital firearm manufacturing code" as any digital instruction in the form of computer-aided design files or other code or instructions stored and displayed in electronic format as a digital model that may be used to program a CNC milling machine, 3D printer, or other machine, to manufacture a firearm, including frames, receivers, and precursor parts.

6) Specifies that only state-licensed firearms manufacturers are exempt from CNC milling machine and 3D printer regulations on manufacturing firearms.

7) Defines a "state-licensed firearms manufacturer" as a person licensed to manufacture firearms under California state law.

8) Makes it a crime to sell, transfer, or possess a CNC milling machine or 3D printer that has a primary or intended function of manufacturing firearms, unless done by a state-licensed manufacturer.

9) States that CNC milling machines or 3D printers have a primary or intended function of manufacturing firearms if they are "marketed or sold to the public in a manner that advertises that they may be used to manufacture firearms, or in a manner that knowingly or recklessly promotes the machine's use in manufacturing firearms, … regardless of whether the machine or printer is otherwise described or classified as having other functions or as a general-purpose machine or printer."

10) Requires a person who possesses a CNC milling machine or 3D printer that has a primary or intended function of manufacturing a firearm before January 1, 2024, to do the following within 90 days of that day in order to not be in violation of state law:

    a) Sell or transfer the device to a state-licensed firearms manufacturer,

    b) Sell or transfer the device to a businessperson that sells such devices to state-licensed firearms manufacturers,

    c) Take the device out of state,

    d) Give the device to a law enforcement agency, or;

    e) Otherwise lawfully terminate possession of the device.

11) Contains a severability clause.

EXISTING LAW:

1) Defines a "firearm," in certain parts of the Penal Code as, "a device, designed to be used as a weapon, from which is expelled through a barrel, a projectile by the force of an explosion or other form of combustion." (Pen. Code, § 16520, subd. (a).)

2) Defines a "firearm" for other specified provisions of the Penal Code, as including the frame or receiver, or a firearm precursor part; including the provision governing CNC milling machines. (Pen. Code, §16520, subd. (b)(17).)

3) Defines a "firearm precursor part" as "any forging, casting, printing, extrusion, machined body, or similar article that has reached a stage in manufacture where it may readily be completed, assembled or converted to be used as the frame or receiver of a functional firearm, or that is marketed or sold to the public to become or be used as the frame or receiver of a functional firearm once completed, assembled or converted." (Pen. Code, § 16531, subd. (a).)

4) Prohibits any person or corporation from manufacturing more than three firearms in this state over the course of a year unless they are licensees. (Pen. Code, § 29010, subd. (a).)

5) Defines "three-dimensional printer" as specified, and prohibits any person or corporation from manufacturing a firearm through use of a 3D printer unless they are a licensee. (Pen. Code, § 29010, subd. (b).)

6) Defines a "licensee" as a person or corporation that the DOJ has confirmed possesses a federal license to manufacture firearms, necessary local government licenses, a certificate of eligibility issued by the DOJ, is on a DOJ maintained centralized list, and other specified requirements. (Pen. Code, § 29050.)

7) Provides that a license to manufacture firearms cannot be valid for more than one year from the date of issuance. (Pen. Code, § 29050, subd. (c).)

8) Makes it a misdemeanor for a person to knowingly possess a firearm without a valid state or federal serial number. (Pen. Code, § 23920.)

9) States that prior to manufacturing or assembling a firearm (not including precursor parts) that does not have a valid state or federal serial number, a person must:

   a) Apply to the DOJ for a serial number;

   b) Describe the firearm they intend to assemble; and,

   c) Provide their date of birth, address and full name. (Pen. Code, § 29180, subd. (b)(1).)

10) Requires that within 10 days of manufacturing or assembling a firearm (not including precursor parts), a person must engrave or permanently affix the serial number previously provided to them by the DOJ and notify the DOJ of such. (Pen. Code, § 29180, subd. (b)(2)-(3).)

11) Prohibits persons or corporations from using a CNC milling machine to manufacture a firearm or firearm precursor part unless they are a federally licensed firearms manufacturer or importer. (Pen. Code, § 29185, subd. (a).)

12) States that it is unlawful to sell, offer to sell, or transfer a CNC milling machine that has the sole or primary function of manufacturing firearms to any person aside from a federally licensed firearms manufacturer or importer. (Pen. Code, § 29185, subd. (b).)

13) Provides that it is unlawful to possess, purchase, or receive a CNC milling machine that has the sole or primary function of manufacturing firearms unless a person is a federally licensed firearms manufacturer or importer. (Pen. Code, § 29185, subd. (c).)

14) Exempts air carriers, certain business persons, and other specified persons from the prohibition on possessing or selling specified CNC milling machines. (Pen. Code, § 29185, subd. (d).)

15) Defines the word "person" as including a corporation as well as a natural person. (Pen. Code, § 7.)

16) Establishes the "Firearm Industry Responsibility Act" which allows for civil actions to be brought against firearm industry members who deal in abnormally dangerous firearm-related products. (Civ. Code, § 3273.50 *et seq.*)

17) Authorizes any resident of, or visitor to, California, other than an officer or employee of a state or local governmental entity in this state, to bring a civil action against any person who knowingly traffics in illegal firearms and in firearm parts in the state. Also requires persons who bring lawsuits against enforcement of firearms laws to pay for the attorney's fees of the state if the state prevails. (Bus. & Prof. Code, § 22949.60 *et seq.*; Civ. Code, § 1021.11.)

FEDERAL LAW Prohibits, in part, the taking of private property for public use without just compensation. (U.S. Const. amend. V.)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "Even before the COVID-19 pandemic, stories from families of gun violence have kept me up at night. My own son and his fiancé were victims… and this issue has only gotten worse in our communities. For communities alike, gun violence is a wildfire that we work diligently trying to contain. And the casualties are our babies, sisters, brothers, friends, and acquaintances - all deserving of life but were cut short of their potential. To say that this issue is personal to me is an understatement, and sending thoughts and prayers just isn't enough. AB 1089 will close the loop on ghost guns and getting one step closer to getting illegal guns off the street. My heart breaks every single time I hear of another life lost from senseless gun violence. Not one more rally. Not one more vigil. Not one more shooting. We need the comprehensive solutions - this is wholeheartedly about saving lives, and nothing less."

2) **3D Printing in General**: 3D printing is an additive manufacturing process which lays down consecutive layers of material to create objects. This differs from the more traditional method of subtractive manufacturing like wood carving, laser cutting, and CNC milling, which all take a block of material and either cut, drill, mill, or machine off parts. (Jandyal et al. *3D printing – A review of processes, materials and applications in industry 4.0*. (Oct. 7, 2021) <https://reader.elsevier.com/reader/sd/pii/S2666412721000441?token=908AF5C6C38EEF951C10B187DE0F05F7A207AD8CB919B05D12C08BC5EBE01883314CAB5F86ACE0FC723A50808F855E4A&originRegion=us-east-1&originCreation=20230324020851> [as of Mar. 23, 2023] at p. 33.)

   3D printers use digital files containing three-dimensional data to create physical objects out of a variety of different materials. 3D printing has been used to make furniture, automotive and aviation parts, sculptures, hearing aids, prosthetics, and artificial teeth. 3D printing has been used to create prosthetic arms and hands for victim of violence in Sudan. NASA's 3D printing research includes food printing, such as 3D-printed pizza. (PC Magazine. *3D Printing: What You Need to Know*. (Updated Jul. 1, 2020) <https://www.pcmag.com/news/3d-printing-what-you-need-to-know> [as of Mar. 23, 2023].)

3) **3D Printed Firearms**: Certain 3D printers can also manufacture firearms. In December 2021, the U.S. Office of Inspector General (OIG) conducted an audit of the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) in regards to 3D printed firearms and ATF's response readiness. The OIG's report provides a comprehensive look into the danger 3D printed firearms pose. 3D printed firearms became prominent in 2013, when a company released its designs on the Internet for a fully functional, fully 3D printed firearm called the

"Liberator." (OIG. *Audit of the Bureau of Alcohol, Tobacco, Firearms and Explosives' Monitoring of 3-D Firearm Printing Technology*. (hereafter *OIG Report*) (Dec. 2021) <https://oig.justice.gov/sites/default/files/reports/22-016.pdf> [as of Mar. 13, 2023].)

The ATF tested the Liberator and concluded it could successfully fire a single or a few shots before it was destroyed in the process. (*OIG Report* at 10-11.) Since 2013, however, the quality and design of 3D printed firearms have improved significantly. In 2019 the FBI tested another 3D printed firearm design and concluded the firearm was functional and lethal as designed. (*Id.* at 14.) While most commercial-grade polymer 3D printers are unaffordable for most individuals, academic and industry experts state that motivated individuals can use more affordable 3D printers to print and subsequently strengthen the quality and reliability of a 3D printed firearm. (*OIG Report* at 13.) The OIG estimated that the full cost for 3D printing a 9 millimeter handgun frame and adding unregulated firearm components (such as the barrel, trigger, slide, magazine, etc.) was around $700. (*Ibid.*) For similarly 3D printing and assembling an AR-15 style rifle it was around $840. (*Ibid.*) The OIG noted that these prices reflect the range of cost for similar firearms purchased from a firearms dealer. (*Ibid.*)

When it comes to 3D firearm blueprint files, the files containing the manufacturing schematics, the US government had for years restricted their dissemination. Based on that, a private company that distributed 3D firearm blueprints sued the federal government. The US government initially defended against the lawsuit, however, in 2018, the Trump administration did an about face, and agreed to settle the lawsuit and remove 3D firearm blueprints from any restrictions. Twenty-two state Attorney Generals sued to prevent the change from taking effect, however, they eventually lost their lawsuit. The dissent in that case noted that previously the U.S. government had argued distribution of the files would irreparably harm the U.S.' national security interest. (*Washington v. United States Dep't of State* (2021) 996 F.3d 552; Courthouse News Service. *Ninth Circuit Lifts Ban on 3D-Printed Gun Blueprints*. (Apr. 27, 2021) <https://www.courthousenews.com/ninth-circuit-lifts-ban-on-3d-printed-gun-blueprints/> [as of Mar. 23, 2023].)

According to the OIG's 2021 report, the ATF has not considered 3D printed firearms a priority because few of them have been confirmed to have been used in crimes that the ATF has investigated. (*OIG Report* at 12.) Of course it was an ATF decision in 2015 that deemed unfinished firearm receivers as "not firearms," which led to the mass proliferation of ghost guns (firearms without any type of legally required serial number) stemming from such unfinished firearm receivers being found by law enforcement all over the country. (Governing. *Why Outlawing Ghost Guns Didn't Stop America's Largest Maker of Ghost Gun Parts*. (Aug. 28, 2022) <https://www.governing.com/now/why-outlawing-ghost-guns-didnt-stop-americas-largest-maker-of-ghost-gun-parts> [as of Mar. 23, 2023].) According to the ATF's own numbers, law enforcement recovered 1,758 ghost guns at crimes scenes in 2016; in 2021 that number had jumped to 19,344. (*Ibid.*) That type of proliferation may likely occur with 3D printed ghost guns. It may already be occurring at least with 3D printed firearm components.

In Fort Worth, Texas, a police officer reached out to the ATF after he noticed a surge in gang shooting where officers found handguns with a "switch" on them. A handgun switch is a Lego-sized device that can be installed on a handgun to allow it to shoot fully automatic. An ATF official stated that these switches allowed the handguns to fire faster than guns used by the military. The ensuing ATF investigation uncovered that these switches were being

illegally 3D printed out of an apartment, and investigators were told by the suspect that between two 3D printers, about 400 machine gun conversion devices could be made daily. (CBS. (Jan. 10, 2023) <https://www.cbsnews.com/texas/news/3d-printers-used-to-make-illegal-handgun-switches-magnifies-the-challenge-for-law-enforcement/> [as of Mar. 23, 2023].)

4) **What This Bill Does**: This bill has a number of provisions that include both civil and criminal liability. Since this bill has been double referred to the Assembly Judiciary Committee, issues involving civil liability will not be discussed. Relevant here are the provisions that establish criminal liability. These provisions seek to further the regulation of firearm manufacturing devices.

   Last year, California enacted laws regulating who can possess a CNC milling machine that had a sole or primary function of manufacturing firearms. (AB 1621 (Gipson) Chapter 76, Statutes of 2021-2022.) AB 1621, in part, also outlined how such CNC machines can be transported, transferred, and, if a person was in unauthorized possession, how they must be dispensed with. Part of this bill also deletes references to "firm" or "corporation" when it comes to firearm manufacturing laws, and simply leaves "person." This is a nonsubstantive change because the Penal Code defines "person" as including a corporation. (Pen. Code, § 7.) Another part of this bill defines and includes 3D printers in the regulations for CNC milling machines.

   However, this bill would also expose someone to criminal liability depending on whether they market their CNC machine or 3D printer in a certain manner. Previously, a CNC machine would be subject to firearm manufacturing laws if its "sole or primary function" was to manufacture firearms. This bill would make a CNC machine, or a 3D printer, be subject to firearm manufacturing laws if their primary or intended function is to manufacture firearms. This bill further defines an "intended function" as depending on whether the machine or printer is marketed or advertised in a manner indicating it may be used to manufacture firearms. As mentioned by some of the bill's supporters, the reason behind this language is due to the ability of advanced CNC machines and 3D printers to manufacture firearms without it being the sole or primary function of the device.

   This language is problematic as it would treat identical devices differently depending on actions not related to their actual function. For example, a vendor may possess a 3D printer that is capable of manufacturing a firearm, but it may also be capable of manufacturing a number of other objects. Under this bill, the vendor would not necessarily be subject to firearm device manufacturing laws unless they began marketing the 3D printer in a manner indicating that it could be used to manufacture firearms. This is regardless of the fact that the 3D printer is the same device as before. Is it good public policy to create a legal artifice of this sort? An analogous situation would be the state's sale of controlled substances laws. (Health & Saf. Code, § 11352.) In order to be punished for selling a controlled substance, which could lead to incarceration for up to five years, it must be proven that the substance sold was actually a controlled substance. (*Ibid.*) The gravamen of the offense is that there was in fact a controlled substance sold. There is another statute that prohibits selling a substance under the pretense that it is a controlled substance, however it is punishable by up to three years of incarceration. (Health & Saf. Code, § 11355.) Conflating the definition of CNC machines and 3D printers to include essentially a restriction on their marketing leads to the question, why not simply create a statute that restricts the marketing of CNC machines

and 3D printers if the marketing is for firearm manufacturing purposes? Last year, AB 2571 (Bauer-Kahan) Chapter 77, Statutes of 2021-2022, restricted the marketing of firearms to minors. AB 2571 has, at this point, withstood preliminary judicial scrutiny. (*Junior Sports Magazines Inc. v. Bonta* (2022) U.S. Dist. LEXIS 193730.)

5) **Takings Issues**: The Fifth Amendment of the U.S. Constitution provides, in part, that private property shall not be taken for public use without just compensation. That said, there are times when a government can justly deprive an individual of their property. A recent Ninth Circuit case decided, in part, whether California's ban on extended capacity magazines constituted a facial regulatory taking. (*Duncan v. Bonta* (2021) (hereafter *Duncan*) 19 F.4th 1087 [vacated and remanded by the Supreme Court for further consideration in light of *New York State Rifle & Pistol Assn., Inc. v. Bruen* (2022) 142 S. Ct. 2111]; see *Def. Distributed v. Bonta* (2022) U.S. Dist. LEXIS 195839 [finding that *Bruen* primarily focused on the right to keep or bear arms, not regulations on manufacturing].)

   This bill would require persons with CNC milling machines or 3D printers with the primary or intended function of manufacturing firearms to relinquish them by January 1, 2024, or 90 days thereafter, either by sale, legal transfer, removal from the state, relinquishment to law enforcement, or otherwise lawful termination of possession, even though these items were legally purchased and possessed. This bill does not provide for any sort of compensation for that property.

   The Ninth Circuit found that California's ban on extended capacity magazines was not a regulatory facial taking in part because there was no record demonstrating the relinquishment procedures deprived owners of all economically beneficial use of the property with respect to every owner of an extended capacity magazine. (*Duncan*, 19 F.4th at 1112.) It was also not a facial physical taking as, "[m]andating the sale, transfer, modification, or destruction of a dangerous item cannot reasonably be considered a taking akin to a physical invasion of a rental building or the physical confiscation of raisins." (*Id.* at 1113.)

   Last year, AB 1621 mandated the relinquishment of CNC milling machines that had the sole or primary function of manufacturing firearms. Arguably, this was analogous to the *Duncan* case because such a device could be considered dangerous and the relinquishment procedures may not have deprived owners of all economically beneficial use of the property. This bill, however, would require relinquishment of a CNC machine or a 3D printer because the definition has changed to include an 'intended' function (i.e. its marketing). This bill would classify a CNC machine or 3D printer due to the way it is being marketed without any regard to the actual capability of the device itself. This brings into question whether the device could be properly characterized as "dangerous." Would the requirement to relinquish property that is otherwise legal but for the way it has been marketed constitute an improper taking?

6) **Argument in Support**: According to the bill's sponsor, *Giffords*, "...Despite the enormous positive impact California's ghost gun reform legislation has had in reforming most ghost gun product sellers' business practices, certain companies have openly declared, including in court filings, that they are continuing to sell ghost gun manufacturing machines as an effort to circumvent California's regulations on ghost gun kits and components. These digitally programmable machines are designed to enable untrained amateurs to produce firearm frames or receivers with the press of a button, either by additive manufacturing (from a 3-D

printer) or subtractive manufacturing (from a CNC milling machine that carves the product out of metal or other material). Instead of selling ghost gun kits, these sellers claim that they are selling merely the machines, unformed material, and digital files for use in those machines.

"We believe they are very clearly violating both the spirit and letter of California law. For instance, AB 1621 (Gipson) already enacted some important restrictions on the sale, purchase, and use of digitally programmable CNC milling machines that have the sole or primary function of manufacturing firearms. AB 1621 (Gipson) also unambiguously prohibited any person who does not have a federal firearm manufacturer's license from using such machines to produce any number of firearms. AB 2156 (Wicks) similarly prohibited using 3-D printers to produce any number of firearms without both a California and federal manufacturer's license.

"Nonetheless, irresponsible companies have continued to sell machines that are explicitly designed and marketed as ghost gun manufacturing machines (including a CNC milling machine called "the Ghost Gunner" sold by Defense Distributed) while dubiously and deceptively claiming that these same machines do not have the "primary" purpose of manufacturing firearms. The seller of the Ghost Gunner machine describes it as "the most popular way of finishing unserialized rifles and pistols in the comfort and privacy of home" and informs California buyers only that they buy ghost gun manufacturing machines "at their own risk." Similarly, sellers on "Ghostguns.com" market a 3D printing ghost gun manufacturing machine called "The Ender" along with files for printing plastic components of undetectable firearms. Companies like these marketing ghost gun manufacturing machines continue to fail to inform unlicensed customers that it is now unambiguously unlawful in California to use either a CNC milling or a 3-D printer to manufacture or in any way produce firearms (including completed or unfinished frames and receivers) without a firearm manufacturer's license.

"Additionally, there is need to consolidate and standardize provisions that were separately enacted by AB 1621 and AB 2156 which separately regulated CNC milling machines and 3-D printers, respectively. For instance, while California law now prohibits unlicensed manufacturers from *using* a 3-D printer to produce firearms, state law does not regulate the purchase, possession, or sale of 3-D printers that are designed or marketed as ghost gun manufacturing 3-D printers; only AB 1621 included purchase, possession, and sale restrictions on CNC milling ghost gun machines. Additionally, while AB 1621 (Gipson) required a *federal* firearm manufacturer license to use CNC milling machines to produce firearms, AB 2156 (Wicks) required both a federal and state firearm manufacturer license to use a 3-D printer to produce firearms. (The federal license is a prerequisite under state law for a California firearm manufacturer license). Consolidating and standardizing these statutes will promote compliance and public safety.

"AB 1089 (Gipson) would help urgently and unequivocally address these threats and shut down these companies' dangerous and irresponsible attempts to circumvent California's new ghost gun reforms. This legislation would build on the strong ghost gun reforms California enacted last year by clarifying and strengthening California's limitations on the sale of ghost gun manufacturing machines and by strengthening efforts to hold individuals accountable for harms caused by their distribution of digital blueprints for printing and manufacturing guns

and key firearm components…"

7) **Argument in Opposition**: According to the *Gun Owners of California*, "As currently written, the bill would ban any 3-D or CNC machine for the simple reason that they are capable of manufacturing unserialized firearms – as well as a host of other products. According to 3D Sourced, "3D printing has grown to impact almost every major industry worldwide in some capacity." According to their research in which they showcase developments in the 3D printing sector, hospitals are increasingly turning to 3D printing for uses in orthopedics, surgical implants, and custom surgical instruments. It also dominates the hearing aid industry and it's uses are increasingly popular in the fields of dental prosthetics as well as auto parts production and jewelry.

   "It's an overreach to ban a product because a tiny subsection of our society chooses to make a item that is used for an unlawful goal; the fact remains that the significant majority of 3D uses are responsible and law-abiding, and those individuals should not be penalized for the misdeeds of a few.

   "I believe we should get down to the business of reducing crime, rather than penalizing the lawful for the misdeeds of the unlawful – it will never have its anticipated resolution. For those who are interested in stemming the tide of illegal weapons, we share a common desire, and GOC believes we can cooperatively move towards this goal."

8) **Prior Legislation**:

   a) SB 1327 (Hertzberg), Chapter 146, Statutes of 2021-2022, created a private right of action for various conduct related to firearms.

   b) AB 1594 (Ting), Chapter 98, Statutes of 2021-2022, among other things, established a firearm industry standard of conduct and prohibited firearm industry members from marketing abnormally dangerous firearm-related products.

   c) AB 1621 (Gipson), Chapter 76, Statutes of 2021-2022, in part, established various restrictions on the possession, sale, and transfer of CNC machines.

   d) AB 2156 (Wicks), Chapter 142, Statutes of 2021-2022, in part, defined a 3D printer, and restricted persons or corporations from using a 3D printer to manufacture any firearm, frame, receiver, or precursor part.

   e) AB 2571 (Bauer-Kahan), Chapter 77, Statutes of 2021-2022, restricted firearms from being marketed to minors.

REGISTERED SUPPORT / OPPOSITION:

Support

Giffords (Sponsor)
Brady Campaign (Co-Sponsor)
Brady Campaign California (Co-Sponsor)

California Medical Association
California Nurses Association
Consumer Attorneys of California
Everytown for Gun Safety Action Fund

87 Private Individuals

Opposition

Gun Owners of California, INC.

Analysis Prepared by: Mureed Rasool / 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 1104 (Bonta) – As Introduced February 15, 2023

SUMMARY: States that the deprivation of liberty due to incarceration, in and of itself, satisfies the punishment aspect of sentencing, and that the purpose of incarceration is to rehabilitate a person so they can be successfully reintegrated into the community. Specifically, **this bill**:

1) States that the Legislature finds and declares, in recognition of previous hyper-punitive policies that led to mass incarceration, that effective rehabilitation increases public safety and builds stronger communities, among other things.

2) Provides that when a sentence includes incarceration, the deprivation of liberty in and of itself satisfies the punishment aspect of sentencing and that the purpose of incarceration is rehabilitation and successful community reintegration through education, treatment, and restorative justice programs.

3) Declares that community-based organizations (CBOs) are integral to ensuring all incarcerated persons in state prisons have access to rehabilitative programs and that the Department of Corrections and Rehabilitation (CDCR) must maintain a mission statement incorporating such.

EXISTING LAW:

1) 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.)

2) Declares that strategies such as standardized risk and needs assessments, transitional housing, treatment, medical and mental health services, and employment, have been demonstrated to significantly reduce recidivism among offenders in other states. (Pen. Code, § 17.7.)

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

4) States that a sentence including incarceration is best served by terms proportionate to the seriousness of the offense and uniformity for all similarly situated offenders. (Pen. Code, § 1170, subd. (a)(1).)

5) Finds and declares that incarcerated persons should have educational, rehabilitative, and restorative justice programs available so that their behavior may be modified and they are prepared to reenter the community. (Pen. Code, § 1170, subd. (a)(2).)

6) Provides that CDCR must require every able-bodied prisoner to work as many hours of faithful labor each and every days during their term of imprisonment. (Pen. Code, § 2700.)

7) States that every able-bodied incarcerated individual in prison is obligated to work as assigned by CDCR. (Cal. Code. Regs., tit. 15, § 3040, subd. (a).)

8) States that an assignment may be up to a full day of work, or may include Rehabilitative Programs managed by the Division of Rehabilitative Programs (DRP), or a combination of work or other programs. (Cal. Code. Regs., tit. 15, § 3040, subd. (a).)

9) Provides that any able-bodied inmate may be assigned to perform any work deemed necessary to maintain and operate the institution and its services in a clean, safe and efficient manner. Operational needs may always override a program assignment. (Cal. Code. Regs., tit. 15, § 3040, subd. (a).)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "My bill emphasizes the importance of incarcerated individuals being afforded opportunities for restorative justice, trauma healing, education, and participation in community-based programming designed to assist in successful reintegration after release. Community based organizations provide an essential lifeline to incarcerated people. Its time our laws reflect how much we value and prioritize their contribution to successful rehabilitation and healing. With AB 1104 we are continuing to move away from the failed policies of the past, and toward a healing and restorative future inside of California's prisons."

2) **Incarceration and Rehabilitation**: Prior to the passage of AB 2590 (Weber) Chapter 696, Statutes of 2015-2016, California law declared that the purpose of imprisonment for crime was punishment. AB 2590 (Weber), among other things, amended the law to state that the purpose of sentencing is public safety, which is achieved through punishment, rehabilitation, and restorative justice. Considering that research shows recidivism can be reduced through prison-based rehabilitation programs, and that approximately 95% of prisoners will return to their communities, this change in legislative purpose makes sense. (National Institute of Justice (NIJ). *Reentry Research at NIJ: Providing Robust Evidence for High-Stakes Decision-Making*. (Apr. 11, 2022) <https://nij.ojp.gov/topics/articles/reentry-research-nij-providing-robust-evidence-high-stakes-decision-making#noteReferrer1> [as of Mar. 20, 2023]; US Department of Justice (US DOJ) *Prison Reform: Reducing Recidivism by Strengthening the Federal Bureau of Prisons*. (Last Updated Mar. 6, 2017) <https://www.justice.gov/archives/prison-reform#_ftnref1> [as of Mar. 20, 2023].)

   This remains a pressing matter in California, where, although the number of inmates housed in prisons has decreased in years, the recidivism rates have remained high, hovering at around 50% over the past decade. (State Auditor. *California Department of Corrections and Rehabilitation: Several Poor Administrative Practices Have Hindered Reductions in Recidivism and Denied Inmates Access to In-Prison Rehabilitation Programs.* (hereafter *CDCR Poor Rehabilitation Practices)* (Jan. 2019) <https://www.auditor.ca.gov/reports/agency/22> at p. 1 [as of Mar. 20, 2023].) These

recidivism rates may in part be due to several shortcomings of CDCR's rehabilitation programs as outlined in detail by the California State Auditor's Office (State Auditor). (*Id.* at 1-3.) The report stated how staffing shortfalls, failures to use evidence-based practices, and failures to properly identify and address rehabilitative needs were all factors leading to little change in recidivism rates. (*Id.* at 1, 19, 23.)

This bill, in part, would state that the deprivation of liberty resulting from incarceration satisfies the punitive aspect of a defendant's sentence, and states that the purpose for incarceration is actually for rehabilitation and successful reentry. As pointed out above, the data indicates this is the proper route to take to enhance public safety. For example, one meta-analysis of high quality research studies showed that, on average, incarcerated individuals who participated in correctional education programs had 43%lower odds of recidivating. (Research and Development (RAND) Corporation. *Evaluating the Effectiveness of Correctional Education: A Meta-Analysis of Programs That Provide Education to Incarcerated Adults.* (2013) <https://www.rand.org/pubs/research_reports/RR266.html> at p. xvi [as of Mar. 20, 2023].) This translated into a reduction in the risk of recidivating of 13% between those who participated in correctional education programs versus those who did not. (*Ibid.*)

3) **CBOs and Reentry**: Despite the lack of consensus on how reentry programs should be structured, there appears to be sufficient evidence that CBOs more frequently emphasize elements that lead to successful reentry that government-based organizations do not. (Zhang et al. *Successful Reentry: A Community-Level Analysis*. (Dec. 2019) <https://iop.harvard.edu/sites/default/files/sources/program/IOP_Policy_Program_2019_Reentry_Policy.pdf> at p. 19 [as of Mar. 20, 2023].) Government-based organizations generally tend to focus on work and employability, whereas CBOs emphasize larger issues of access to social services like healthcare, housing, and economic development. (*Id.* at 19-20.)

   This bill, in part, would recognize the value that CBOs have in assisting incarcerated individuals rehabilitation.

4) **Argument in Support**: According to the *Transformative In-Prison Workgroup*, "The TPW is a coalition of 85 community-based organizations offering rehabilitative, trauma-informed, healing programs in all California Department of Corrections and Rehabilitation (CDCR) prisons, serving a significant percentage of the prison system's total population at any given time. We are privileged to provide a collective platform for community-based in-prison program providers, while also engaging on state policy issues in our individual organizational capacity.

   "In the 2015-2016 session, AB 2590 (Weber) suggested a move away from punitive justice toward a more restorative justice approach and directed the CDCR to create a mission statement in line with those stated goals. The CDCR now maintains a non-punitive mission statement, but the Penal Code has not been adjusted to reflect this momentous change in mission, value, and goals.

   "The Penal Code does not provide language clarifying the purpose of incarceration despite the principles and values embodied and enacted by the Legislature, which indicate that prisons are sites for rehabilitation and not additional unfettered punishment. This lack of definition doesn't reflect the expressed will, values, or expectations of the Legislature. This

lack of definition leads to confusion on the ground in the prisons.

"Penal Code section 1170 also fails to reflect the value and role of Community-Based Organization (CBO) provided rehabilitative programs in California's prisons. CBOs fill a crucial gap by providing the incarcerated population with reentry support, skills and workforce development as well as trauma healing and restorative justice programs. These critical in-prison programs make rehabilitation and personal transformation possible, improve reentry outcomes, make prisons safer, and have the added benefit of providing short and long term savings to the State. The presence of CBO programs in prison signals a move away from the isolating and punitive nature of incarceration toward a model driven by the pursuit of individual and societal wellbeing. Creating an explicitly non-punitive approach to incarceration is one of the key building blocks for successful return to communities and families…"

5) **Related Legislation**: AB 581 (Carrillo), would standardize CDCR's process for arranging clearances to prison program providers. AB 581 is currently pending hearing in this committee.

6) **Prior Legislation**:

   a) ACA 3 (Kamlager), of the 2021-2022 Legislative Session, the "End Slavery for All Act" would have prohibited all forms of involuntary servitude, including those for punishment purposes.

   b) AB 2590 (Weber), Chapter 696, Statutes of 2016, revised existing legislative declarations concerning the purpose of punishment to instead state that the purpose of sentencing is public safety achieved through accountability, rehabilitation, and restorative justice, as specified.

REGISTERED SUPPORT / OPPOSITION:

Support

Friends Committee on Legislation of California (Co-Sponsor)
Alliance for California Traditional Arts
Asian Prisoner Support Committee
Awareness Into Domestic Abuse
Boundless Freedom Project
California Public Defenders Association (CPDA)
Compassion Prison Project
Grip Training Institute
Humane Prison Hospice Project
Initiate Justice
Insight Garden Program
Jail Guitar Doors
Kalw Public Media
Marin Shakespeare Company
Playwrights Project

Reevolution
Root & Rebound
Sacred Purpose LLC
The Place4grace
The Transformative In-prison Workgroup
The W. Haywood Burns Institute
Uncommon Law
Vnon Activist Musician's Movement
William James Association

Opposition

None

Analysis Prepared by: Mureed Rasool / 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 1118 (Kalra) – As Amended March 15, 2023

SUMMARY: Clarifies that a defendant can raise a claim alleging a violation of the California Racial Justice Act (CRJA) on direct appeal. Specifically, **this bill**:

1) Provides that CRJA claims based on the trial record may be raised on direct appeal from the conviction or sentence.

2) Specifies that the defendant may move to stay the appeal and request remand to the superior court to file a CRJA motion.

3) Clarifies that a CRJA motion, which must be filed in a court of competent jurisdiction, does not have to be filed during trial.

4) Corrects an erroneous cross-reference.

EXISTING LAW:

1) Establishes the CRJA which prohibits the state from seeking or obtaining a criminal conviction or seeking, obtaining, or imposing a sentence on the basis of race, ethnicity, or national origin. A violation is established if the defendant proves, by a preponderance of the evidence, any of the following:

    a) The judge, an attorney in the case, a law enforcement officer involved in the case, an expert witness, or juror exhibited bias or animus towards the defendant because of the defendant's race, ethnicity, or national origin;

    b) During the trial, in a court and during the proceedings, the judge, an attorney in the case, a law enforcement officer involved in the case, an expert witness, or juror, used racially discriminatory language about the defendant's race, ethnicity, or national origin, or otherwise exhibited bias or animus towards the defendant because of the defendant's race, ethnicity, or national origin, whether or not purposeful, except as specified;

    c) The defendant was charged or convicted of a more serious offense than defendants of other races, ethnicities, or national origins who have engaged in similar conduct and are similarly situated, and the evidence establishes that the prosecution more frequently sought or obtained convictions for more serious offenses against people who share the defendant's race, ethnicity, or national origin in the county where the convictions were sought or obtained;

d) A longer or more severe sentence was imposed on the defendant than was imposed on other similarly situated individuals convicted of the same offense, and longer or more severe sentences were more frequently imposed for that offense on people that share the defendant's race, ethnicity, or national origin than on defendants of other races, ethnicities, or national origins in the county where the sentence was imposed; or,

e) A longer or more severe sentence was imposed on the defendant than was imposed on other similarly situated individuals convicted of the same offense, and longer or more severe sentences were more frequently imposed for the same offense on defendants in cases with victims of one race, ethnicity, or national origin than in cases with victims of other races, ethnicities, or national origins in the county where the sentence was imposed. (Pen. Code, § 745, subd. (a).)

2) States that a defendant may file a motion in the trial court, or if judgment has been imposed, may file a petition for writ of habeas corpus or a motion to vacate the conviction or sentence alleging a violation of the CRJA in a court of competent jurisdiction. (Pen. Code, § 745, subd. (b).)

3) States that if a motion is filed in the trial court and the defendant makes a prima facie showing of a violation of the CRJA, the court shall hold a hearing. Requires the judge to recuse themselves if the conduct was based in whole or in part on conduct or statements by the judge. (Pen. Code, § 745, subd. (c).)

4) Requires a motion made at trial to be made as soon as practicable upon the defendant learning of the violation. An untimely motion may be deemed waived in the court's discretion. (Pen. Code, § 745, subd. (c).)

5) Provides that at the hearing, either party may present evidence, including, but not limited to, statistical evidence, aggregate data, expert testimony, and the sworn testimony of witnesses. The court may also appoint an independent investigator. (Pen. Code, § 745, subd. (c)(1).)

6) States the defendant must prove the violation by a preponderance of the evidence but need not prove intentional discrimination. (Pen. Code, § 745, subd. (c)(2).)

7) States that, notwithstanding any other law, except for an initiative approved by the voters, if the court finds by a preponderance of evidence a violation of the CRJA, the court shall impose a remedy specific to the violation found from a specified list of remedies. (Pen. Code, § 745, subd. (e).)

8) Provides that before a judgment has been entered, the court may declare a mistrial if requested by the defendant, discharge the jury panel and empanel a new jury, or, in the interests of justice, the court may dismiss enhancements, special circumstances, or special allegations, or reduce one or more charges. (Pen. Code, § 745, subd. (e)(1).)

9) Provides that after judgment has been entered, the following remedies apply:

a) If the court finds that the conviction was sought or obtained in violation of the CRJA, the court shall vacate the conviction and sentence, find that it is legally invalid, and order new proceedings consistent with the CRJA;

b) If the court finds the violation was based only on the defendant being charged or convicted of a more serious offense than defendants of other races, ethnicities, or national origins, the court may modify the judgment to impose a lesser included or lesser related offense; and,

c) If the court finds that only the sentence was sought or obtained in violation of the CRJA, the court shall vacate the sentence, find that it is legally invalid, and impose a new sentence no greater than the sentence previously imposed. (Pen. Code, § 745, subd. (e)(2).)

10) Prohibits imposition of the death penalty where the court finds a violation of the CRJA. (Pen. Code, § 745, subd. (e)(3).)

11) Provides that a court is not foreclosed from imposing any other remedies available under the United States Constitution, the California Constitution, or any other law. (Pen. Code, § 745, subd. (e)(4).)

12) Specifies that these provisions apply to adjudications and dispositions in the juvenile delinquency system and adjudications to transfer a juvenile case to adult court. (Pen. Code, § 745, subd. (f).)

13) Defines "prima facie showing" as meaning that the defendant produces facts that, if true, establish a substantial likelihood that a violation of the CRJA occurred, as specified. (Pen. Code, § 745, subd. (h)(2).)

14) Provides that the CRJA applies to all cases in which the judgment is not final. (Pen. Code, § 745, subd. (j)(1).)

15) Provides that the CRJA shall also apply retroactively, as follows:

a) Commencing January 1, 2023, to all cases in which, at the time of the filing the petition raising a claim of a violation of the CRJA, the petitioner is sentenced to death or to cases in which a motion to vacate a judgment is filed because of actual or potential immigration consequences related to the conviction or sentence, regardless of when the judgment or disposition became final;

b) Commencing January 1, 2024, to all cases in which, at the time of the filing of the petition raising a claim of a violation of the CRJA, the petitioner is currently serving a sentence in the state prison or in a county jail on a realigned felony, or committed to DJJ for a juvenile disposition, regardless of when the judgment or disposition became final;

c) Commencing January 1, 2025, to all cases raising a claim of a violation of the CRJA in which judgment became final for a felony conviction or juvenile disposition that resulted in commitment to DJJ on or after January 1, 2015; and,

d) Commencing January 1, 2026, to all cases raising a claim of a violation of the CRJA in which judgment was for a felony conviction or juvenile disposition that resulted in commitment to DJJ, regardless of when the judgment or disposition became final. (Pen.

Code, § 745, subd. (j)(2)-(4).)

16) States that for petitions (motions) that are filed in cases for which judgment was entered before January 1, 2021, and only in those cases, if the petition is based on exhibited bias or animus or the use of discriminatory language, as provided, the petitioner shall be entitled to relief as specified, unless the state proves beyond a reasonable doubt that the violation did not contribute to the judgment. (Pen. Code, § 745, subd. (k).)

17) States that a writ of habeas corpus may be prosecuted after a judgment has been entered, based on evidence of a violation of the CRJA. Incorporates the same timelines applicable CRJA motions based on finality of judgment and nature of the case. (Pen. Code, § 1473, subd. (f).)

18) States that if the petitioner already has a habeas corpus petition on file in state court, but it has not yet been decided, the petitioner may amend the existing petition with a claim that the petitioner's conviction or sentence was sought, obtained or imposed in violation of the CRJA. (Pen. Code, § 1473, subd. (f).)

19) Requires the petition to state if the petitioner requests appointment of counsel, and the court to appoint counsel if the petitioner cannot afford counsel and either the petition alleges facts that would establish a violation of the CRJA or the State Public Defender requests counsel be appointed. Newly appointed counsel may amend a petition filed before their appointment. (Pen. Code, § 1473, subd. (f).)

20) Requires the court to review the petition, and if the court determines that the petitioner makes a prima facie showing of entitlement to relief, the court shall issue an order to show cause why relief shall not be granted and hold an evidentiary hearing, unless the state declines to show cause. The defendant may appear remotely, and the court may conduct the hearing through the use of remote technology, unless counsel indicates the defendant's presence in court is needed. (Pen. Code, § 1473, subd. (f).)

21) Allows a person who is no longer in custody to vacate a conviction or sentence based on a violation of the CRJA, as specified. (Pen. Code, § 1473.7, subd. (a)(3).)

22) Allows a person who is unlawfully imprisoned or restrained of his or her liberty, under any pretense, to prosecute a writ of habeas corpus to inquire into the cause of their imprisonment or restraint. (Pen. Code, § 1473, subd. (a).)

23) Specifies that habeas corpus is the exclusive procedure for collateral attack on a judgment of death. (Pen. Code, § 1509, subd. (a).)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "In passing the Racial Justice Act (AB 2542, 2020) and Racial Justice Act for All (AB 256, 2022), California's Legislature cemented the state's commitment to addressing institutionalized and implicit racial bias in our criminal courts. AB 1118 simply builds on that work by making technical changes to ensure RJA

claims are processed more efficiently and that the intent of the law is followed. Specifically, this bill clarifies that RJA claims can be raised on appeal, or, if additional evidence is needed, permits individuals to request stay of an appeal and remand to the trial court to file a motion. The bill also clarifies that a case need not be set for trial to file an RJA motion."

2) **The California Racial Justice Act**: In its landmark *McCleskey* decision, the United States Supreme Court rejected the defendant's claim that the Georgia capital punishment statute violates the equal protection clause of the 14 Amendment. The defendant argued "that race has infected the administration of Georgia's statute in two ways: persons who murder whites are more likely to be sentenced to death than persons who murder blacks, and black murderers are more likely to be sentenced to death than white murderers." (*McCleskey v. Kemp* (1987) 481 U.S. 279, 291-292.) In rejecting the claim, the Court concluded the defendant had failed to demonstrate that the statute was enacted for or that decisionmakers in defendant's case acted with a discriminatory purpose. (*Id.* at pp. 297-299.)

   The Court acknowledged that biased decision making may affect sentencing. (*McCleskey v. Kemp, supra*, 481 U.S. at p. 309.) However, the Court suggested that the legislature, not the judiciary, was the proper branch to engineer remedies to these systemic problems. (*Id.* at p. 319.)

   In response, the Legislature passed AB 2542 (Kalra), Statutes of 2020, the California Racial Justice Act, which allows a defendant to seek relief because their case was impacted by racial bias. This Act allows racial bias to be shown by, among other things, statistical evidence that convictions for an offense were more frequently sought or obtained against people who share the defendant's race, ethnicity or national origin than for defendants of other races, ethnicities or national origin in the county where the convictions were sought or obtained; or longer or more severe sentences were imposed on persons based on their race, ethnicity or national origin or based on the victim's race, ethnicity or national origin. Racial bias may also be shown by evidence that a judge or attorney, among other listed persons associated with the defendant's case, exhibited bias towards the defendant, or, in court and during the trial proceedings, used racially discriminatory language or otherwise exhibited bias or animus, based on the defendant's race, ethnicity or national origin. The Act does not require the discrimination to have been purposeful or to have had a prejudicial impact on the defendant's case.

   As originally enacted, the CRJA applied only to judgments of conviction occurring on or before January 1, 2021. AB 256 (Kalra), Chapter 739, Statutes of 2022, created a timeline for retroactive application of the CRJA. AB 256 made additional substantive, technical, and clarifying changes. These changes included imposing a standard of prejudice for certain petitions (i.e., motions) filed in cases in which the judgment was entered before January 1, 2021. In that subset of cases, in particular, if the petition (motion) is based on exhibited bias or animus or the use of discriminatory language, the petitioner would be entitled to relief unless the state proves beyond a reasonable doubt that the violation did not contribute to the judgment. (Pen. Code, § 745, subd. (k).)

   This bill would make additional clarifying changes to the CRJA. It would specify that a CRJA claim based on the trial record may be raised on direct appeal from the conviction or sentence, not just in a habeas petition. (*In re Carpenter* (1995) 9 Cal.4th 634, 646 ["Appellate jurisdiction is limited to the four corners of the record on appeal . . . ."].) This

bill would also clarify that the defendant/appellant may move to stay the appeal and request remand to the superior court to file a CRJA motion. This may be necessary to permit the trial court to rule on the claim in the first instance, and to allow the parties to fully litigate the issue. (See *Grayl CPB, LLC v. SCC Acquisitions, Inc.* (2015) 233 Cal.App.4th 882, 897 ["[I]t is fundamental that a reviewing court will ordinarily not consider claims made for the first time on appeal which could have been but were not presented to the trial court. Thus, we ignore arguments, authority and facts not presented and litigated in the trial court"] (citation and quotations omitted); see also *People v. Welch* (1993) 5 Cal.4th 228, 237 ["Reviewing courts have traditionally excused parties for failing to raise an issue at trial where an objection would have been futile or wholly unsupported by substantive law then in existence"].)

Generally, a trial court loses jurisdiction once an appeal is filed. But in other post-conviction relief contexts, stays and remands have been permitted by the courts – for example to file a petition to vacate a felony murder conviction and be resentenced under SB 1437 (Skinner), Chapter 1015, Statutes of 2018. (See *People v. Martinez* (2019) 31 Cal.App.5th 719, 729 ["A Court of Appeal presented with such a stay request and convinced it is supported by good cause can order the pending appeal stayed with a limited remand to the trial court for the sole purpose of permitting the trial court to rule on a petition under section 1170.95."].)

This bill would also clarify that a CRJA motion does not have to be filed during trial, in particular.

3) **Argument in Support**: According to *Ella Baker Center for Human Rights*, a co-sponsor of this bill, "In 2020, the Legislature passed AB 2542 (Kalra), the California Racial Justice Act (RJA), to address racial discrimination and bias in criminal proceedings across the state. Under this law, defendants can file a motion for an RJA violation through a trial court, or if a judgment has been imposed, they can file a petition for a writ of habeas corpus. However, questions have been raised as to whether habeas petitions are the exclusive avenue for a post-conviction RJA challenge or whether individuals can file claims on direct appeal if the violation is apparent on the trial record. In this scenario, the case would be more efficiently decided through the appeals process as opposed to the habeas route, which requires more litigation and judicial resources.

"In other cases already on appeal, counsel may identify an RJA issue that requires additional evidence outside the record and may wish to pursue this claim before the appeal is decided. In these cases, it is more efficient to stay the appeal and remand the case to the trial court for an RJA motion to be filed rather than require a new habeas petition. This is particularly important for individuals with death sentences, as it can take a decade or more for their direct appeal to be decided."

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

5) **Prior Legislation**:

   a) AB 256 (Kalra), Chapter 739, Statutes of 2022, made the CRJA applicable to cases in which judgment was entered prior to January 1, 2021, among other things.

b) AB 2542 (Kalra), Chapter 317, Statutes of 2020, created the CRJA which prohibits the state from seeking or obtaining a conviction or sentence on the basis of race, ethnicity, or national origin, applicable to all cases regardless of the date of conviction.

c) AB 3070 (Weber), Chapter 318, Statutes of 2020, prohibits a party from using a peremptory challenge to remove a prospective juror on the basis of race, ethnicity, gender, and other specified characteristics, and outlines a court procedure for objecting to, evaluating, and resolving improper bias in peremptory challenges.

d) AB 1798 (Levine), of the 2019-2020 Legislative Session, would have prohibited a person from being executed pursuant to a judgment that was either sought or obtained on the basis of race – i.e., where race was a significant factor in the decision to either seek or impose the death penalty. AB 1798 was held in the Assembly Committee on Appropriations.

REGISTERED SUPPORT / OPPOSITION:

Support

California Coalition for Women Prisoners (Co-Sponsor)
Californians United for a Responsible Budget (Co-Sponsor)
Coalition for Humane Immigrant Rights (CHIRLA) (Co-Sponsor)
Ella Baker Center for Human Rights (Co-Sponsor)
Initiate Justice (Co-Sponsor)
Alliance for Boys and Men of Color
American Friends Service Committee
California Alliance for Youth and Community Justice
California Catholic Conference
California Innocence Coalition: Northern California Innocence Project, California Innocence Project, Loyola Project for the Innocent
California Public Defenders Association (CPDA)
Center on Juvenile and Criminal Justice
Communities United for Restorative Youth Justice (CURYJ)
Fair Chance Project
Fresno Barrios Unidos
John Burton Advocates for Youth
Legal Services for Prisoners with Children
Nextgen California
San Francisco Public Defender
Showing Up for Racial Justice (SURJ) Bay Area
Silicon Valley De-bug
Smart Justice California
The W. Haywood Burns Institute

Opposition

None on file

Analysis Prepared by: Cheryl Anderson / 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 1149 (Grayson) – As Introduced February 16, 2023

SUMMARY: Establishes the California Multidisciplinary Alliance to Stop Trafficking Act (California MAST) to review collaborative models between governmental and nongovernmental organizations for protecting victims and survivors of trafficking, among other related duties. Specifically, **this bill**:

1) Establishes the California MAST to do all of the following:

   a) Review collaborative models between governmental and nongovernmental organizations for protecting victims and survivors of trafficking;

   b) Map the progress of the state in preventing trafficking, providing comprehensive assistance to victims and survivors of trafficking, and prosecuting persons engaged in trafficking; and,

   c) Provide recommendations to strengthen state and local efforts to address the issues of human trafficking, including the role of forced criminality in human trafficking.

2) Provides that the task force will appoint its chair, and the Office of Emergency Services (OES) shall provide staff and support for the task force, to the extent that resources are available.

3) Provides that the task force shall be comprised of the following representatives or their designees:

   a) The Secretary of Labor and Workforce Development;

   b) The Director of Social Services;

   c) The Director of Health Care Services;

   d) The Director of Emergency Services;

   e) The State Public Health Officer;

   f) The Director of Housing and Community Development;

   g) The Director of Transportation;

h) The Director of the Department of Fair Employment and Housing (renamed the California Civil Rights Department);

i) A representative from the California Child Welfare Council;

j) One representative from the California District Attorneys Association;

k) One representative from the California Public Defenders Association;

l) The Speaker of the Assembly shall appoint one representative from a human rights organization;

m) The Senate Committee on Rules shall appoint one representative from an immigrant rights organization; and,

n) The Governor shall appoint:

i) One survivor of labor trafficking;

ii) One survivor of sex trafficking;

iii) One representative each from a northern, central, and southern California organization that provides services to victims of human trafficking; and,

iv) Three representatives from tribal organizations from northern, central, and southern California.

4) Requires, whenever possible, members of the task force to have experience providing services to trafficked persons or have knowledge of human trafficking issues.

5) Provides that the members of the task force shall serve at the pleasure of the respective appointing authority. Reimbursement of necessary expenses may be provided at the discretion of the respective appointing authority or agency participating in the task force.

6) Requires the task force to meet at least four times. Subcommittees may be formed and meet as necessary. All meetings shall be open to the public. The first meeting of the task force shall be held no later than July 1, 2024.

7) Provides that on or before January 1, 2026, the task force shall report its findings and recommendations to OES, the Governor, the Attorney General, and the Legislature. At the request of any member, the report may include minority findings and recommendations.

8) Provides that for the purposes of the California MAST, "trafficking" has the same meaning as "severe forms of trafficking in persons" as defined in federal code.

9) Makes these provisions inoperative on July 1, 2026, and repeals them on January 1, 2027.

10) States legislative findings and declarations.

EXISTING STATE LAW:

1) States that a person who deprives or violates the personal liberty of another with the intent to obtain forced labor or services is guilty of human trafficking and shall be punished by imprisonment in the state prison for 5, 8, or 12 years and a fine of not more than $500,000. (Pen. Code, § 236.1, subd. (a).)

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

3) Specifies that a person who causes, induces, or persuades, or attempts to cause, induce, or persuade, a person who is a minor at the time of commission of the offense to engage in a commercial sex act, with the intent to commit specified crimes including pimping, pandering, or child pornography, is guilty of human trafficking. A violation is punishable by imprisonment in the state prison as follows:

   a) Five, 8, or 12 years and a fine of not more than $500,000; or,

   b) Fifteen-years-to-life and a fine of not more than $500,000 when the offense involves force, fear, fraud, deceit, coercion, violence, duress, menace, or threat of unlawful injury to the victim or to another person. (Pen. Code, § 236.1, subd. (c).)

4) Provides that cases involving minor victims of human trafficking shall be provided with assistance from the local county Victim Witness Assistance Center, if the minor so desires. However, this does not require local agency's to operate a Victim Witness Assistance Center. (Pen. Code, § 236.13.)

5) Establishes in the State Treasury the Human Trafficking Victims Assistance Fund. Moneys in the fund shall only be expended to support programs for victims of human trafficking. (Gov. Code § 8590.7 (a).)

6) Requires the OES to publish procedures for organizations applying for grants from the Human Trafficking Victims Assistance Fund, and to award grants based on all of the following:

   a) The capability of the qualified nonprofit organization to provide comprehensive services;

   b) The stated goals and objectives of the qualified nonprofit organization;

   c) The number of people served and needs of the community;

   d) Evidence of community support; and,

   e) Any other criteria deemed appropriate. (Gov. Code, § 8590.7, subd. (b).)

7) Provides that the Department of Fair Employment and Housing can receive, investigate, and prosecute claims that are brought under the state's Trafficking Victims Protection Act on behalf of victims of human trafficking. (Gov. Code § 12930, subd. (f)(3).)

EXISTING FEDERAL LAW: Defines the term "severe forms of trafficking in persons" as:

1) Sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or

2) The recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery. (22 U.S.C. § 7102(11).)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "AB 1149 will create the California MAST which aims to take a human rights and public health approach to combatting trafficking in our state. California MAST will utilize a multidisciplinary, collaborative approach that not only includes serving survivors and prosecuting traffickers, but preventing human trafficking altogether. The California MAST will be comprised of select state agencies, survivors, and representatives from human rights and immigrant rights organizations whose main priorities are to evaluate the state's progress in preventing human trafficking and providing support to victims and survivors. In doing so, the California MAST will be able to provide critical recommendations to strengthen state and local efforts to address the issues of human trafficking. This will ultimately allow California to address the root causes that make individuals, families, and communities at risk of trafficking and prevent the initial and continued victimization of survivors by strengthening the health and safety of our state."

2) **Human Trafficking in California**: In California, human trafficking occurs when a person deprives or violates the personal liberty of another with the intent to obtain forced labor or service. (Pen. Code, § 236.1, subd. (a).) These services can include commercial sex acts, forced labor, and domestic servitude. Identifying the scope of human trafficking is particularly difficult because the crime is under-reported and hidden. (California Department of Justice. (2012). *The State of Human Trafficking in California.* https://oag.ca.gov/sites/all/files/agweb/pdfs/ht/human-trafficking-2012.pdf)

3) **Need for this Bill:** After conducting hearings on the matter, in June of 2020, the Little Hoover Commission released a report on the state's lack of coordinated response to human trafficking. In part, the report concludes:

"The state lacks a lacks a coordinated strategy to target the crime of labor trafficking. The Commission believes it is past time for California to create a mechanism for coordinating the anti- trafficking efforts of all government agencies – state, local, and federal – and non-governmental organizations that do critical on-the-ground work to identify victims and help survivors. There must be a hub to coordinate efforts, collect data, increase public awareness, and share strategies to fight and prevent all forms of this crime.

"To accomplish these goals, the Commission recommends that the state create the California Anti- Human Trafficking Council within the Governor's Office. The Council should be broad-based, and should include representatives of law enforcement, health and human service agencies, victims advocates and others. It should include state and local representatives and reflect the diverse regions and populations of California. Last, it should be provided with adequate staffing and meet with sufficient frequency to fulfill its mission. This mission should include, among other tasks, developing public awareness, collecting data, improving training guidelines, and developing standardized screening tools for industries in which trafficking is prevalent."
(https://lhc.ca.gov/sites/lhc.ca.gov/files/Reports/251/Report251.pdf ; see also https://lhc.ca.gov/content/combatting-labor-trafficking ["Create an Anti-Human Trafficking Council to coordinate efforts of all government agencies – state, local, and federal – and non-governmental organizations around efforts to combat all forms of human trafficking.")

This bill would establish California MAST. The purpose of the task force would be to review collaborative models between governmental and nongovernmental organizations for protecting victims and survivors of trafficking, among other related duties. The task force would be comprised of specified state officials or their designees and specified individuals who have expertise in human trafficking or providing services to victims of human trafficking, as specified. The task force would be required to hold its first meeting no later than July 1, 2024, and would require the task force to meet at least 4 times. Additionally, the task force would be required to report its findings and recommendations to OES, the Governor, the AG, and the Legislature by January 1, 2026. The provisions of this bill would become inoperative on July 1, 2026, and be repealed as of January 1, 2027.

4) **Argument in Support**: According to the *California Catholic Conference*, "Human trafficking is defined as the use of force, fraud, or coercion for the purpose of forced labor or commercial sexual exploitation, or any time a minor is involved in a commercial sex act. California has been identified as a hot spot for human trafficking due to its large economy, foster care system, immigrant population, and its international border, ports, interstates, and airports. In 2021, more than 5200 calls and messages were made to the National Human Trafficking Hotline from our state.

"The majority of trafficking victims in California are US citizens, women and girls, Black, Indigenous, or people of color. Groups particularly vulnerable to trafficking include those experiencing homelessness, poverty, and substance use disorders, youth involved with the foster or juvenile justice systems, undocumented immigrants, and those with a history of family violence or sexual abuse. Given the scope of the issue, a statewide taskforce is necessary to respond adequately and serve the broader community."

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

6) **Related Legislation**:

   a) AB 229 (Patterson), would expand the crimes that are within the definition of a violent felony for all purposes, including for the Three Strikes Law, to include additional forms of sexual crimes, human (sex) trafficking, and felony domestic violence, as defined. AB 229 failed passage in this committee.

b) AB 235 (B. Rubio), would establish the Labor Trafficking Unit (LTU) within the Civil Rights Department (CRD) and requires the LTU to coordinate with the Labor Enforcement Task Force (LETF), the Department of Justice (DOJ), and the Division of Labor Standards Enforcement (DLSE) to take steps to prevent labor trafficking, receive and investigate complaints alleging labor trafficking, and report specified data. AB 235 is pending hearing in this committee..

c) AB 380 (Arambula), would establish the LTU within the DLSE to coordinate with the LETF, the Criminal Investigation Unit, the DOJ, and the CRD to investigate and prosecute complaints alleging labor trafficking, and report specified data. AB 380 is pending hearing in this committee.

d) AB 1497 (Haney), would among other things, make the affirmative defense that a person was coerced to commit the offense as a direct result of human trafficking, intimate partner violence, or sexual violence applicable to violent felonies. AB 1497 is pending hearing in this committee on April 11, 2023.

e) AB 1602 (Alvarez), would add to the definition of disorderly conduct the attempt to engage in the crime of soliciting prostitution, the attempt to agree to engage in prostitution, or the attempt to engage in prostitution and requires the punishment for a victim of human trafficking to be an education class on the dangers of human trafficking and a referral to human trafficking support services. AB 1602 is pending hearing in this committee.

f) AB 1739 (Sanchez), would require OES to allocate funds to up to 11 district attorney offices that employ vertical prosecution for human trafficking, to the extent funds are available for this purpose and until January 1, 2028. AB 1739 is pending hearing in this committee.

g) SB 14 (Grove), would include human trafficking within the definition of a serious felony for all purposes, including for purposes of the Three Strikes Law. SB 14 is pending hearing in the Senate Public Safety Committee.

h) SB 236 (Jones), would require OES to award funds to up to 11 district attorney offices that employ vertical prosecution for human trafficking, to the extent funds are available for this purpose and until January 1, 2029. SB 236 is pening hearing in the Senate Public Safety committee today.

7) **Prior Legislation**:

a) AB 1820 (Arambula), of the 2021-2022 Legislative Session, was substantially similar to AB 380 (Arambula) of the current Legislative Session. AB 1820 was vetoed by the Governor.

b) AB 2553 (Grayson), of the 2021-2022 Legislative Session, was substantially similar to this bill. AB 2553 was held in the Senate Appropriations Committee.

c) AB 2843 (Rodriguez), of the 2021-2022 Legislative Session, would have created the Human Trafficking Prosecution Grant Program to be administered by the OES, upon

appropriation by the Legislature. AB 2843 was held in the Assembly Appropriations Committee.

d) SB 35 (Chang), of the 2019-2020 Legislative Session, would have reestablished the California Alliance to Combat Trafficking and Slavery (California ACTS) for the purpose of gathering data on the nature and extent of human trafficking in California. SB 35 was vetoed by the Governor.

e) AB 2216 (Patterson), of the 2017-2018 Legislative Session, would have appropriated $15 million annually from the General Fund and allocated it to the Human Trafficking Assistance Fund for the purpose of supporting programs for victims of human trafficking, and conducting a study on the prevalence of human trafficking in California. AB 2216 was held in the Assembly Appropriations Committee.

f) SB 180 (Kuehl), Chapter 239, Statutes of 2005, established the California ACTS task force to collect data on human trafficking, and required the development of a course of instruction for law enforcement officers in California in responding to human trafficking.

REGISTERED SUPPORT / OPPOSITION:

Support

California Catholic Conference

Opposition

None on file

Analysis Prepared by: Cheryl Anderson / 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 1177 (McKinnor) – As Amended March 22, 2023

SUMMARY: Requires the Board of Parole Hearings (BPH) to send a transcript of a parole hearing to an incarcerated individual, and if requested, an audio recording as well. Specifically, **this bill**:

1) Provides that upon completion of the required stenographic record, the BPH must send a copy of the transcript to the incarcerated person, and if requested by the incarcerated person, an audio recording as well.

2) Prohibits the incarcerated individual from being charged a fee for the transcript or audio recording.

3) States that the victim, next of kin, members of the victim's family, and two designated representatives, are permitted to request and receive an audio recording of all proceedings.

4) Requires the BPH to retain an audio recording of the proceeding for at least one year after the proceeding.

EXISTING LAW:

1) Provides for a period of post-prison supervision immediately following a period of incarceration in state prison. (Pen. Code, § 3000 et seq.)

2) Authorizes BPH to determine whether people who are serving indeterminate sentences are suitable for release on parole once they reach their minimum eligible parole date. (Pen. Code, § 3041, subd. (a).)

3) Provides that parole shall be granted unless it is determined that the gravity of the current offense or offenses, or the timing and gravity of current or past convictions, is such that consideration of the public safety requires a more lengthy period of incarceration. (Pen. Code, § 3041, subd. (b).)

4) Requires the BPH to record all parole hearings and transcribe those hearings within 30 days of any hearing. (Pen. Code, § 3042, subd. (b).)

5) States that all parole hearing transcripts must be filed and maintained by the BPH and be made publicly available no later than 30 days from the date of the hearing. (Pen. Code, § 3042, subd. (b).)

6) Mandates that any statements, recommendations, or other materials considered by the BPH be incorporated into the transcript of the hearing unless there is a security concern, as specified. (Pen. Code, § 3042, subd. (d).)

7) Provides that the incarcerated person, the victim, next of kin, members of victim's family, and two representatives designated by the victim or next of kin, are permitted to request and receive a stenographic record of all proceedings. (Pen. Code, § 3041.5, subd. (a)(4).)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, ""AB 1177 would make it easier for incarcerated individuals and interested parties to easily request full audio and transcribed records that are taken during parole hearings."

2) **Parole Hearings and Transcripts**: All parole hearings are required to be recorded and transcribed within 30 days. (Pen. Code, § 3042, subd. (b).) If the incarcerated person, victim or other specified person requests, BPH must provide them with a transcript. (Pen. Code, § 3041.5, subd. (a)(4).) According to a California Department of Corrections and Rehabilitation (CDCR) webpage, for the most part, free electronic transcripts are provided upon request, but printed copies cost 12 cents per page plus the cost of postage. (CDCR) *Request for Parole Suitability Hearing Transcript*. <https://www.cdcr.ca.gov/bph/psh-transcript/> [as of Mar. 21, 2023].) It is unclear whether an incarcerated individual must pay for printed copies. This bill will entitle the incarcerated person a free transcript and/or audio recording.

   There are benefits and limitations to transcriptions from audio recordings, (Hennink and Weber. *Quality Issues of Court Reporters and Transcriptionists for Qualitative Research*. (Jun. 13, 2015) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4465445/> [as of Mar. 21, 2023].) One limitation is the clarity of the recording, which can result in missing, incomplete, or incorrect transcripts. (*Id.* at 2.) Also, transcribers may use incorrect punctuation that changes the tone or meaning of a comment; or experience difficulties in identifying individual speakers. (*Ibid.*) One study found that the most common error for a transcription was the omission of a speaker identified; the second common error was dialogue not transcribed because of inaudible speech on the recording; and the third most common error was the transcription of an incorrect word. (*Id.* at 6.) Although the study was limited in a number of ways, it may provide some insight of transcription quality issues. (*Id.* at 11.)

   Although the study was limited in some ways, it is likely applicable in this situation. Some letters of support for this bill highlighted a part of the prior version of this bill, which would have required audio recordings be sent to an incarcerated individual if the term "inaudible" was found on the transcript five or more times. As noted above, the second most common transcription error was dialogue not transcribed because of inaudible speech on the recording. Furthermore, as a person present during the hearing, the incarcerated individual would likely be better at filling in the gaps of inaudible speech as well as identifying the speaker.

   During a parole suitability hearing, BPH commissioners ask incarcerated individuals about their social history, past and present mental state, past and present attitude toward their

crime, and plans for work and housing if they are released. (Legislative Analyst's Office (LAO) *Promoting Equity in the Parole Hearing Process.* (Jan. 5, 2023) <https://lao.ca.gov/Publications/Report/4658> at p. 6 [as of Mar. 21, 2023].) If the incarcerated person is found unsuitable for release, the commissioners are required to set the next hearing 3, 5, 7, 10, or 15 years in the future. (*Id.*at 5.) During that time, it makes sense to ensure the incarcerated person has the most complete record of why they were denied parole, so that they may go about addressing those issues. This bill does that by ensuring the incarcerated individual is automatically given a transcript of the hearing, and, if requested, an audio recording. It is also helpful in the event that the individual wants to appeal from the denial of parole. (*Id.* at 16.)

3) **Argument in Support**: According to the *Jesse's Place Organization*, "In California, the number of incarcerated individuals stands at around 97,000, a significant proportion of whom have no option but to rely solely on the parole board to grant them freedom. In 2020 over 7,600 individuals were scheduled to appear before the Board of Parole Commissioners to demonstrate their successful rehabilitation and prove their eligibility for release.

"During the parole hearing, the commissioner of the Parole Board undertakes the significant responsibility of determining the suitability of an individual for release. While these hearings are recorded, incarcerated people, since the establishment of the BPH, have historically only ever been provided with a written transcript.

"AB 1177 is a crucial step in promoting transparency in the parole board process. This legislation aims to establish accountability measures for both incarcerated individuals and board commissioners involved in the parole decision-making process which will enhance the integrity of the system. When an individual appears before the parole board and is deemed ineligible for parole, the hearing record becomes a valuable resource for further study. The record provides incarcerated individuals with an opportunity to delve deeper into the recommendations of the commissioners and focus on the necessary steps to eventually meet the suitability criteria. The passing of AB 1177 will furnish individuals with an accurate representation of their hearing, ultimately increasing their chances of rehabilitation success.

"In addition, AB 1177 proposes to provide legal counsel, family members, and support networks with a clear and comprehensive record of the hearing, enabling them to actively participate in and assist the incarcerated individual in preparing for subsequent Board of Parole Hearings. This measure would enhance transparency and facilitate better communication and coordination among all parties involved."

4) **Related Legislation**: SB 81 (Becker), would declare legislative intent to increase the transparency, predictability, and accountability of parole suitability hearings. SB 81 is pending referral in the Senate Rules Committee.

5) **Prior Legislation**: SB 260 (Hancock), Chapter 312, Statutes of 2014, established a parole process for persons sentenced to lengthy prison terms for crimes committed before attaining 18 years of age.

REGISTERED SUPPORT / OPPOSITION:

Support

Dee Hill Foundation INC
Initiate Justice
Jesse's Place Org
Jesse's Place Organization
Just Advocate, INC.
Prison From-theinside-out INC

2 Private Individuals

Opposition

None Submitted.

Analysis Prepared by: Mureed Rasool / 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 1186 (Bonta) – As Introduced February 16, 2023

SUMMARY: Removes the ability of the court to require a minor to pay victim restitution. Specifically, **this bill**:

1) Removes victim restitution as a permissible punishment for minors under the jurisdiction of the juvenile court. Instead, allows minors to participate in a restorative justice program, perform community service, or participate in an educational, employment, youth development, or mental health program.

2) Repeals provisions of law that allow cities, counties, schools and government agencies, as specified, to recoup through juvenile proceedings, costs associated with defacement by minors of property. Instead, allows the minor to participate in a restorative justice or other youth-appropriate program.

3) Removes the ability of the court to order the minor to make restitution for any crime, to pay $250 fine to be deposited in the county treasury, or to participate in uncompensated work programs. Instead requires the minor to make amends by participating in a restorative justice program, performing community service, or participating in an educational, employment, youth development, or mental health program.

4) Permits the court to order a minor who cause an economic loss to a victim because of their conduct, to make amends by participating in a restorative justice program, performing community service, or participating in an educational, employment, youth development, or mental health program.

5) Requires these alternative programs to be youth appropriate, limited to no more than 25 hours, not interfere with the minor's school or work commitments, and be provided at no cost to the minor or their parent or guardian.

6) Removes the ability of the court, when a minor is placed under the supervision of the probation officer, to require the minor to work and earn money for the support of their dependents or to effect reparation.

7) Removes the requirement that a minor ordered by the juvenile court to complete a sex offender treatment program must pay the reasonable costs of the program. Provides that the minor or the minor's parent or guardian shall not be responsible for the cost of the program.

8) Removes the ability of the court to require a minor to pay restitution to the victim when they participate in deferred entry of judgement.

9) States that a minor or the minor's parent or guardian shall not be ordered to pay restitution to a victim who incurs economic loss because of the minor's conduct.

10) Repeals the ability of the court to issue a citation to a minor's parents or guardians making them liable for the payment of restitution.

11) Prohibits the court from considering a minor's future earning capacity as a factor in determining a minor's ability to pay a restitution fine.

12) States that restitution for the amount of economic loss suffered as a result of a minor's conduct shall be determined by the court and shall identify each victim.

13) Provides after issuing a restitution order, the juvenile court shall transmit the order to the California Victim Compensation Board (the Board) for issuance of payment to the victim. Victims shall receive restitution directly from the Board.

14) Requires the Board, upon appropriation by the Legislature, to compensate victims in the amount outlined in a restitution order.

15) States that it is the intent of the Legislature that no minor or the minor's parent or guardian shall be ordered to pay restitution to a victim that incurred economic loss as a result of the conduct of that minor.

16) States that it is the intent of the Legislature to eliminate the current youth restitution system and publicly fund survivor compensation.

17) Provides that the changes do not apply to juvenile restitution orders made before January 1, 2023.

18) States legislative findings and declarations.

19) Makes other technical, conforming changes.

EXISTING LAW:

1) Provides that, in order to preserve and protect a victim's rights to justice and due process, a victim shall be entitled specified rights, including among others, restitution. (Cal. Const., art. I, § 28, subd. (b)(13).

2) States that it is the unequivocal intention of the People of the State of California that all persons who suffer losses as a result of criminal activity shall have the right to seek and secure restitution from the persons convicted of the crimes causing the losses they suffer. Cal. Const., art. I, § 28, subd. (b)(13)(A).)

3) Provides that restitution shall be ordered from the convicted wrongdoer in every case, regardless of the sentence or disposition imposed, in which a crime victim suffers a loss. (Cal. Const., art. I, § 28, subd. (b)(13)(B).)

4) Establishes the victim compensation program administered by the California Victim Compensation Board (the "Board") and the procedure for victims to obtain compensation from the Restitution Fund. (Gov. Code, §§ 13950 et seq.)

5) Defines "Crime" for the purposes of the victim compensation program, as "a crime or public offense, wherever it may take place, that would constitute a misdemeanor or a felony if the crime had been committed in California by a competent adult." (Gov. Code, § 13951, subd. (b)(1).)

6) Permits the juvenile court to, as appropriate, direct a minor to pay restitution to the victim or victims, and make a contribution to the victim restitution fund after all victim restitution orders and fines have been satisfied, in order to hold them accountable or restore the victim or community. (Welf. & Inst. Code, § 202, subd. (f).)

7) Provides that a minor shall not be eligible for supervision in specified cases, including but not limited to cases in which the minor is alleged to have committed an offense in which the restitution owed to the victim exceeds $1,000. A minor's inability to pay restitution due to their indigence is not grounds for finding a minor ineligible for the program of supervision. (Welf. & Inst. Code, § 654.3, subd. (a)(5)(A).)

8) Permits the juvenile court to order a minor to make restitution, to pay a fine up to $250 if the court finds that the minor has the financial ability to pay the fine, or to participate in uncompensated work programs. (Welf. & Inst. Code, § 730, subd. (a)(1)(A).)

9) Provides that, when a minor is placed under the supervision of the probation officer, the court may make any and all reasonable orders for the conduct of the minor including the requirement that the minor go to work and earn money for the support of their dependents or to effect reparation. (Welf. & Inst. Code, § 730, subd. (b).)

10) Provides that if a minor is ordered by the court to complete a sex offender treatment program, the minor shall pay all or a portion of the reasonable costs of the sex offender treatment program after a determination is made of the ability of the minor to pay. (Welf. & Inst. Code, § 730, subd. (d).)

11) States that it is the intent of the Legislature that a victim who incurs an economic loss because of a minor's conduct shall receive restitution directly from that minor. (Welf. & Inst. Code, § 730.6, subd. (a)(1).)

12) Requires the court to order the minor to pay, in addition to any other penalty provided or imposed under the law, both a restitution fine and restitution to the victim or victims. (Welf. & Inst. Code, § 730.6, subds. (a)(2) & (d)(2).)

13) Requires the court to order full restitution unless it finds compelling and extraordinary reasons for not doing so, and states them on the record. A minor's inability to pay shall not be considered a compelling or extraordinary reason not to impose a restitution order, nor shall inability to pay be a consideration in determining the amount of the restitution order. (Welf. & Inst. Code, § 730.6, subd. (h).)

14) States that consideration of a minor's ability to pay may include his or her future earning capacity A restitution order, to the extent possible, shall identify each victim, and the amount of each victim's loss to which it pertains, and shall be of a dollar amount sufficient to fully reimburse the victim or victims for all determined economic losses incurred as the result of the minor's conduct. If the amount of loss cannot be ascertained at the time of sentencing, the restitution order shall include a provision that the amount shall be determined at the direction of the court at any time during the term of the commitment or probation. (Welf. & Inst. Code, § 730.6, subd. (h).)

15) Provides that a minor permitted to participate in deferred entry of judgment may also be required to pay restitution to the victim. (Welf. & Inst. Code, § 794.)

16) Makes a minor's parent or guardian liable for the payment of the minor's restitution. Provides that execution may be issued on an order holding a parent or guardian liable for victim restitution in the same manner on a judgment in a civil action, including any balance unpaid at the termination of the court's jurisdiction over the minor. (Welf. & Inst. Code, § 729.5.)

17) States that when a minor is ordered to make restitution to the victim, or the minor is ordered to pay fines and penalty assessments, a parent or guardian who has joint or sole legal and physical custody and control of the minor shall be presumed to be jointly and severally liable with the minor for the amount of restitution, fines, and penalty assessments so ordered, subject to the court's consideration of the parent's or guardian's inability to pay. When considering the parent's or guardian's inability to pay, the court may consider future earning capacity, present income, the number of persons dependent on that income, and the necessary obligations of the family, including, but not limited to, rent or mortgage payments, food, children's school tuition, children's clothing, medical bills, and health insurance. The parent or guardian has the burden of showing an inability to pay. (Welf. & Inst. Code, § 730.7, subd. (a).)

18) Provides that the juvenile court shall require any minor who is ordered to pay restitution, or to perform community service, to report to the court on their compliance with the court's restitution order or order for community service, or both, no less than annually until the order is fulfilled. (Welf. & Inst. Code, § 730.8.)

19) Allows cities and counties to elect, by ordinance, to have the probation officer of the county recoup, through juvenile court proceedings, its costs associated with defacement by minors of its property and the property of others by graffiti or other inscribed material. (Welf. & Inst. Code, § 742.14.)

20) States that a as a condition of probation, the court may require a minor to wash, paint, repair, or replace or repair the property defaced, damaged, or destroyed by the minor or otherwise pay restitution to the probation officer of the county for disbursement to the owner or possessor of the property, or both. If the minor is not granted probation or if the minor's cleanup, repair, or replacement of the property will not return the property to its condition before it was defaced, damaged, or destroyed, the court shall make a finding of the amount of restitution that would be required to fully compensate the owner of the property. The court shall order the minor or the minor's estate to pay that restitution to the probation officer of the county for disbursement to the owner or possessor of the property or both, to the extent

the court determines that the minor or the minor's estate have the ability to do so, except in any case in which the court makes a finding and states on the record its reasons why full restitution would be inappropriate. If full restitution is found to be inappropriate, the court shall require the minor to perform specified community service, except in any case in which the court makes a finding and states on the record its reasons why that condition would be inappropriate to participate in a restorative justice or other youth-appropriate program. (Welf. & Inst. Code, § 742.16, subd. (a).)

21) Provides that, if the court determines that the minor or the minor's estate is unable to pay in full the costs and damages, and if the minor's parent or parents have been cited, the court shall hold a hearing to determine the liability of the minor's parent for those costs and damages. Except when the court makes a finding setting forth unusual circumstances in which parental liability would not serve the interests of justice, the court shall order the minor's parent or parents to pay those costs and damages to the probation officer of the county to the extent the court determines that the parent or parents have the ability to pay, if the minor was in the custody or control of the parent or parents at the time he or she committed the act. In evaluating the parent's or parents' ability to pay, the court shall take into consideration the family income, the necessary obligations of the family, and the number of persons dependent upon this income. (Welf. & Inst. Code, § 742.16, subd. (d).)

22) Provides that if a minor under the jurisdiction of the juvenile court has committed certain specified property damage offenses, the court shall issue a citation to the minor's parent or legal guardian, notifying them that they may be ordered to pay restitution sufficient to fully compensate the owner and possessor of the property defaced by the minor for the damage caused, the law enforcement costs of identifying and apprehending the minor, if applicable, and the costs incurred by a public entity to remove graffiti or other material inscribed by the minor, or to repair or replace the property defaced by the minor, if applicable. The citation shall advise the parent that they may be ordered to pay an amount not exceeding $20,000 for the damages and costs and shall contain a warning to the parent or parents that they fail to appear, the court will order them to pay in full the costs and damages caused by the act of the minor. (Welf. & Inst. Code, § 742.18.)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "Our current restitution system is broken. Restitution was meant to make crime survivors whole, but in reality, it's creating a perpetual cycle of debt, especially for poor Black and brown families. Debt from restitution never expires and cannot be discharged in bankruptcy proceedings. There is no limit as to how much a court can order for restitution and a young person's ability to pay cannot be taken into consideration. We have ended up with a system where already struggling families cannot afford to pay this debt, leaving crime survivors without the ability to access the resources they need to heal and move on. California is in need of an alternative system that holds young people accountable while placing them, and survivors, on a more just and economically secure path."

2) **Juvenile Restitution**: Like adults, juvenile courts are required to order minors to pay fees, restitution fines, and direct victim restitution orders. (Welf. & Inst. Code § 730.6, subds. (a)

& (b).) A "restitution fine" is a fine imposed and paid to the State Restitution Fund. (Pen. Code, § 2085.6.) A restitution fine is required to be proportionate with the seriousness of the offense, and can only be waived for compelling and extraordinary reasons. (Welf. & Inst. Code, § 730.6, subds. (b) & (g).) Fines for misdemeanors range from $100 to $1,000. (The Board, *Juvenile Restitution Fine Guide* (Sept. 2021) <https://victims.ca.gov/uploads/2021/09/Juvenile-Restitution-Guide_9.21.pdf> [as of March 22, 2023].) The restitution fine is in addition to any other disposition or fine imposed and is required to be imposed regardless of the minor's inability to pay. In setting the amount of the fine the court must consider any relevant factors including, but not limited to, the minor's ability to pay, the seriousness and gravity of the offense and the circumstances of its commission, any economic gain derived by the minor as a result of the offense, and the extent to which others suffered losses as a result of the offense. (Welf. & Inst. Code, § 730.6.) The consideration of a minor's ability to pay may include his or her future earning capacity. (*Ibid.*)

The bill does not eliminate the requirement that the juvenile court order a minor to pay a restitution fine, but it does delete the provision allowing the court to consider the minor's future earning capacity when setting the amount of the fine.

Under existing law, juveniles must also pay, in addition to the restitution fine, a restitution order. A "restitution order" means an order for restitution to the victim of a crime. (Pen. Code, § 2085.6.) It is the intent of the legislature that a victim of conduct, for which a minor is under the jurisdiction of the juvenile court, who incurs any economic loss as a result of the minor's conduct, shall receive restitution directly from that minor. (Welf. & Inst. Code, § 730.6, subd. (a)(1).) Direct victims, including corporations, commercial entities, and the government can receive direct restitution. (*Ibid.*) There is no cap on the amount of direct restitution— the court is required to order full restitution, in an amount to fully reimburse the victim(s) for all determined economic losses, such as medical expenses, wages, lost profits and property damage. (The Board, *Juvenile Restitution Order Guide* (Sept. 2021) <https://victims.ca.gov/uploads/2021/09/Juvenile-Restitution-Guide_9.21.pdf> [as of March 22, 2023].) The term "economic losses" is entitled to an expansive interpretation and a victim's right to restitution is broadly and liberally construed. (*In re Johnny M.* (2000) 100 Cal.App.4th 1128, 1132.)

This bill would repeal the authority of the juvenile court to order a minor or their parents to pay a restitution order to the victim. Instead, this bill would require the juvenile court to identify the victims and determine the amount of their economic loss suffered because of the minor's conduct in a restitution order. The juvenile court would be required to transmit the restitution order to the Board and the Board would be required to compensate the victim the amount in the order.

3) **Inadequacies and Disparate Impact of Juvenile Restitution**: Youth, as a class, are generally unable to pay restitution. (Feierman et al., Juv. L. Ctr, *Debtors' Prison for Kids? The High Cost of Fines and Fees in the Juvenile Justice System 6-8* (2016) <http://debtorsprison.jlc.org/documents/jlc-debtors-prison.pdf> [as of March 20, 2023].) Many youth involved in the justice system are not legally old enough to work, categorically prohibited from working in certain professions, or to work enough hours to pay off restitution orders. (Department of Industrial Relations, *Information on Minors and Employment* <https://www.dir.ca.gov/dlse/dlse-cl.htm> [as of March 20, 2023].) Despite limited earning-capacity of minors, California requires justice system-involved minors to satisfy victim

restitution.

Victim restitution can easily exceed amounts in the tens of thousands of dollars, on top of which is added accruing interest. Most people can never afford to pay off the restitution order. Instead, they live with debt. (Wels, S., *Restitution Relief: Policy Advocacy Clinic Spearheads Reform Efforts to Lift a Lifelong Burden* <https://www.law.berkeley.edu/article/restitution-relief-policy-advocacy-clinic-spearheads-reform-efforts-to-lift-lifelong-burden/> [as of March 20, 2023].) Unpaid restitution also results in significant long-term financial consequences for young people, including the interest and fees that compound their restitution debts. The debt may also be garnished directly from bank accounts, wages, or tax refunds the young person relies on for basic subsistence, further pushing them into financial instability. This fact renders most restitution orders symbolic, rather than an effective method of compensating victims for their losses—which has had serious consequences for people of color, deepening the racial wealth gap of Black persons in particular. In Los Angeles County, though Black people make up 8% of the population, they were charged with 20% of all dollars owed in restitution. (*Ibid.*)

Juvenile restitution laws "heighten racial and economic disparities in the juvenile justice system. Most young people who make mistakes, including those who damage property, don't end up in the justice system at all. Instead, schools, families, and communities solve the problem in ways that work for everyone involved. Because of structural racism, discrimination, economic disparities, and persistent bias, however, certain groups of youth are disproportionately pulled into the justice system for the same types of mistakes. The risk of system involvement is particularly high for Black, Latinx, Indigenous, and other youth of color, young people in poverty, youth with disabilities, and LGBTQIA+ youth. […] people then face a rigid and unforgiving set of restitution laws, including severe consequences for nonpayment." (Juvenile Law Center, *Reimagining Restitution* (2022) https://debtorsprison.jlc.org/documents/JLC-Reimagining-Restitution.pdf> [as of March 20, 2023].)

4) **Victims' Right to Restitution Pursuant to the California Constitution**: The California Constitution guarantees victims the right to restitution. Specifically, Article I, Section 28 of the California constitution, provides that, in order to preserve and protect a victim's rights to justice and due process, a victim shall be entitled specified rights, including among others, restitution. (Cal. Const., art. I, § 28, subd. (b)(13).) It also states that it is the unequivocal intention of the People of the State of California that all persons who suffer losses as a result of criminal activity shall have the right to seek and secure restitution from the persons *convicted* of the crimes causing the losses they suffer. (Cal. Const., art. I, § 28, subd. (b)(13)(A) [emphasis added].) And, it provides that restitution shall be ordered from the *convicted wrongdoer* in every case, regardless of the sentence or disposition imposed, in which a crime victim suffers a loss. (Cal. Const., art. I, § 28, subd. (b)(13)(B) [emphasis added].)

This bill would amend and repeal provisions of the Welfare and Institutions Code that provide statutory authority for courts to order victim restitution in juvenile cases. Arguably, this does not run afoul of the California Constitution because Juveniles are not *convicted* of crimes. Juveniles are *adjudicated delinquent*. The difference is material.

The creation of the juvenile court, now over 100 years old, was rooted in the idea that

adolescents, who are not fully developed or mature, are less culpable than adults. Accordingly, the focus of the juvenile court was supposed to be rehabilitation, not punishment. (See e.g., *In re Gault* (1967) 387 U.S. 1, 15-16.) The purpose of the juvenile law is to provide for the protection and safety of the public and each minor under the jurisdiction of the court and to preserve and strengthen family ties when possible. (Welf. & Inst. Code, § 202, subd. (a).) Minors under the jurisdiction of the juvenile court as a consequence of delinquent conduct receive care, treatment, and guidance that is consistent with their best interest, that holds them accountable for their behavior, and that is appropriate for their circumstances. (Welf. & Inst. Code, § 202, subd. (b).)

In *People v. West*, the court held that juvenile adjudications of criminal misconduct are not "convictions" within the purview of the sentencing enhancement provisions within the Victims' Bill of Rights. (*People v. West* (1984) 154 Cal.App.3d 103, 109-111.) In analyzing the addition of Article I Section 28 to the California Constitution, the court found reference to "juvenile" alone insufficient to capture youth charged with violations of juvenile court law as they are not "defendants" and adjudications are not "criminal convictions." (*Ibid.*) The court also determined that the intent of the electorate was not to make juvenile adjudications convictions as the voters were not told that juvenile adjudications would be considered convictions. (*Ibid.*)

The law is very clear that "an order adjudging a minor to be a ward of the juvenile court *shall not be deemed a conviction of a crime for any purpose*, nor shall a proceeding in the juvenile court be deemed a criminal proceeding. (Welf. & Inst. Code, § 203 [emphasis added].) Accordingly, repealing statutory authority to order victim restitution in juvenile cases does not implicate the California Constitution or any voter approved Victims' Bill of Rights initiatives, and therefore would not require the approval by voters via ballot measure.

5) **This Bill Does Not Abolish Victim Restitution**: This bill would remove the obligation of paying direct victim restitution from juveniles and their families, and instead allows the victim to receive compensation for their losses directly from the Victim Compensation Board (the Board). Specifically, this bill would require the court to determine the amount of restitution for the economic loss suffered as a result of a minor's conduct by each victim, to issue an restitution order in that amount, and to transmit the order to the Board for issuance of payment to the victim. This bill would require the Board, upon appropriation by the Legislature, to compensate victims in the amount outlined in a restitution order. In so doing, this bill would ensure that victims actually receive the full restitution owed to them in a timely and efficient manner.

Currently, many victims receive little or no restitution. In a 2021 survey of victims in San Francisco, only 2% of respondents reported receiving any restitution and only 1% received the full amount of restitution ordered. Nearly 93% of respondents reported restitution was never ordered to them. And 68% of respondents who got restitution orders never received any payment. (San Francisco District Attorney's Office, *2020 Victim Impact Survey Report* (2020) at p.16 <https://sfdistrictattorney.org/wp-content/uploads/2021/04/4.19.21-Victim-Impact-Survey-Report.pdf> [as of March 20, 2023].) Another survey of 771 survivors statewide found 66% of respondents had restitution ordered, but most received little or no payment, and what was received came slowly and in small amounts. (Castro Rodriguez, G., *Survivor Voices* (2021) at p. 20 https://prosecutorsalliance.org/wp-content/uploads/2022/04/Survivor-Voices-Report-CA2022.pdf [as of March 20, 2033].)

In 1994, the Legislature passed AB 3169 (Hoge), which provided "parallel restitutionary requirements for juvenile offenders" as adults in the Welfare and Institutions Code. In the Senate Floor Analysis of AB 3169, opponents of the bill expressed concern that: "extending restitution requirement minors while at the same time placing on the minor the burden of demonstrating a present and future inability to pay. The consequences of this bill will make restitution orders more unreasonable and compliance more difficult." (Senate Floor, *Analysis of AB 3169*, 1993-1994 Reg. Sess. (Aug. 22, 1994).) These consequences have come to fruition—youth, especially those involved in the juvenile justice system, do not have the money to pay off their restitution orders, leaving them in worse situations than when they began their court case, while victims do not receive timely or complete compensation. (Juvenile Law Center, *Reimagining Restitution* (2022), supra, at p. 13.) Commonsense suggests that victims should be compensated from a source other than the pocketbooks of minors.

6) **Condition of the Restitution Fund:** The Restitution Fund, which funds the victim compensation program, has been operating under a structural deficiency for a number of years. In 2015, the Legislative Analyst's Office (LAO) reported the Restitution Fund was depleting and would eventually face insolvency. (LAO, Improving State Programs for Crime Victims (2015) <https://lao.ca.gov/reports/2015/budget/crime-victims/crime-victims-031815.aspx> [as of Feb. 8, 2023].) Although revenue has remained consistent, expenditures have outpaced revenues since FY 2015-16. The Governor's 2021-22 budget proposed $33 million dollars in one-time General Fund monies to backfill declining fine and fee revenues in the Restitution Fund, and $39.5 million annually afterwards. This amount will allow the Board to continue operating at its current resource level. The Budget Act allows for additional backfill upon a determination that revenues are insufficient to support the Board. (Department of Finance, California State Budget –2023-24 at p. 90 <https://ebudget.ca.gov/2023-24/pdf/BudgetSummary/CriminalJustice.pdf> [as of Feb. 8, 2023].) In addition, the 2022 Budget prioritized changes to the victim compensation program and the elimination of the restitution fine, if a determination is made in the spring of 2024 that the General Fund over the multiyear forecast is available to support this ongoing augmentation. (*Ibid.*)

   Restitution fines are a major source of funding for the Restitution Fund. (The Board, *Juvenile Restitution Fines Guide* (Sept. 2021) <https://victims.ca.gov/uploads/2021/09/Juvenile-Restitution-Guide_9.21.pdf> [as of March 22, 2023].) Notably, this bill eliminates juvenile restitution orders, but does not repeal the requirement that juveniles be required to pay restitution fines to the Restitution Fund.

7) **Argument in Support**: According to *Initiate Justice*, "California's current restitution system is broken and fails survivors, youth, and their families. Crime survivors often need immediate care and resources, and rely on restitution payments to receive compensation. Because most youth cannot pay, only a small fraction of crime survivors ever receive any compensation. Public records data, received by the Berkeley Law Policy Advocacy Clinic, shows that only about 20% of California youth restitution ordered since 2010 has been collected, and much of the outstanding debt is years old and unlikely ever to be paid.

   "Furthermore, the current restitution system drives already struggling families into cycles of poverty and incarceration. Under current state law, judges order youth, who have been accused of causing harm, to pay direct monetary compensation, or restitution, to a person

who has experienced loss or injury. Judges are prohibited from considering economic ability to pay compensation. Children as young as 6 years old (dating back to when the law allowed for youth under 12 to be referred to juvenile court) have been ordered restitution–meaning children who have no ability to work or pay a debt. Because youth are considered dependents, parents are held jointly and severally liable for their child's restitution. Often, families cannot afford to pay restitution orders, which are converted into civil judgments, enforceable through wage garnishment, tax refund intercept, and bank levy. Once a youth is eighteen years old, they are also subject to these penalties, hindering their economic stability as they enter the pivotal years of young adulthood.

"The REPAIR Act seeks to make survivors whole and create meaningful opportunities for youth to rehabilitate and be held accountable. AB 1186 will provide the opportunity for judges to address racial and economic equity, by ensuring that harm is addressed in youth-appropriate ways, without perpetuating cycles of poverty, and requiring that youth have the opportunity to participate in restorative justice practices, community service, and/or be connected to job opportunities. AB 1186 would establish a public compensation fund that would ensure crime survivors can address immediate needs for compensation to recover from loss or injury."

8) **Related Legislation**:

a) AB 855 (Jackson), would change the annual interest rate on restitution orders and the annual interest rate charged by the Franchise Tax Board on certain delinquent payments, including fines, fees, and restitution, to no more than 1%. AB 855 is pending in Assembly Revenue and Taxation Committee.

b) AB 1643 (Bauer-Kahan), would increase the required amount from $1,000 to $5,000 for to require probation officer to commence juvenile proceedings, if the minor is alleged to have committed an offense in which restitution is owed to victim. AB 1643 is pending hearing in this Committee.

9) **Prior Legislation**:

a) AB 1803 (Jones-Sawyer), Chapter 494, Statutes of 2022, prohibited a court from denying expungement relief to an otherwise qualified person, and who meets the criteria, as specified, for a waiver of court fees and costs, solely on the basis that the person has not yet satisfied their restitution obligations.

b) SB 1106 (Wiener), Chapter 734, Statutes of 2022, prohibited the denial of a petition for expungement relief, the denial of release on parole to another state, and the denial of a petition for reduction of a conviction, solely on the basis that the person has not yet satisfied their restitution obligations.

c) SB 651 (Leyva), Chapter 131, Statutes of 2015, expanded the definition of "victim" in juvenile proceedings to include a corporation, estate, or other legal or commercial entity when that entity is a direct victim of a crime and a person who has sustained economic loss because of a crime and who satisfies specified conditions.

d) AB 576 (Torres), Chapter 454, Statutes of 2009, expanded the definition of a "victim" for the purposes of restitution to include any governmental entity responsible for repairing, replacing or restoring public and privately owned property defaced with graffiti or other inscribed material, as specified, and has sustained economic loss as a result.

REGISTERED SUPPORT / OPPOSITION:

Support

Communities United for Restorative Youth Justice (CURYJ) (Co-Sponsor)
Root & Rebound (Co-Sponsor)
Ryse Youth Center (Co-Sponsor)
San Francisco Financial Justice Project (Co-Sponsor)
San Francisco Public Defender (Co-Sponsor)
Young Women's Freedom Center (Co-Sponsor)
ACLU California Action
Alliance for Boys and Men of Color
Alliance for Children's Rights
California Alliance for Youth and Community Justice
California Catholic Conference
California for Safety and Justice
California Public Defenders Association (CPDA)
Californians United for A Responsible Budget
Care First California
Ceres Policy Research
Children's Defense Fund - CA
Community Legal Services in East Palo Alto
Community Works
Dignity and Power Now
East Bay Community Law Center
Ella Baker Center for Human Rights
Freedom 4 Youth
Fresh Lifelines for Youth
Fresno Barrios Unidos
Friends Committee on Legislation of California
Initiate Justice
Justice2jobs Coalition
LA Defensa
Lawyers' Committee for Civil Rights of The San Francisco Bay Area
Legal Services for Prisoner With Children
Legal Services for Prisoners With Children
Milpa (motivating Individual Leadership for Public Advancement)
National Association of Social Workers, California Chapter
National Consumer Law Center, INC.
Pacific Juvenile Defender Center
Prosecutors Alliance California
Returning Home Foundation
Santa Cruz Barrios Unidos INC.
Showing Up for Racial Justice (SURJ) Bay Area

Smart Justice California
The Collective Healing and Transformation Project
The Maven Collaborative
The Unity Council
The W. Haywood Burns Institute
UC Berkeley's Underground Scholars Initiative (USI)
Underground Grit
United Core Alliance
Western Center on Law & Poverty

Opposition

None.

Analysis Prepared by: Liah Burnley / 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 1226 (Haney) – As Amended March 22, 2023

SUMMARY: Requires the California Department of Corrections and Rehabilitation (CDCR) to assign or reassign an incarcerated person in the correctional institution or facility that is located nearest to the primary place of residence of the person's child, except as specified. Specifically, **this bill**:

1) States that, if an incarcerated person has a parent and child relationship with a child under 18 years of age, as defined, or is a guardian or relative caregiver, as defined, the Secretary shall place the person in the correctional institution or facility that is located nearest to the primary place of residence of the person's child, if the placement is suitable and reasonable, would facilitate increased contact between the person and their child, and the incarcerated parent gives their consent to the placement.

2) Provides that an incarcerated person's placement may be reevaluated to determine whether existing orders and dispositions should be modified or continued in force, including, but not limited to, whether their child has moved to a place significantly nearer to an otherwise suitable and appropriate institution.

3) Allows an incarcerated person to request a review of their housing assignment when there is a change in the primary place of residence of the person's child upon which the person's housing assignment was based.

4) Requires CDCR to make a separate determination for each individual child if an incarcerated person has more than one child under 18 years of age.

5) Redefines "Incarcerated person's home" to include a place where the incarcerated person's spouse, parents, or children reside at the time of commitment or at the time of a review of an incarcerated person's classification or housing assignment.

6) Redefines "Reasonable" to include consideration of the safety of the incarcerated persons and the institution.

7) Defines "Reassign" to mean the transfer of an incarcerated person's housing assignment from one institution to another.

EXISTING LAW:

1) Provides that defendants sentenced to state prison shall be delivered to the custody of the Secretary at the place designated by the Secretary to serve the term of imprisonment ordered

by the court. (Pen. Code, § 2900.)

2) Requires CDCR to examine and study each person who is newly committed to a state prison. This includes the investigation of all pertinent circumstances of the person's life such as the existence of any strong community and family ties, the maintenance of which may aid in the person's rehabilitation, and the antecedents of the violation of law for which the person has been committed to prison. (Pen. Code, § 5068.)

3) Provides that, upon the basis of the examination and study, CDCR shall classify incarcerated persons, and when reasonable, assign an incarcerated person to the institution of the appropriate security level and gender population nearest the person's home, unless other classification factors make such a placement unreasonable. (Pen. Code, § 5068.)

4) Defines "reasonable" to include consideration of the safety of the prisoner and the institution, the length of term, and the availability of institutional programs and housing. (Pen. Code, § 5068.)

5) Defines "Prisoner's home" as a place where the prisoner's spouse, parents, or children reside at the time of commitment. (Pen. Code, § 5068.)

6) Provides that a "parent child relationship" is established between a child and natural parent, by proof of having given birth to the child, or between a child and adoptive parent, by proof of adoption. (Pen. Code, § 5068; Fam. Code, § 7610.)

7) Defines "Guardian" as the legal guardian of the child, who assumed care and control of the child while the child was in the guardian's control, and who is not a biological or adoptive parent. (Pen. Code, § 5068; Fam. Code, § 17550.)

8) Defines "Relative caregiver" as a relative, who assumed primary responsibility for the child while the child was in the relative's care and control, and who is not a biological or adoptive parent. A relative is an adult who is related to the child by blood, adoption, or affinity within the fifth degree of kinship, including stepparents, stepsiblings, and all relatives whose status is preceded by the words "great," "great-great," or "grand" or the spouse of any of those persons even if the marriage was terminated by death or dissolution. (Pen. Code, § 5068; Fam. Code, § 17550; Welf. & Inst. Code, § 11362.)

9) States that incarcerated persons shall not be prohibited from family visits based solely on the fact that they were sentenced to life without the possibility of parole or sentenced to life and is without a parole date established by the Board of Parole Hearings. (Pen. Code, § 6404.)

10) Requires that regulations adopted by CDCR which may impact the visitation of incarcerated persons, among other things, consider the important role of visitation in establishing and maintaining a meaningful connection with family and community. (Pen. Code, § 6400.)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "A relationship between a parent and child is crucial for the child's behavioral and emotional development. Sadly, children with incarcerated parents have a harder time creating a relationship with their parent because they have less contact with them. One of the main barriers to children and incarcerated parents maintaining contact is the long distances between prison and the child's home. There are thousands of incarcerated parents who are placed more than 500 miles from their children, making it difficult for the child to maintain contact. AB 1226 respects the right of a child to remain in contact with their incarcerated parent by requiring CDCR to place incarcerated parents in the closest institution to their child's home."

8) **Placement of Persons Incarcerated at CDCR**: CDCR's Department Operations Manual (DOM) establishes the standard procedures for reception, processing, and transfer of incarcerated persons into CDCR institutions. (DOM § 61010.2.) Upon reception, staff processes each newly-incarcerated person by collecting their social and criminal history, and interviewing the person. (DOM § 61010.4.) A correctional counselor reviews all relevant documents available during the reception process and completes a score sheet. An incarcerated person's placement score usually determines to which institution to they will be assigned. (DOM § 61010.9.)

   The correctional counselor takes into account a wide array of factors to calculate the placement score, including but not limited to the incarcerated person's gang involvement, immigration status, psychiatric and medical conditions, age at first arrest, age at reception, number of years of their total term, prior incarceration, prior incarceration behavior including any serious disciplinary history, whether the person is condemned or serving life without the possibility of parole, history of escape, whether the person has a current or prior conviction for a violent felony, and whether the case is one of public interest. (DOM §§ 61010.1-61010.18.) The incarcerated person's score determines what level institution they can be placed. (*Ibid.*) Institutions range from least to most restrictive, Level I – Level IV. (*Ibid.*)

   Each year an annual review is performed by a counselor to determine if an incarcerated person meets the criteria to have their placement score reduced. An incarcerated person has the opportunity to reduce their score if they have been programming and have not received any disciplinary actions. In contrast, an incarcerated person's score and subsequent housing level can be increased due to receiving disciplinary actions. (CDCR, *What to Expect* <https://www.cdcr.ca.gov/ombuds/ombuds/entering-a-prison-faqs/> [as of March 15, 2023].) According to CDCR, the incarcerated person's family location is taken into consideration, however, being placed near family is not guaranteed due to many other factors. (*Ibid.*)

   This bill would require CDCR, if an incarcerated person has a child, or children, under 18 years of age, to place the person in the correctional institution or facility that is located nearest to the primary place of residence of the child, if the placement would facilitate increased contact between the person and their child, and if the incarcerated parent gives their consent to the placement. This bill would also allow an incarcerated parent to request a review of their housing assignment when there is a change in the primary place of residence of their children.

2) **Importance of Parent-Child Visitation**: Being incarcerated long distances away from home is a barrier for families with minor children to in-person visitation. The purpose of this bill is to alleviate that burden by requiring CDCR to consider placing an incarcerated person in

correctional institution that is located nearest to the primary place of residence of their children.

Decades of research has shown that in-person visitation is beneficial, particularly when it comes to reducing recidivism. (Prison Policy Imitative, Research Roundup: The Positive Impacts of Family Contact for Incarcerated People and Their Families (Dec. 21, 2021) <https://www.prisonpolicy.org/blog/2021/12/21/family_contact/> [as of March 11, 2023].) One study found that any visit reduced the risk of recidivism by 13% for felony reconvictions and 25% for technical violation revocations, which reflects the fact that visitation generally had a greater impact on revocations. (*Ibid.*) The findings further showed that more frequent and recent visits were associated with a decreased risk of recidivism. (*Ibid.*) A 1972 study on visitation that followed 843 people on parole from California prisons found that those who had no visitors during their incarceration were six times more likely to be reincarcerated than people with three or more visitors. (*Ibid.*) Visitation is also correlated with adherence to prison rules. (*Ibid.*) A 2019 study found that one additional visit per month would reduce misconduct by 14%. According to another study, misconduct tended to decrease in the three weeks before a visit. (*Ibid.*) This may explain why more frequent visits lead to more consistent good behavior, better overall outcomes and post-release success. (*Ibid.*) Research has also found that visitation is linked to better mental health, including reduced depressive symptoms for incarcerated persons. (*Ibid.*) Supportive family relationships can promote psychological and physiological health for incarcerated people and their loved ones. (*Ibid.*) When done well, visitation can ease anxiety in children and mitigate some of the impacts on strained interpersonal relationships. (*Ibid.*) Children who had displayed concerning behavior upon their parent's incarceration showed improved behavior after visiting. (*Ibid.*)

3) **Argument in Support**: According to *Legal Services for Prisoners with Children*, "Parents and caregivers play a critical role in the development of their children. Data shows that up until the age of 18, frequent contact between the child and their parent is crucial for the child's behavioral and emotional development.

"Currently, about 195,000 children have incarcerated parents in California state prisons. Due to sudden separation from their caregiver, children with incarcerated parents experience unique issues such as antisocial behavior and drug abuse. However, children who are able to maintain contact with their parents experience less severe harmful impacts.

"Additionally, incarcerated parents who participate in family visitation programs have lower rates of parole violation and recidivism after release. Regular contact between children and their incarcerated parents also improves family reunification following the parent's release from prison.

"Under current CDCR practices, the incarcerated parent's family location is taken into consideration. However, there is no law that requires CDCR to place a parent close to their minor child and many families end up hundreds of miles apart from each other.

"Being incarcerated long distances from home is the number one barrier to families with minor children staying in contact with one another.

"In 2019, CDCR released information that said only 25% of incarcerated people in California state prisons are placed in institutions less than 100 miles from their home. The long

distances place a burden on families who do not have the financial means or the time to travel across the state for family visits.

"Visitation falls off significantly the farther from home a person is incarcerated. 50% of people placed less than 50 miles away from home receive frequent family visitation, but only 15% of people placed 500 miles away receive visitors.

"Incarcerated mothers in particular, struggle to maintain contact with their children. More than half of incarcerated mothers do not receive any visits from their children while they are in prison. The single most significant reason for lack of contact is the children's distance from their mothers' prisons, many of which are located far from major population centers.

"AB 1226 removes contact barriers between children and their incarcerated parents or caregivers by requiring CDCR to assign the incarcerated person to serve their term in the institution closest to their minor child's home."

4) **Related Legislation**:

   a) AB 958 (Santiago), would make the right to visitation in correctional facilities a civil right, as specified. AB 958 is pending in the Assembly Appropriations Committee.

   b) AB 280 (Holden), would limit the use of segregated confinement in detention facilities in the State and require facilities to follow specified procedures related to segregated confinement. AB 280 is pending in the Assembly Appropriations Committee.

5) **Prior Legislation**:

   a) AB 990 (Santiago), of the 2021-2022 Legislative Session, would have made the right to visitation in correctional facilities a civil right, as specified. AB 990 was vetoed.

   b) SB 1008 (Becker) Chapter 827, Statutes of 2022, requires CDCR to provide voice communication services to incarcerated persons free of charge.

   c) SB 1139 (Kamlager) Chapter 837, Statutes of 2022, requires, among other things, emergency in-person contact visits and video calls to be made available whenever an incarcerated person is hospitalized or moved to a medical unit within the facility and the incarcerated person is in a critical or more serious medical condition.

   d) AB 964 (Medina), of the 2019-2020 Legislative Session, would have required all local detention facilities to offer in-person visitation. AB 964 was held on the Assembly Appropriations suspense file.

   e) SB 843 (Committee on Budget), Chapter 33, Statutes of 2016, barred prohibiting incarcerated persons from family visits based solely on the fact that the incarcerated person is sentenced to life without the possibility of parole or is sentenced to life and is without a parole date.

f) SB 1157 (Mitchell), of the 2015-2016 Legislative Session, would have prohibited local correctional facilities and juvenile facilities from replacing in-person visits with video or other types of electronic visitation. SB 1157 was vetoed.

g) SCR 20, Chapter 88, Statutes of 2009, encouraged correctional facilities to distribute the Children of Incarcerated Parents Bill of Rights to children of incarcerated parents, and to use the bill of rights as a framework for analysis and determination of procedures when making decisions about services for these children.

h) AB 2133 (Goldberg), Chapter 238, Statutes of 2002, required that any amendments to regulations adopted by CDCR which may impact the visitation of incarcerated persons recognize and consider the value of visitation as a means of increasing safety in prisons, maintaining family and community connections, and preparing inmates for successful release and rehabilitation.

REGISTERED SUPPORT / OPPOSITION:

Support

Legal Services for Prisoners With Children (Co-Sponsor)
The Place4grace (Co-Sponsor)
A New Way of Life Reentry Project
Alliance for Boys and Men of Color
Aouon Orange County
Blameless and Forever Free Ministries
California Alliance for Youth and Community Justice
California Catholic Conference
California Public Defenders Association (CPDA)
Center on Juvenile and Criminal Justice
Communities United for Restorative Youth Justice (CURYJ)
Community Works
Ella Baker Center for Human Rights
Empowering Women Impacted by Incarceration
Fresno Barrios Unidos
Grace Institute - End Child Poverty in Ca
Initiate Justice
Jesse's Place Org
John Burton Advocates for Youth
Legal Aid At Work
Milpa (motivating Individual Leadership for Public Advancement)
National Center for Youth Law
Prosecutors Alliance California
Roadmap to Peace Initiative
Root & Rebound
Secure Justice
Showing Up for Racial Justice Santa Cruz County
Smart Justice California
Starting Over, INC.
The Transformative In-prison Workgroup

UC Berkeley's Underground Scholars Initiative (USI)
Universidad Popular
Valorcalifornia / Valorus
Young Women's Freedom Center
Youth Alive!
Youth Leadership Institute

5 Private Individuals

Opposition

None.

Analysis Prepared by: Liah Burnley / 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 1266 (Kalra) – As Amended March 22, 2023

SUMMARY: Eliminates the authority to issue a bench warrant for the failure to pay, or to appear in court, on an infraction ticket. Specifically, **this bill**:

1) States legislative intent to eliminate arrest warrants for infractions.

2) Exempts the issuance of a bench warrant for an infraction from the general rule that all laws relating to misdemeanors apply to infractions.

3) Prohibits the issuance of a bench warrant for the failure to pay an infraction ticket.

4) Prohibits the issuance of a bench warrant for the failure to appear in court on a written promise to appear when the underlying charge is an infraction.

5) Removes the requirement that a court inform the Department of Motor Vehicles (DMV) of a willful failure to pay bail in installments or pay the fine for a Vehicle Code infraction.

6) Includes legislative findings and declarations.

7) Makes conforming changes to other provisions of law.

EXISTING LAW:

1) Provides that an infraction is not punishable by incarceration, and that a person charged with an infraction is not entitled to a jury trial or the representation by a public defender, except as specified. (Pen. Code, § 19.6.)

2) States that, except as otherwise provided by law, all provisions of law relating to misdemeanors apply to infractions. (Pen. Code, § 19.7.)

3) Allows an officer who arrests a person for an infraction to require evidence of identification and then release the person on a written promise to appear contained in a notice to appear. (Pen. Code, § 853.5, subd. (a).)

4) Provides that a willful violation of a written promise to appear will result in a misdemeanor, regardless of the disposition of the charge upon which the defendant was originally arrested. (Pen. Code, § 853.7, & Veh. Code § 40508, subd. (a).)

5) Provides that a bench warrant may be issued when a person signs a written promise to appear in court and does not. (Pen. Code, §§ 853.8 & 978.5.)

6) Provides that the willful failure to pay a lawfully imposed fine for a violation of the Vehicle Code within the time authorized by the court and without a lawful excuse having been presented to the court on or before the date the fine is due is guilty of a misdemeanor. (Veh. Code § 40508, subd. (b.)

7) Requires the court to notify the DMV if a person was convicted of specified offenses. States that a forfeiture of bail on violations is equivalent to a conviction. (Veh. Code, § 1803, subd. (a).)

8) Does not require court notification to the DMV for other specified Vehicle Code violations. (Veh. Code, § 1803, subd. (b).)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "Infraction bench warrants have functioned as a debtor's prison, creating a system where people who have money for fines never have to appear in court and are merely inconvenienced, while those who can't pay are arrested for minor tickets. AB 1266 addresses the disparate punishment of low-income people that has done little to further public safety by prohibiting the issuance of a bench warrant if the underlying charge is an infraction. This will ensure minor citations only subject to a fine do not unfairly turn into jail time simply for what is essentially a crime of poverty."

2) **Background**: An infraction is an offense that is not punishable with incarceration. (Pen. Code, § 19.6.) Because the punishment for an infraction does not implicate the same loss of liberty, the same constitutional rights that apply to other criminal offenses do not apply. (*Ibid.*; see also *People v. Prince* (1976) 55 Cal.App.3d Supp 19.) However, for the most part, all provisions of law applicable to misdemeanors also apply to infractions. (Pen. Code, § 19.7.)

   Generally, a person arrested for an infraction must be released on signing a written notice to appear. (Pen. Code, § 853.6, subd. (a).) After a person has been released on a promise to appear, a bench warrant for arrest can issue if the person fails to appear in court and/or fails to deposit the bail. (Pen. Code §§ 853.6, subd. (f) & 853.8; see also Veh. Code, § 40514.) A willful violation of a promise to appear is a misdemeanor, even if the original offense was an infraction. (Pen. Code, § 853.7.)

   This bill would prohibit the court from issuing a bench warrant for failure to appear in court on a written promise to appear for an infraction.

3) **Impact of Infractions on the Criminal Justice System**: The Judicial Council's 2021 Court Statistics Report notes that in FY 2019-20, out of all the criminal case filings, comprised of felonies, misdemeanors, and infractions, the overwhelming majority were infractions. There were 174,553 felony cases filings, 636,112 misdemeanor filings, and 3,243,819 infraction cases. (*2021 Court Statistics Report*, Judicial Council of California, pp. 3-4, 2021-Court-Statistics-Report.pdf (ca.gov).) And the majority of infractions were traffic infractions. (*Id.* at p. 55.) There were over 1,000,000 bail forfeitures for traffic infractions and over 19,000 bail

forfeitures for non-traffic infractions. (*Id.* at p. 84.)

4) **Argument in Support**: According to the *Lawyers Committee for Civil Rights of the San Francisco Bay Area*, a co-sponsor of this bill, "Under current state law, people who have money to pay fines for infractions like littering, loitering, or jaywalking never have to go to court, but under antiquated legal authority, courts can issue a bench warrant for a person's arrest if they are unable to pay the penalty. These warrants punish people who do not have the money for fines and fees by making them vulnerable to arrest at any time, for infringements that are not otherwise punishable by jail time. Essentially, the current law allows for a direct line to prison for people who are economically insecure. This is an urgent issue of racial and economic justice.

"We have seen over and over the negative impact this kind of warrant has on people's jobs, child care, and housing status, which led LCCRSF to successfully advocate for San Francisco and Alameda County to stop issuing this kind of warrant. Data from San Francisco show that after ending the practice, collections for the infraction fines and fees actually went up. It's time for the rest of California to meet these best practices.

"Police do this type of infraction enforcement disproportionately in communities of color, and therefore these warrants particularly impact Black and Brown people. For instance, in our report Cited for Being in Plain Sight, we show that before San Francisco ended this practice, though Black people only made up 5.8% of the local population, due to systemic racism and targeted, unjust policing, they made up 48.7% of those arrested for 'failure to appear or pay' traffic court warrants. AB 1266 would help bring the state in line with the California Reparations Committee's recommendation to 'eliminate the over-policing of predominantly Black communities.'

"Arresting someone who cannot pay does not give them the means to pay but only further punishes people living in poverty while also exacerbating racial inequality. Similarly, issuing a bench warrant for someone's arrest ignores structural issues in people's lives, especially as many low income people—primarily Black and brown people—face barriers, including transportation, risk of losing employment, childcare, etc., that can prevent them from being able to appear in court to clear a warrant.

"Research shows that punitive measures are ineffective in compelling people to pay or appear in court. Common sense, non-punitive practices like text message reminders and follow-ups help get people to appear in court. Furthermore, courts have other less punitive means to address these infractions under current law, such as trial by absentia and methods to address a failure to pay.

"AB 1266 will continue the trajectory of fine and fee justice in California. Recognizing the broad harm caused by civil assessment fees, Governor Newsom signed AB 199 into law, which erased retroactive debt for civil assessment fees and capped the fee at $100, effective July 1, 2022. AB 1266 builds on this important work, ensuring that families won't be separated because they cannot pay a traffic fine or make a court hearing.

"The overinvestment in law enforcement and simultaneous disinvestment in communities disproportionately targeted by the criminal legal system cannot continue. Eliminating bench warrants for infractions will help end one pipeline to the legal system and allow families to

focus on what matters – to devote their already limited time and resources to meeting their critical needs."

5) **Argument in Opposition**: According to the *California District Attorneys Association*, "this bill eliminates any consequence for the numerous offenders who simply ignore appearing in court and prevent their underlying infraction from ever being adjudicated. Excepting Vehicle Code infractions, as currently drafted, AB 1266 prohibits courts and prosecutors from using the necessary tools that ensure infractions identified in other California codes are properly adjudicated.

"Although AB 1266 would apply to all California codes, only infractions currently identified in the Vehicle Code may be adjudicated by declaration and, in the event the offender fails to appear, in the offender's absence. Pursuant to Vehicle Code § 40903, "[a]ny person who fails to appear as provided by law may be deemed to have elected to have a trial by written declaration upon any alleged infraction, as charged by the citing officer, involving a violation of this code or any local ordinance adopted pursuant to this code." Therefore, the underlying vehicle code infraction may be adjudicated in the offender's absence and, if found guilty, any associated penalty could be sent to civil collections without the need for the court to issue a warrant or the prosecutor to file a misdemeanor charge for failing to appear. This is not the case, however, for the hundreds of infractions that are contained in other California codes.

"Because there is no analogous provision to Vehicle Code § 40903 in other California codes, eliminating the court's authority to issue warrants ensures that numerous infractions will never be adjudicated, and offenders will not be held accountable. Oftentimes, these infractions directly impact public safety or public health....

"In addition, AB 1266 may result in several unintended consequences that run contrary to the purpose of the bill.

- Currently numerous violations provide prosecutors with the discretion to file misdemeanor charges instead of an infraction (commonly known as a "wobblette").Without a mechanism to adjudicate underlying infractions, AB 1266 would incentivize the filing of misdemeanor charges over unenforceable infractions.

- Several infractions currently contain an escalating penalty structure in which multiple infraction violations will ultimately lead to a misdemeanor offense. AB 1266 would nullify any graduated penalty schemes.

- Certain infractions currently involve the imposition of community service hours or other probation obligations, such as restitution, if convicted. By prohibiting courts from issuing a warrant, AB 1266 would deprive courts of their ability to monitor and ensure that offenders are in compliance with their post-conviction obligations. ...

"In order to address the above concerns and ensure that underlying infractions are able to be adjudicated, AB 1266 should either limit its application to the Vehicle Code (or any local ordinance adopted pursuant to the Vehicle Code) or propose an analogous provision to Vehicle Code § 4093 that is applicable to all California codes. If a mechanism were added to

allow adjudication of the underlying infractions, AB 1266 could hold individuals accountable while, at the same time, doing so without the threat of incarceration or arrest."

6) **Related Legislation**: AB 1125 (Hart) eliminates the court's authority to impound a person's driver's license for failure to pay the bail amount on infraction violations of the Vehicle Code. AB 1125 is pending hearing in the Assembly Transportation Committee.

7) **Prior Legislation**: AB 2746 (Friedman), Chapter 800, Statutes of 2022, removes the ability for a court to suspend a person's driver's license for failure to appear.

REGISTERED SUPPORT / OPPOSITION:

Support

Western Center on Law & Poverty (Co-Sponsor)
A New Way of Life Reentry Project
ACLU California Action
Aouon Orange County
California Alliance for Youth and Community Justice
California for Safety and Justice
California-Hawaii State Conference of The NAACP
California Public Defenders Association
Care First California
Children's Defense Fund CA
Communities United for Restorative Youth Justice (CURYJ)
Community Legal Sevices in East Palo Alto
Dignity and Power Now
East Bay Community Law Center
Ella Baker Center for Human Rights
Freedom 4 Youth
Friends Committee on Legislation of California
Indivisible Ca: Statestrong
Initiate Justice
Justice2jobs Coalition
Lawyers' Committee for Civil Rights of The San Francisco Bay Area
Legal Services for Prisoner With Children
Milpa (Motivating Individual Leadership for Public Advancement)
National Association of Social Workers, California Chapter
Policing Project
Prosecutors Alliance California
San Francisco Bay Area Planning and Urban Research Association (SPUR)
San Francisco Financial Justice Project
Secure Justice
Showing Up for Racial Justice (SURJ) Bay Area
Sister Warriors Freedom Coalition
Smart Justice California
The Maven Collaborative
The W. Haywood Burns Institute
United Core Alliance

Young Women's Freedom Center

Opposition

California District Attorneys Association
California State Sheriffs' Association

Analysis Prepared by: Sandy Uribe / 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 1310 (McKinnor) – As Amended March 22, 2023

As Proposed to be Amended in Committee

SUMMARY: Allows a petition for recall and resentencing for a person sentenced on or before January 1, 2022, whose sentence included the imposition of a term for specified firearm enhancements. Specifically, **this bill**:

1) Permits a person who was found, whether by trial or by plea, to have used a firearm under Penal Code section 12022.5 or 12022.53 on or before January 1, 2022, to petition for recall and resentencing before the trial court that entered the judgment in their case.

2) States that a person need not be currently serving a sentence for the enhancement, or be currently serving one, in order to be eligible for relief.

3) Requires the court to make a threshold determination that the petitioner satisfies the criteria to be eligible for resentencing, namely that they were sentenced on one of the two aforementioned firearm enhancements on or before January 1, 2022.

4) Provides that if the petitioner satisfies the criteria, then the court may strike or dismiss the enhancement and resentence in accordance with the law that was applicable on January 1, 2022.

5) Creates a presumption favoring resentencing if the defendant satisfies the criteria, which may only be overcome if the court finds that the defendant is an unreasonable risk of danger to public safety, as specified.

6) States that notwithstanding any other law, the court shall dismiss an enhancement if it is in the furtherance of justice to do so, except if prohibited by an initiative statute.

7) Enumerates factors the court must consider, any one of which weigh greatly in favor of dismissing the enhancement, unless the court finds that dismissal would endanger public safety, as specified.

8) Requires that a person resentenced under these provisions be given credit for time served and also be subject to parole supervision for one year following completion of their sentence, unless the court also exercises discretion to release the person from parole.

9) Requires resentencing to result in a lesser sentence unless the original enhancement was imposed concurrently or stayed; and prohibits resentencing from resulting in a longer sentence than the one originally imposed.

10) Allows a person who has completed their sentence to file an application before the trial court that entered the judgment of conviction in their case.

11) Allows a person committed to the state hospital after being found guilty by reason of insanity to petition the court to have their maximum term of commitment reconsidered and reduced.

12) Provides that if the original sentencing judge is unavailable, the presiding judge shall designate another to rule on the petition for recall and resentencing.

13) States that resentencing does not diminish or abrogate the finality of judgments in any case that does not come within these provisions.

14) States that a resentencing hearing is a post-conviction proceedings for purposes of Marsy's Law, the Victim's Bill of Rights.

15) Requires the appointment of counsel.

16) Permits the parties to waive a resentencing hearing, or alternately have a sentencing hearing via remote technology, if the defendant agrees.

EXISTING LAW:

1) Provides that any person who personally uses a firearm in the commission or attempted commission of a felony, in addition and consecutive to the punishment for the underlying felony offense, shall be sentenced to a term of 3, 4, or 10 years in state prison, unless the use of a firearm is an element of the offense for which they are convicted. A person who personally uses an assault weapon or machine gun during the commission of a felony or attempted felony is subject to an additional consecutive term of 5, 6 or 10 years in state prison. (Pen. Code, § 12022.5, subds. (a) & (b).)[1]

2) Provides for the 10-20-life firearm law. A person who personally uses a firearm, whether or not the firearm was operable or loaded, during the commission of certain enumerated offenses[2] is subject to an additional consecutive term of 10 years in prison. If the firearm is personally and intentionally discharged during the crime, the defendant is subject to an additional consecutive term of 20 years in prison. If discharging the firearm results in great bodily injury (GBI) or death, the defendant is subject to an additional, consecutive term of

---

[1] The firearm need not be operable or loaded. (*People v. Nelums* (1982) 31 Cal.3d 355, 360; see *People v. Steele* (1991) 235 Cal.App.3d 788, 791–795.) Someone personally uses a firearm if he or she intentionally displays the firearm in a menacing manner, hits someone with the firearm, or fires the firearm. (*People v. Bland* (1995) 10 Cal.4th 991, 997; *People v. Johnson* (1995) 38 Cal.App.4th 1315, 1319–1320; see also Pen. Code, § 1203.06, subd. (b)(2).)

[2] The felonies which trigger the enhancements under the 10-20-life firearm law are: murder; mayhem, kidnapping; robbery; carjacking; assault with intent to commit a specified felony; assault with a firearm on a peace officer or firefighter; specified sex offenses; assault by a life prisoner; assault by a prisoner; holding a hostage by a prisoner; any felony punishable by death or life imprisonment; and any attempt to commit one of these crimes other than assault. (Pen. Code, § 12022.53, subd. (a).)

25-years-to-life in prison.[3] (Pen. Code, § 12022.53, subds. (b)-(d).)

3) Provides that if the offense is gang-related, the 10-20-life firearm enhancements shall apply to every principal in the commission of the offense. An enhancement for participation in a criminal street gang shall not be imposed in addition to an enhancement under this provision, unless the person personally used or personally discharged a firearm in the commission of the specified offense. (Pen. Code, § 12022.53, subds. (e)(1) & (e)(2).)

4) Provides that only one additional term of imprisonment under the 10-20-life firearm law shall be imposed per person per crime. An enhancement for use of a firearm shall not be imposed on a person in addition to an enhancement under this provision. (Pen. Code, § 12022.53, subd. (f).)

5) States that when two or more enhancements may be imposed for being armed with or using a a firearm in the commission of a single offense, only the greatest of those enhancements shall be imposed for that offense. (Pen. Code, § 1170.1, subd, (f).)

6) States that, notwithstanding any other law, the sentencing court "shall dismiss" an enhancement "if it is in the furtherance of justice to do so" except if dismissal of that enhancement is prohibited by any initiative statute. (Pen. Code, § 1385, subd. (c)(1).)

7) Instructs the court to consider the following factors in determining whether it is in the interests of justice to dismiss an enhancement:

   a) Application of the enhancement would result in a discriminatory racial impact, as specified;

   b) Multiple enhancements are alleged in a single case, in which case all enhancements but one shall be dismissed;

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

   d) The current offense is connected to mental illness, as specified;

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

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

   g) The defendant was a juvenile when they committed the current offense or any prior juvenile adjudication that triggers the enhancement or enhancements applied in this case;

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

---

[3] The felonies which trigger the 25-to-life enhancement also include discharge of a firearm at an inhabited dwelling and willfully and maliciously discharging a firearm from a motor vehicle. (Pen. Code, § 12022.53, subd. (d).)

i) Though a firearm was used in the current offense, it was inoperable or unloaded. (Pen. Code, § 1385, subd. (c)(3)(A)-(I).)

8) States that proof of the presence of one or more of those mitigating circumstances weighs greatly in favor of dismissing the enhancement, unless the court finds that dismissal of the enhancement would "endanger public safety," meaning that there is a likelihood that the dismissal of the enhancement would result in physical injury or other serious danger to others. (Pen. Code, § 1385, subd. (c)(2).)

9) Provides that no part of the Penal Code is retroactive, unless expressly so declared. (Pen. Code, § 3.)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "This bill will ensure that people receive equal treatment under the law by allowing past legislation to be applied retroactively. AB 1310 will allow for incarcerated people with a firearm enhancement to file a court petition for resentencing. Public safety will not be jeopardized because judges will retain full discretion and prosecutors will have the opportunity to prove that someone is an unreasonable risk to public safety and unfit to be resentenced."

2) **Background of "Use of a Gun and You're Done" Law (i.e., the 10-20-life Firearm Law)**: "In 1997, the Legislature passed the "Use a Gun and You're Done" law that significantly increased sentencing enhancements for possessing a gun at the time of committing a specified felony, such as robbery, homicide, or certain sex crimes. Under the law, if someone uses a gun while committing one of the identified crimes, their sentence is extended by 10 years, 20 years, or 25 years-to-life, depending on how the gun was used. Often the enhancement for gun use is longer than the sentence for the crime itself. For example, in the case of second-degree robbery, a person could serve a maximum of five years for the robbery and an extra 10 years for brandishing a gun during the robbery, even if the gun was unloaded or otherwise inoperable. Someone convicted of first-degree murder would be sentenced to at least 50 years-to-life if a gun was used, whereas if the murder was carried out using another method – such as strangulation – the sentence would be half the length (25 years-to-life). A judge has no discretion in applying this enhancement; if a gun was used, a judge must apply it." (California Budget and Policy Center (2015) *Sentencing in California: Moving Toward a Smarter, More Cost-Effective Approach.*)

   Deterrence was a driving factor behind this legislation: "The Legislature finds and declares that substantially longer prison sentences must be imposed on felons who use firearms in the commission of their crimes, in order to protect our citizens and to deter violent crime." (AB 4 (Bordonaro), Chapter 503, Statutes of 1997.)

   In 2017, the Legislature passed SB 620 (Bradford), Chapter 682, Statutes of 2017. This legislation allowed a court, in the interest of justice, to strike or dismiss a firearm enhancement which otherwise adds a state prison term of 3, 4, or 10 years, or 5, 6, or 10 years, depending on the firearm, or a state prison term of 10 years, 20 years, or 25-years-to-

life depending on the underlying offense and manner of use.

As to the exercise of that judicial discretion, CDCR has informed the committee in the three years preceding the court's ability to strike an enhancement under the 10-20-Life firearm law, there were 6,255 enhancements imposed under the law on 2,845 offenders[4]; and in the three years after judicial discretion to strike the enhancement was implemented, there were 6,078 enhancements pursuant to the statute imposed on 2,672 offenders as follows:

Date Range	Number of Offenders	Number of PC 12002.53(b)	Number of PC 12002.53(c)	Number of PC 12002.53(d)	Number of Enhancements
2015 - 2017	2,845	3,239	1,227	1,789	6,225
2018 - 2021	2,672	3.089	1,181	1,808	6,078

Based on these figures, it appears that in the first three years in which the courts were given discretion to dismiss enhancements under the 10-20-Life rule, judges continued to impose these enhancements at about the same rate as before they lacked discretion to strike them.

This bill would allow a person to petition for recall and resentencing if sentenced on a section 12022.53 enhancement at any time prior to January 1, 2022.

3) **Enhancement for Personal Use of a Firearm**: Penal Code section 12022.5 imposes an additional term of 3, 4, or 10 years for the personal use of a firearm in the commission, or the attempted commission of any felony. (Pen. Code, § 12022.5, subd. (a).) If the firearm is an assault weapon or a machine gun, then the additional term is 5, 6, or 10 years. (Pen. Code, § 12022.5, subd. (b).) This time period is in addition and consecutive to the punishment that you receive for the underlying felony offense. As noted above, SB 620 (Bradford), Chapter 682, Statutes of 2017, allowed a court, in the interest of justice, to strike or dismiss this firearm enhancement, in addition to dismissing the 10-20-life Firearm Law which is applicable only to specified felonies.

   This bill would also allow a petition for recall and resentencing in cases where a section 12022.5 enhancement was imposed at any time prior to January 1, 2022.

4) **Retroactivity**: Penal Code section 3 provides that no provision of the Penal Code is retroactive unless expressly stated. Therefore, changes in the law are generally applied prospectively unless expressly stated otherwise. However, where a change in the law potentially decreases punishment, it can be applied to defendants whose judgments were not

---

[4] The law prohibits imposition of more than one enhancement under the statute per *crime*, but not per *case*. (See Pen. Code, § 12022.53, subd. (f).) Therefore, an offender who is convicted of two or more crimes using or discharging the same gun, can receive multiple enhancements under the 10-20-Life Law. (See e.g. *People v. Palacios* (2007) 41 Cal.4th 720, 733 [Where defendant was convicted of attempted murder, kidnapping for robbery, and kidnapping for carjacking based on a single act against a single victim, the imposition of sentence for three Penal Code section 12022.53 enhancements was proper and did not violate the bar against multiple punishment].)

final on appeal when the change became effective. (See *In re Estrada* (1965) 63 Cal.2d 740.) A case is final when the time for petitioning the United States Supreme Court for a writ of certiorari expires, which is 90 days after a remitter is issued. (*People v. Vieira* (2005) 35 Cal.4th 264, 306.) Consistent with these well-settled principles, in *People v. Woods* (2018) 19 Cal.App.5th 1080, the court of appeal held that SB 620 may apply retroactively, but only to non-final cases.

While the purpose of this bill is to give courts discretion to apply SB 620 retroactively, it goes beyond the effective date the law changed, which was January 1, 2018. Instead, this bill provides that it applies to persons sentenced on or before January 1, 2022.

Presumably, trial courts were aware of their discretion under SB 620 after its effective date. (See *People v. Myers* (1999) 69 Cal.App.4th 305, 310 [We presume trial judges understand the law and understand the requirements of the sentencing laws absent an affirmative record to the contrary].) Does this bill give defendants sentenced between January 1, 2018, and January 1, 2022, two bites at the apple?

5) **Judicial Discretion to Dismiss Enhancements**: Penal Code section 1385 specifies that a judge may, in furtherance of justice, order an action to be dismissed. That provision has been interpreted to allow courts broad discretion to strike prior convictions and enhancements in order to provide individualized sentencing to a defendant. "Section 1385 has long been recognized as an essential tool to enable a trial court 'to properly individualize the treatment of the offender.'" (*People v. Tanner* (1979) 24 Cal.3d 514, 530.) "It was designed to alleviate 'mandatory, arbitrary or rigid sentencing procedures [which] invariably lead to unjust results.'" (*People v. Dorsey* (1972) 28 Cal.App.3d 15, 18.) "Society receives maximum protection when the penalty, treatment, or disposition of the offender is tailored to the individual case. Only the trial judge has the knowledge, ability, and tools at hand to properly individualize the treatment of the offender." (*People v. Williams* (1970) 30 Cal.3d 470, 482, citation and internal quotation marks omitted.) One of the purposes of Section 1385 is to ensure that sentences are proportional to a defendant's conduct.

   Effective January 1, 2022, "the court's authority to strike enhancements has been expanded." (See *California Criminal Law Procedure and Practice*, 2002, § 37.1, p. 1069.) SB 81 (Skinner) Chapter 721, Statutes of 2021, enacted Penal Code section 1385, subdivision (c) which provides that a court "shall dismiss" an enhancement if it is in the furtherance of justice to do so, unless any initiative statute prohibits such action, and unless dismissal endangers public safety. (See *People v. Mendoza* (2023) 88 Cal.App.5th 427 [section 1385, subdivision (c)(2)(C) does not mandate dismissal of an enhancement that could result in a sentence over 20 years where the trial court finds dismissal would endanger public safety].)

   In exercising discretion under section 1385, subdivision (c), the court must give great weight to evidence offered by the defendant to prove any of mitigating circumstances, unless the court finds that dismissal would endanger public safety. Examples of mitigating circumstances include: where the enhancement would result in discriminatory racial impact; where multiple enhancements are alleged in a single case; where the enhancement could result in a sentence exceeding 20 years; and where the enhancement is based on a prior conviction that is over five years old. The statute allows a court to exercise this discretion before, during, or after trial or entry of plea as well as at sentencing.

Penal Code section 1385, subdivision (c) applies only to sentencings after January 1, 2022. (*People v. Flowers* (2022) 81 Cal.App.5th 680.) However, it must be applied when a sentence is vacated or recalled for other reasons and resentencing occurs after January 1, 2022. (*People v. Sek* (2022) 74 Cal.App.5th 657, 674 ["Because any resentencing in this case will take place after Senate Bill No. 81 became effective on January 1, 2022, we agree with Sek that the court must apply the new law in any such proceeding."]; see also *People v. Padilla* (2022) 13 Cal.5th 152 [new laws apply at resentencing after habeas corpus petition led to original sentence being vacated as unconstitutionally imposed].)

Notwithstanding settled case law that a court must apply the laws in effect at the time of a resentencing, this bill re-codifies the criteria and presumptions of SB 81.

6) **Additional Judicial Discretion at Resentencing**: As noted above, Penal Code § 12022.53 provides for three different lengths of sentencing enhancements for the use of a firearm in committing specified crimes. A twenty-five-year enhancement applies if defendant "personally and intentionally" discharged a firearm "and proximately caused great bodily injury." (Pen. Code, § 12022.53, subd. (d).) A twenty-year enhancement may apply to a defendant for "personally and intentionally discharging a firearm" but without proximately causing great bodily injury. (Pen. Code, § 12022.53, subd. (c).) And third, a ten-year enhancement may apply if a defendant "personally uses a firearm" (brandishes) while committing the crime. (Pen. Code, § 12022.53, subd. (b).)

In *People v. Tirado* (2022) 12 Cal.5th 688, the Supreme Court considered whether when exercising discretion to dismiss or strike a gun enhancement per the provisions of SB 620, a judge may lower the length of the enhancement (for example, from 20 to 10 years) by substituting a different subdivision of the statute. The Supreme Court held that it could, noting that a court is not categorically prohibited from imposing a lesser included, uncharged enhancement so long as the prosecution has charged the greater enhancement and the facts supporting imposition of the lesser enhancement have been alleged and found true. (*Id.* at p. 697.) Specifically, the court ruled "When an accusatory pleading alleges and the jury finds true the facts supporting a section 12022.53(d) enhancement, and the court determines that the section 12022.53(d) enhancement should be struck or dismissed under section 12022.53(h), the court may, under section 12022.53(j), impose an enhancement under section 12022.53(b) or (c)." (*Id.* at p. 700.)

Subsequent to the decision in *Tirado*, *supra*, the California Supreme Court has granted review on the question of whether the trial court has discretion to strike a firearm enhancement imposed pursuant to Penal Code section 12022.53 and instead impose a lesser uncharged firearm enhancement pursuant to a different statute, namely Penal Code section 12022.5? (See *People v. McDavid* [nonpublished opinion, review granted 9/28/2022 (S275940/D078919); review on this issue has also been granted with briefing deferred in *People v. Fuller* (2022) 83 Cal.App.5th 394, review granted 11/22/2022 (S276762/E071794); and *People v. Johnson* (2022) 83 Cal.App.5th 1074, review granted 12/14/2022 (S277196/C094491).)

As introduced, this bill would have limited judicial discretion because it provided that "if the court does exercise its discretion, no additional or substitute term of imprisonment shall be added in its place." However, as proposed to be amended in committee, this language is stricken, thereby giving the court full judicial discretion at resentencing. So, for example, it

might substitute a previously stayed firearm enhancement; or pursuant to *Tirado*, *supra*, substitute a lesser punishment under the 10-20-life firearm enhancement; or depending on how the California Supreme Court rules in *McDavid*, *supra*, potentially imposing a lesser uncharged firearm enhancement under section 12022.5 when the enhancement to be stricken is one under the 10-20-life firearm enhancement.

7) **Enhancements and Proposition 57**: In November 2016, California voters overwhelmingly passed Proposition 57, the Public Safety and Rehabilitation Act of 2016 (Prop. 57). Prop. 57 created a process for parole consideration for eligible people convicted of nonviolent crimes. Those who demonstrate that their release would not pose an unreasonable risk of violence to the community may be eligible for release upon serving the full term of their primary offense when an alternative sentence has been imposed. Prop. 57 also gave the California Department of Corrections and Rehabilitation (CDCR) new authority to award certain credits that reduce the length of state prison sentences.

   Propostion 57 adopted California Constitution, Article I, section 32, which states:

   > (a)(1) Parole Consideration: Any person convicted of a nonviolent felony offense and sentenced to state prison shall be eligible for parole consideration after completing the full term for his or her primary offense.
   > (A) For purposes of this section only, the full term for the primary offense means the longest term of imprisonment imposed by the court for any offense, excluding the imposition of an enhancement, consecutive sentence, or alternative sentence.
   > ....
   > (b) The Department of Corrections and Rehabilitation shall adopt regulations in furtherance of these provisions, and the Secretary of the Department of Corrections and Rehabilitation shall certify that these regulations protect and enhance public safety.

   Nonviolent offender parole eligibility is based on an inmate's current convictions. (*In re Gadlin* (2020) 10 Cal.5th 915, 943.) CDCR regulations define a "violent felony" for purposes of early parole consideration as a crime or enhancement listed in Penal Code section 667.5, subdivision (c). (Cal. Code Regs., tit. 15, § 3490, subd. (c)). The ballot materials provide support for this interpretation. (See I*n re Mohammad* (2022) 12 Cal.5th 518, 542.) In its classification of "violent felony," Penal Code 667.5 includes "any felony in which the defendant uses a firearm which use has been charged and proved as provided in subdivision (a) of [Penal Code] Section 12022.3, or Section 12022.5 or 12022.55." (Pen. Code, § 667.5, subd. (c)(8).)

   Because the people impacted by this bill are currently serving a sentence for a firearm enhancement under two of the aforementioned provisions, they are considered violent felons and not entitled to parole eligibility under Prop. 57. However, if a person's sentence were to be recalled in accordance with the provisions of this bill, and the court dismissed the firearm use enhancement at resentencing, then that person would become eligible for early parole consideration under Prop. 57.

8) **Disparate Impact**: According to the 2020 Annual Report by the Committee on the Revision of the Penal Code, over 80% of the people sentenced to state prison are serving a sentence lengthened by an enhancement, with some of the most common enhancements including

firearm-use enhancements. (See *Annual Report and Recommendations 2020*, Committee on Revision of the Penal Code, at p. 37-38, http://www.clrc.ca.gov/CRPC/Pub/Reports/CRPC_AR2020.pdf.) Citing data provided by the California Department of Correction and Rehabilitation's Office of Research, the committee noted that these enhancements are applied disproportionately against people of color and people suffering from mental illness. (*Id.* at p. 38.)

Applying the judicial discretion conferred by SB 620 retroactively, as this bill would do, may help to alleviate that disparate impact.

9) **Argument in Support**: According to *Initiate Justice*, a co-sponsor of this bill, "AB 1310 (McKinnor) will allow currently incarcerated people with firearm enhancements to file a court petition for resentencing by making previous legislation, SB 620 (Bradford), retroactive. Passed in 2017, SB 620 (Bradford), gives judges the discretion to strike or dismiss firearm enhancements at sentencing in the interest of justice, but this change in law was not made available to anyone currently incarcerated. AB 1310 will ensure currently incarcerated people sentenced before January 1, 2022 will be able to petition the court for the same relief.

"Sentence enhancements add extra years to someone's sentence in addition to the statutory ranges for criminal offenses. There are more than 100 sentence enhancements across California's penal code. These enhancements are costly, ineffective, and a relic of the failed tough on crime era. Firearm enhancements are one of the most commonly used enhancements that add extra years to a sentence. The latest available data shows that 37,237 people in CDCR custody had some form of gun enhancement as part of their sentence. 89% of these people were people of color. Many people receive these firearm enhancements without a firearm ever being physically recovered, or if a firearm was recovered, it doesn't need to even be loaded or operable for the enhancement to be applied. Additional research has shown that people suffering from mental illness disproportionately recieve these enhancements.

"Not only do enhancements not serve public safety goals, they also serve no meaningful deterrence purpose. Research on extreme sentence lengths offers little to no support for the idea that the threat of longer sentences deters people from committing crimes.

"This bill is not a get-out-of-jail free card because judges retain full discretion and prosecutors will be able to argue that someone is an unreasonable risk to public safety and unfit to be resentenced. Therefore public safety will not be jeopardized and there will be significant state savings while striking the right balance between fairness and safety."

10) **Argument in Opposition**: According to the *San Diego Deputy District Attorneys Association*, "This bill will make retroactive the recent legislative changes to Penal Code section 1385 as it relates to the most serious gun enhancements that apply to murder, rape, robbery and assaults with a deadly weapon. This is beyond burdensome on the criminal justice system, and it also falsely assumes that the courts did not already have discretion to strike or dismiss those enhancements in the interests of justice. This is a direct attack on the finality of the most violent felonies and on victims who have been killed or injured by gun violence.

"This bill allows everyone convicted of a gun enhancement prior to 2022 to be resentenced, presumably with all other new laws now available for reconsideration as well. This will break open the finality of nearly all violent felonies cases in California, including cases that have been final for decades. This bill ignores the appellate and habeas process that are available to all convicted defendants to correct mistakes made during the criminal prosecution.

"In addition to Deputy Public Defenders who will be assigned to file these petitions, Deputy District Attorneys will be assigned each petition. The resentencing of felony murders pursuant to Senate Bill 1437 were a burden on the criminal justice system, this will be an avalanche because of the sheer number of violent crimes that have been committed with guns that will all now be subject to being resentence. Victims in every city, of every age will be recalled to court to be told their family's member's murderer or the perpetrator who shot them will now be resentenced. There will be untold trauma to these victims that cannot be mitigated by hiring additional victim advocates. This is truly going to be a living nightmare for thousands of victims and the family of victims.

"This is not only a burden on the criminal justice system, but also a travesty of justice for all who try to keep the public safe from gun violence."

11) **Related Legislation**:

a) AB 27 (Ta), would have exempted specified firearm enhancements from the provision of law that states a court shall dismiss an enhancement if it is in the furtherance of justice and does not endanger public safety. AB 27 failed passage in this committee.

b) AB 328 (Essayli), would have prohibited the court from dismissing an enhancement for personal use of a firearm in the commission of certain violent crimes, except when the person did not personally use or discharge the firearm or when the firearm was unloaded. AB 328 failed passage in this committee and reconsideration was refused.

c) AB 758 (Dixon), would create a sentencing enhancement for persons who in the commission, or attempted commission, of a felony are armed with a ghost gun. AB 758 failed passage in this committee but was granted reconsideration.

12) **Prior Legislation**:

a) SB 81 (Skinner), Chapter 721, Statutes of 2021, requires the court to dismiss an enhancement if it is in the furtherance of justice to do so, except if dismissal is prohibited by an initiative statute, or unless dismissal endangers public safety.

b) SB 620 (Bradford), Chapter 682, Statutes of 2017, allows a court, in the interest of justice, to strike or dismiss a firearm enhancement which otherwise adds a state prison term of three, four, or 10 years, or five, six, or 10 years, depending on the firearm, or a state prison term of 10 years, 20 years, or 25-years-to-life depending on the underlying offense and manner of use.

c) AB 1509 (Lee), of the 2021-2022 legislative session, would have repealed several firearm enhancements, reduced the penalty for using a firearm in the commission of specified crimes from 10 years, 20 years, or 25-years-to-life to one, two or three years, and authorized recall and resentencing for a person serving a term for these enhancements. AB 1509 was held in the Assembly Appropriations Committee.

d) AB 4 (Bordonaro), Chapter 503, Statutes of 1997, provided for the 10-20-life firearm law.

REGISTERED SUPPORT / OPPOSITION:

Support

ACLU California Action
California Coalition for Women Prisoners
California for Safety and Justice
California Public Defenders Association (CPDA)
Californians United for A Responsible Budget
Communities United for Restorative Youth Justice (CURYJ)
Ella Baker Center for Human Rights
Fair Chance Project
Initiate Justice
Initiate Justice Action
Legal Services for Prisoners With Children
Milpa (Motivating Individual Leadership for Public Advancement)
Root & Rebound
San Francisco Public Defender
Santa Cruz Barrios Unidos INC.
Showing Up for Racial Justice (SURJ) Bay Area
Smart Justice California
The W. Haywood Burns Institute
Uncommon Law
Underground Grit
Young Women's Freedom Center

Opposition

California District Attorneys Association
California State Sheriffs' Association
San Diegans Against Crime
San Diego County District Attorney's Office
San Diego Deputy District Attorneys Association

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

Amended Mock-up for 2023-2024 AB-1310 (McKinnor (A))

Mock-up based on Version Number 98 - Amended Assembly 3/22/23
Submitted by: Sandy Uribe, Assembly Public Safety Committee

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

SECTION 1. Section 1385.2 is added to the Penal Code, to read:

1385.2. (a) A person who, on or before January 1, 2022, suffered a conviction, whether by trial or plea, of an enhancement under Section 12022.5 or 12022.53 may petition for a recall of sentence before the trial court that entered the judgment of conviction in their case to request resentencing. Eligibility for relief pursuant to this section is not dependent on the petitioner currently serving a sentence or having ever served a sentence due to the conviction for the enhancement.

(b) Upon receiving a petition under subdivision (a), the court shall determine whether the petitioner satisfies the criteria in subdivision (a). If the petitioner satisfies the criteria in subdivision (a), the court may strike or dismiss the enhancement and resentence in accordance with those sections as they read on January 1, 2022.

(c) If the application satisfies the criteria in subdivision (a), there shall be a presumption favoring resentencing of the defendant, which may only be overcome if a court finds the defendant is an unreasonable risk of danger to public safety, as defined in subdivision (c) of Section 1170.18. Notwithstanding any other law, the court shall dismiss an enhancement if it is in the furtherance of justice to do so, except if dismissal of that enhancement is prohibited by any initiative statute.

(d) In exercising its discretion under this section, the court shall consider and afford great weight to evidence offered by the defendant to prove that any of the mitigating circumstances in paragraphs (1) to (10) are present. Proof of the presence of one or more of these circumstances weighs greatly in favor of dismissing the enhancement, unless the court finds that dismissal of the enhancement would endanger public safety. "Endanger public safety" means there is a likelihood that the dismissal of the enhancement would result in physical injury or other serious danger to others.

(1) Application of the enhancement would result in a discriminatory racial impact as described in paragraph (4) of subdivision (a) of Section 745.

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

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

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

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

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

(7) The defendant was a juvenile when they committed the current offense or any prior juvenile adjudication that triggers the enhancement or enhancements applied in this case.

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

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

(10) The court may consider postconviction factors, including, but not limited to, the disciplinary record and record of rehabilitation of the defendant while incarcerated, evidence that reflects whether age, time served, and diminished physical condition, if any, have reduced the defendant's risk for future violence, and evidence that reflects that circumstances have changed since the original sentencing so that continued incarceration is no longer in the interest of justice.

(e) The circumstances listed in subdivision (d) are not exclusive and the court maintains authority to dismiss or strike an enhancement in accordance with subdivision (c).

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

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

(1) "Childhood trauma" means that as a minor the person experienced physical, emotional, or sexual abuse, physical or emotional neglect. A court may conclude that a defendant's childhood trauma was connected to the offense if, after reviewing any relevant and credible evidence, including, but not limited to, police reports, preliminary hearing transcripts, witness statements, medical records, or records or reports by qualified medical experts, the court concludes that the

defendant's childhood trauma substantially contributed to the defendant's involvement in the commission of the offense.

(2) "Prior victimization" means the person was a victim of intimate partner violence, sexual violence, or human trafficking, or the person has experienced psychological or physical trauma, including, but not limited to, abuse, neglect, exploitation, or sexual violence. A court may conclude that a defendant's prior victimization was connected to the offense if, after reviewing any relevant and credible evidence, including, but not limited to, police reports, preliminary hearing transcripts, witness statements, medical records, or records or reports by qualified medical experts, the court concludes that the defendant's prior victimization substantially contributed to the defendant's involvement in the commission of the offense.

(h) A person who is resentenced pursuant to subdivision (b) shall be given credit for time served and shall be subject to parole for one year following completion of their sentence, unless the court, in its discretion, as part of its resentencing order, releases the person from parole. The person shall be subject to parole supervision by the Department of Corrections and Rehabilitation pursuant to Section 3000.08 and the jurisdiction of the court in the county in which the parolee is released or resides, or in which an alleged violation of supervision has occurred, for the purpose of hearing petitions to revoke parole and impose a term of custody.

(i) Resentencing pursuant to this section shall result in a lesser sentence, unless the original enhancement was imposed concurrently or stayed and no other provision requires further reduction. ~~If there was a term associated with an enhancement stricken or dismissed pursuant to this section, no additional or substitute term shall be added in its place during resentencing.~~ Resentencing pursuant to this section shall not result in a longer sentence than the one originally imposed. The court shall apply the sentencing rules of the Judicial Council and apply any other changes in law that reduce sentences or provide for judicial discretion so as to eliminate disparity of sentences and to promote uniformity of sentencing.

(j) A person who has completed their sentence for a conviction, whether by trial or plea, of an enhancement described in subdivision (a) may file an application before the trial court that entered the judgment of conviction in their case to have the enhancement conviction or convictions reconsidered pursuant to this section.

(k) If the application satisfies the criteria in subdivision (j), the court may vacate the enhancement convictions.

(l) If the court that originally sentenced the petitioner is not available, the presiding judge shall designate another judge to rule on the petition or application.

(m) This section does not diminish or abrogate any rights or remedies otherwise available to the petitioner or applicant.

(n) Resentencing pursuant to this section does not diminish or abrogate the finality of judgments in any case that does not come within the purview of this section.

(o) A resentencing hearing ordered under this section shall constitute a "postconviction release proceeding" under paragraph (7) of subdivision (b) of Section 28 of Article I of the California Constitution (Marsy's Law).

(p) (1) A person who is committed to a state hospital after being found not guilty by reason of insanity pursuant to Section 1026 may petition the court to have their maximum term of commitment, as established by Section 1026.5, reconsidered pursuant to a petition filed in accordance with this section. In order for the maximum term of commitment to be reduced, the person shall have met all of the criteria for a modification of sentence pursuant to this section, had the person been found guilty.

(2) If a petitioner's maximum term of confinement is ordered reduced under this subdivision, the new term of confinement shall provide opportunity to meet requirements provided in subdivision (b) of Section 1026.5. If a petitioner's new maximum term of confinement ordered under this section does not provide sufficient time to meet requirements provided in subdivision (b) of Section 1026.5, the new maximum term of confinement may be extended, not more than 240 days from the date the petition is granted, in order to meet requirements provided in subdivision (b) of Section 1026.5.

(q) The court shall appoint counsel for a hearing pursuant to this section.

(r) The parties may waive a resentencing hearing. If the hearing is not waived, the resentencing hearing may be conducted remotely through the use of remote technology, if the defendant agrees.

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

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

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

AB 1351 (Haney) – As Introduced February 16, 2023

SUMMARY: Requires all coroners or medical examiners to submit quarterly reports to the Department of Public Health (DPH) on deaths caused by, or involving, overdoses of any drugs. Specifically, **this bill**:

1) Requires coroners or medical examiners to submit written reports on the 15th day of January, April, July, and October to the DPH that detail the death of any person involved or caused by an overdose of any drug within the preceding three-month period.

2) States that the written reports must indicate the primary substances involved in, or causing, each death, as well as the presence, if any, of methamphetamine, opioids, cocaine, or benzodiazepines are included.

EXISTING LAW:

1) Requires coroners to determine the manner, circumstances and cause of death in the following circumstances, among others:

   a) Violent, sudden or unusual deaths;

   b) Known or suspected homicide, suicide or accidental poisoning;

   c) Drowning, fire, hanging, gunshot, stabbing, cutting, exposure, starvation, acute alcoholism, drug addiction, strangulation, aspiration, or sudden infant death syndrome;

   d) Deaths known or suspected as due to contagious disease and constituting a public hazard;

   e) Deaths from occupational diseases or occupational hazards;

   f) Deaths reported for inquiry by physicians and other persons having knowledge of the death. (Gov. Code, § 27491.)

2) Requires the coroner or medical examiner to sign the certificate of death if they perform a mandatory inquiry. (Gov. Code, § 27491, subd. (a).)

3) States that the content of a death certificate must include, among other things, personal data of the decedent, date of death, place of death, disease or conditions leading directly to death and antecedent causes, accident and injury information, and information regarding pregnancy. (Health & Saf. Code, § 102875.)

4) Allows the medical and health section data and time of death to be filled out in certain circumstances by the physician or surgeon last in attendance or by a supervised licensed physician assistant, unless the coroner is required to certify the medical and health section data. (Health & Saf. Code, § 102795.)

5) Requires a physician and surgeon, physician assistant, funeral director, or other person to notify the coroner when they have knowledge that a death occurred, or if they have charge of a body in which death occurred under any of the following, among others:

   a) Without medical attendance;

   b) During continued absence of attending physician and surgeon;

   c) Where attending physician and surgeon, or physician assistant is unable to state cause of death; and,

   d) Reasonable suspicion to suspect death was caused by criminal act. (Health & Saf. Code, § 102850.)

6) Requires an attending physician's certificate be completed within 15 hours of death, or, if a coroner examined the body, within three days after examination of the body. (Health & Saf. Code, § 102800.)

7) Requires each death to be registered with the local registrar of births and deaths in the district in which the death was found or officially pronounced. (Health & Saf. Code, § 102775.)

8) Requires a funeral director, or person acting in lieu thereof, to prepare the certificate, other than the medical and health section data, and register it with the local registrar. (Health & Saf. Code, §§ 102780, 102790.)

9) States that the local registrar of deaths must carefully examine each certificate before acceptance for registration, and if any incomplete or incorrect certificates are submitted, to require further information as needed to make the certificate consistent with established policies. (Health & Saf. Code, § 102305.)

10) Requires the DPH to establish an Internet-based electronic death registration system for the creation, storage, and transfer of death registration information. (Health & Saf. Code, § 102778.)

11) Requires the DPH to access data within the electronic death registration system to compile reports on veteran suicide that include information on age, sex, race, county of residence, and method of suicide. (Health & Saf. Code, § 102791.)

12) Requires DPH to track data on pregnancy-related deaths and publish such data at least once every three years, as specified. (Health & Saf. Code, § 123630.4.)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: None received.

2) **Reporting Drug Overdoses:** California is taking a multi-pronged, collaborative approach to comprehensively address the drug epidemic taking place in the state. (DPH. *Overdose Prevention Initiative*. (Last updated Dec. 6, 2022.) <https://www.cdph.ca.gov/Programs/CCDPHP/DCDIC/SACB/Pages/PrescriptionDrugOverdoseProgram.aspx> [as of Mar. 22, 2023].) From 2012 to 2018, heroin overdose deaths increased 117%, amphetamine overdose deaths increased 212%, and fentanyl overdose deaths increased 858%. (*Id.*) In 2018 there was a total of 786 deaths due to fentanyl overdose, in 2021 there were 7,175. (*Id.*; DPH. *California Overdose Surveillance Dashboard*. <https://skylab.cdph.ca.gov/ODdash/?tab=Home> [as of Mar. 22, 2023].)

   California's Overdose Prevention Initiative (OPI) collects and shares data on fatal and non-fatal drug related overdoses, overdose risk factors, prescriptions, and substance use. (DPH. *Overdose Prevention Initiative*. [Last updated Mar. 14, 2023].) <https://www.cdph.ca.gov/Programs/CCDPHP/sapb/Pages/OPI-landing.aspx> [as of Mar. 22, 2023].)

   The OPI works with local and state partners to address the complex and evolving nature of the drug overdose epidemic by data collection and analysis, prevention programs, public awareness and education campaigns, and safe prescribing and treatment practices. (DPH. *Drug Overdose Response Partner Recommendations*. (Last updated Feb. 16, 2023].) <https://www.cdph.ca.gov/Programs/CCDPHP/sapb/Pages/Drug-Overdose-Response.aspx> [as of Mar. 22, 2023].) One of the five recommendations it makes to local and statewide partners is to improve rapid identification of drug overdose outbreaks partnering with coroner and medical examiner offices, healthcare facilities, and emergency medical services to obtain overdose data to form a timely response. (*Id.*)

   Generally, drug overdose deaths require lengthier investigations that can include forensic toxicology analysis before the data can be used even in a preliminary or provisional manner. (Centers for Disease Control and Prevention (CDC) *Vital Statistics Rapid Release: Provisional Drug Overdose Death Counts*. (Last reviewed Mar. 15, 2023) <https://www.cdc.gov/nchs/nvss/vsrr/drug-overdose-data.htm#drug_specificity> [as of Mar. 22, 2023].) Provisional data is used to give an approximate, although not completely accurate, depiction of drug overdose deaths. (*Id.*) Provisional counts of drug overdose deaths are underestimated relative to final counts, the degree of which is primarily determined by the percentage of records with the manner of death reported as "pending investigation" and tends to vary by a number of factors. (*Id.*) At the federal level, provisional estimates of drug overdose deaths were traditionally reported at 6 months after the date of death, however, due to recent improvements, the 6-month lag was shortened to 4 months. (*Id.*)

   In California, the latest provisional data that the OPI displays was released on February 15, 2023, and it showed overdose deaths up to September 2022. (OPI. *Preliminary Monthly Fatal Drug-Related Overdose Counts*. (Feb. 15, 2023) <https://www.cdph.ca.gov/Programs/CCDPHP/sapb/CDPH%20Document%20Library/Prelim_Monthly_Death_Data_2023_01_FINAL_ADA.pdf> [as of Mar. 23, 2023].) Recent changes in the way overdose deaths are reported are resulting in quicker, although perhaps

more tentative, data.

Overdose Detection Mapping Application Program (ODMAP) provides near real-time suspected overdose surveillance data. (ODMAP. *The Overdose Mapping Application Program*. (Oct. 2020) <https://www.cossapresources.org/Content/Documents/Articles/Overdose_Mapping_Application_Program_Platform_and_User_Guide.pdf> [as of Mar. 23, 2023] at p. 15.) It does so by allowing first responders to submit information while at the scene of an overdose. (*Id.* at 4.) Since its creation in 2017, ODMAP has expanded to 3,330 agencies across 1,019 counties in the U.S. (*Id.* at 5.) SB 67 (Seyarto), which is currently pending hearing in the Senate Public Safety Committee, would create an ODMAP pilot program.

This bill would require coroners and medical examiners to submit quarterly reports directly to the DPH regarding drug overdose deaths. Although this information would not be as near real-time as ODMAP contemplates, it may be a more streamlined manner to receive drug overdose death data while remaining more accurate. The administrative practicalities of this bill remain open. Currently there is no opposition to the bill that raise feasibility concerns.

3) **Argument in Support**: According to the California Department of Justice, "The rapid spread of fentanyl poses an acute danger because many users are not aware that fentanyl has been added to an illicit narcotic such as heroin or methamphetamine. It is critical that public health and law enforcement agencies have up-to-date information on fentanyl-related deaths in order to track how and where the drug is spreading. Unless local corner's offices are required to report overdose deaths on a more frequent basis, CDPH will be unable to publish overdose death data in a timely manner.

"AB 1351 allows law enforcement to track the spread of fentanyl in real time and identify areas to focus their efforts. The California Department of Justice (DOJ) works with local and federal law enforcement partners through the Fentanyl Enforcement Program to detect, deter, disrupt, and dismantle criminal fentanyl operations. DOJ's ongoing work to address the fentanyl crisis includes the seizure of over four million fentanyl pills and almost 900 pounds of fentanyl powder, and over 200 arrests through the DOJ's Bureau of Investigation and work with allied task forces throughout California since April 2021.

"Opioid addiction, abuse, and overdose deaths have torn families apart, damaged relationships, and eroded the social fabric of communities. AB 1351 is an important part of a multi-faceted legislative approach needed to address this ongoing crisis."

4) **Related Legislation**: SB 67 (Seyarto), would, among other things, create a pilot program requiring coroners or medical examiners to report fatalities caused by, or involving overdoses, to a mapping application program within 72 hours of examining the decedent; and would require DPH to submit a report to the legislature on specified outcomes. SB 67 is currently pending hearing in the Senate Health Committee.

5) **Prior Legislation**:

   a) SB 464 (Mitchell) Chapter 533, Statutes of 2019, among other things, required DPH to track severe maternal morbidity data and to publish such data.

b) SB 1695 (Escutia) Chapter 678, Statutes of 2002, among other things, required DPH to create a webpage on drug overdose trends in California, including death rates, in order to ascertain changes in the cause or rate of fatal and nonfatal drug overdoses.

c) AB 2550 (Nation) Chapter 857, Statutes of 2002, required DPH to establish an Internet-based electronic death registration system.

REGISTERED SUPPORT / OPPOSITION:

Support

Attorney General Rob Bonta

Opposition

None

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

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

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

AB 1368 (Lackey) – As Introduced February 17, 2023

SUMMARY: Requires law enforcement agencies to submit and the crime lab to process sexual assault kits within specified time frames. Specifically, **this bill**:

1) Requires a law enforcement agency (LEA) that received sexual assault forensic evidence connected to a reported crime prior to January 1, 2016, to submit the evidence to the crime lab on or before January 31, 2025.

2) Provides that a LEA that received sexual assault forensic evidence connected to a reported crime prior to January 1, 2016, and submitted to the crime lab on or before January 1, 2024, the crime lab shall process the sexual assault evidence kit, create DNA profiles when able, and upload qualifying DNA profiles into Combined DNA Index System (CODIS) as soon as possible, but no later than January 31, 2026

EXISTING LAW:

1) Creates the Sexual Assault Victims' DNA Bill of Rights, which regulates the timing of the testing of samples taken from a sexual assault victim including duties of crime labs and how the samples shall be upload to the CODIS. (Pen. Code, § 680.)

2) Requires a LEA in whose jurisdiction a specified sex offense occurred to do one of the following for any sexual assault forensic evidence received by the LEA on or after January 1, 2016:

   a) Submit sexual assault forensic evidence to the crime lab within 20 days after it is booked into evidence; or,

   b) Ensure that a rapid turnaround DNA program is in place to submit forensic evidence collected from the victim of a sexual assault directly from the medical facility where the victim is examined to the crime lab within five days after the evidence is obtained from the victim (Pen. Code, § 680, subd. (c)(1).)

3) Provides that the crime lab shall do one of the following for any sexual assault forensic evidence received by the crime lab on or after January 1, 2016:

   a) Process sexual assault forensic evidence, create DNA profiles when able, and upload qualifying DNA profiles into CODIS as soon as practically possible, but no later than 120 days after initially receiving the evidence; or,

   b) Transmit the sexual assault forensic evidence to another crime lab as soon as practically possible, but no later than 30 days after initially receiving the evidence, for processing of

the evidence for the presence of DNA. If a DNA profile is created, the transmitting crime lab shall upload the profile into CODIS as soon as practically possible, but no longer than 30 days after being notified about the presence of DNA. (Pen. Code, § 680, subd. (c)(2).)

4) Requires the LEA investigating the crime to inform the victim of the status of the DNA testing of the rape kit evidence or other crime scene evidence from the victim's case, upon the victim;s request. The LEAmay, at its discretion, require that the victim's request be in writing. The LEA shall respond to the victim's request with either an oral or written communication, or by email, if an email address is available. The LEA is not required to communicate with the victim or the victim's designee regarding the status of DNA testing absent a specific request from the victim or the victim's designee. (Pen. Code, § 680 subd. (d)(1).)

5) States that sexual assault victims have the right to access the Department of Justice's Sexual Assault Forensic Evidence Tracking (SAFE-T) database portal for information involving their own forensic kit. (Pen. Code, § 680 subd. (d)(2).)

6) Provides that sexual assault victims have the following rights:

   a) The right to be informed whether or not a DNA profile of the assailant was obtained from the testing of the rape kit evidence or other crime scene evidence from their case;

   b) The right to be informed whether or not the DNA profile of the assailant developed from the rape kit evidence or other crime scene evidence has been entered into the Department of Justice Data Bank of case evidence; and,

   c) The right to be informed whether or not there is a match between the DNA profile of the assailant developed from the rape kit evidence or other crime scene evidence and a DNA profile contained in the Department of Justice Convicted Offender DNA Data Base, provided that disclosure would not impede or compromise an ongoing investigation. (Pen. Code, § 680, subd. (d)(3).)

7) Requires that, if an LEA does not analyze DNA evidence within six months prior to the established time limits, a victim of a sexual assault offense be informed, either orally or in writing, of that fact by the LEA. (Pen. Code, § 680, subd. (e).)

8) Provides that if an LEA intends to destroy or dispose of rape kit evidence or other crime scene evidence from an unsolved sexual assault case, the victim shall be given written notification by the LEA of that intention. (Pen. Code, § 680, subd. (f)(1).)

9) Specifies that an LEA shall not destroy or dispose of rape kit evidence or other crime scene evidence from an unsolved sexual assault case before at least 20 years, or if the victim was under 18 years of age at the time of the alleged offense, before the victim's 40th birthday. (Pen. Code, § 680, subd. (f)(2).)

10) Specifies that written notification to the victim about the destruction of the evidence in an unsolved sexual assault case shall be made at least 60 days prior to its destruction or disposal. (Pen. Code, § 680, subd. (g).)

11) Provides that a sexual assault victim may designate a sexual assault victim advocate, or other support person of the victim's choosing, to act as a recipient of the above information. (Pen. Code, § 680, subd. (h).)

12) Requires that the Department of Justice(DOJ), on or before July 1, 2022, and in consultation with LEAs and crime victims groups, establish a process that allows a survivor of sexual assault to track and receive updates privately, securely, and electronically regarding the status, location, and information regarding their sexual assault evidence kit in the department's SAFE-T database. (Pen. Code, § 680.1.)

13) Provides that the DOJ DNA Laboratory is to serve as a repository for blood specimens, buccal swab, and other biological samples collected and is required to analyze specimens and samples and store, compile, correlate, compare, maintain, and use DNA and forensic identification profiles and records related to the following:

    a) Forensic casework and forensic unknowns;

    b) Known and evidentiary specimens and samples from crime scenes or criminal investigations;

    c) Missing or unidentified persons;

    d) Persons required to provide specimens, samples, and print impressions;

    e) Legally obtained samples; and,

    f) Anonymous DNA records used for training, research, statistical analysis of populations, quality assurance, or quality control. (Pen. Code, § 295.1, subd. (c)(1)-(6).)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "Victim-Survivors of sexual assault experience one of the most destabilizing recovery processes – which would only be worsened by finding out that DNA collected from your body sat on a shelf for years without any action. Survivors often face fatigue when confronted with apathy as self-advocates. A victim should not be responsible for following up with detectives and district attorneys in their journey to realize justice, especially for a felony charge. Behind each untested rape kit is a person whose life has been devastatingly altered. We owe it to the survivors represented by these untested kits to help them seek justice."

2) **Sexual Assault Evidence Kits and the Combined DNA Index System (CODIS)**: After a possible sexual assault has occurred, victims of the crime may choose to be seen by a medical professional, who then conducts an examination to collect any possible biological evidence left by the perpetrator. To collect forensic evidence, many jurisdictions provide

what is called a "sexual assault evidence kit" (SAE kit). SAE kits often contain a range of scientific instruments designed to collect forensic evidence such as swabs, test tubes, microscopic slides, and evidence collection envelopes for hairs and fibers.

Prior to 2019, the composition of SAE kits varied throughout California. (Audit of Untested Sexual Assault Forensic Evidence Kits: 2020 Report (ca.gov) at p. 4 [as of March 21, 2023]) Although they were similar, the exact SAE kit used by a medical facility was determined by the crime laboratory serving that jurisdiction. (*Id.*) AB 1744 (Stats. 2016, ch. 857) required the Department of Justice's Bureau of Forensic Services (BFS), the California Association of Crime Laboratory Directors and the California Association of Criminalists to collaborate with public crime laboratories and the California Clinical Forensic Medical Training Center (CCFMTC) to develop a standardized SAE kit to be used by all California jurisdictions. (*Id.*) The basic components were to be established by January 30, 2018, and guidelines pertaining to the use of the kit components were to be issued on or before May 30, 2019. (*Id.*)The new standardized kit was finalized and ready for production in September 2019. (*Id.*)

Analyzing forensic evidence from SAE kits assists in linking the perpetrator to the sexual assault. Generally, once a hospital or clinic has conducted a SEA kit examination, it transfers the kit to a local law enforcement agency. From there, the law enforcement agency may send the kit to a forensic laboratory. Evidence collected from a kit can be analyzed by crime laboratories and could provide the DNA profile of the offender. Once law enforcement authorities have that genetic profile, they could then upload the information onto CODIS.

Created by the FBI in 1990, CODIS is a national database that stores the genetic profiles of sexual assault offenders onto a software program. By exchanging, testing, and comparing genetic profiles through CODIS, law enforcement agencies can discover the name of an unknown suspect who was in the system or link together cases that still have an unknown offender. The efficacy of CODIS depends on the volume of genetic profiles that law enforcement agencies submit. (FBI website, Combined DNA Index System (CODIS), available at: https://le.fbi.gov/science-and-lab-resources/biometrics-and-fingerprints/codis#Combined-DNA%20Index%20System%20CODIS ,[as of March 20, 2023].) At present, more than 190 public law enforcement laboratories use CODIS. (*Id.*)

3) **Untested Sexual Assault Evidence Kits**: There are a number of reasons why law enforcement authorities may not submit a SAE kit to a crime lab. For example, the identity of the suspect may never have been at issue. Often times, whether or not the victim consented to the sexual activity is the most important issue in the case, not the identity of the suspect. In other cases, charges may be dropped for a variety for reasons, or a guilty plea may be entered rendering further investigation moot. (NIJ, *The Road Ahead: Unanalyzed Evidence in Sexual Assault Case*s, May 2011, at page 3, available at: https://www.ncjrs.gov/pdffiles1/nij/233279.pdf, [as of March 20, 2023].)

A 2020 report by the California Attorney General Division of Law Enforcement Bureau of Forensic Service found that the backlog for analyzing sexual assault evidence kits continues:

> Until 2015, California did not have a system in place for collecting comprehensive data on the number of SAE kits collected from survivors/victims of sexual assault and the status of untested kits. SAE kit records were only maintained at the agency level and were not centrally tracked or reported. In an effort to collect and centralize data regarding

the status and disposition of SAE kits in the possession of LEAs and crime laboratories, the Department created the Sexual Assault Forensic Evidence Tracking (SAFE-T) database in 2015. Access to SAFE-T is strictly limited to designated users from LEAs, public crime laboratories, and district attorneys' offices. Although strongly encouraged, LEAs and crime laboratories were not legally mandated to use SAFE-T to track their SAE kits until 2017 when AB 41 (Stats. 2017, ch. 694) went into effect. This bill required that all survivor/victim SAE kits collected as of January 1, 2018, be reported in the SAFE-T database. However, because the mandate does not extend retroactively to include kits that were collected from a survivor/victim prior to January 1, 2018, SAFE-T does not provide a comprehensive view of the current size and distribution of, or reasons for, California's SAE kit backlog.

This report is a first step in a larger effort to work with other agencies that handle SAE kits to fill the information gaps. Addressing the backlog issue requires knowing the number of untested kits across the state and understanding the reasons they remain untested.

...

A wide range of reasons exist for SAE kits to remain untested. The reasons included: A victim not pursuing prosecution; A case could not be investigated or prosecuted; Testing was not necessary/case adjudicated; Unknown/other Active investigation/prosecution; An analysis was unlikely to yield DNA profile; The kit belongs to another jurisdiction; No crime/crime other than rape. (Audit of Untested Sexual Assault Forensic Evidence Kits: 2020 Report (ca.gov) at p.5 & p.9 [as of March 21, 2023])

It is important to note that just because a kit goes untested does not necessarily mean that the suspect's DNA profile was never uploaded to CODIS in order to potentially link the suspect to other crimes. If a suspect is convicted, or even arrested for, certain qualifying offenses, a DNA sample is collected pursuant to Penal Code section 296 and the DNA profile uploaded to the Arrestee Index or the Convicted Offender Index in CODIS. A conviction for any felony will require the collection of a DNA profile for both adults and juveniles. And an arrest or charge against an adult for any felony or any offense that would result in requiring the person to register as a sex offender, if convicted, would similarly result in the collection of a DNA profile under Penal Code Section 296. Such profiles are then regularly searched against the already-existing profiles in CODIS.

4) **Argument in Support**: According to *The Joyful Heart foundation,* the Sponsor of this bill, "Every 68 seconds, someone is sexually assaulted in the United States. There are more than 15,000 reported rapes in California every year. In the immediate aftermath of a sexual assault, a victim may choose to undergo a medical forensic examination- which may take

four to six hours to collect evidence left behind by the attacker in what is commonly called a rape kit. Survivors expect that their rape kits will be tested. The public expects the same.

"DNA evidence is a powerful law enforcement tool. When tested, rape kit evidence can identify unknown assailants, link crime scenes together, reveal serial offenders, and exonerate the wrongfully convicted. Too often, however, these rape kits languish untested for years—even decades—in storage facilities. While these kits sit on shelves, dangerous offenders remain free on the streets and survivors wait for justice. To date, we don't know how many untested rape kits are sitting on shelves in California."

5) **Argument in Opposition**: According to *The California Public Defenders Association* "If enacted, AB 1368 would require crime laboratories analyze all sexual assault kits received prior to January 1, 2016, no later than January 31, 2026, regardless of whether the DNA is necessary to a prosecution, regardless of whether the suspect has already pled guilty and regardless of whether there are items of evidence from other types of cases, the results of which are necessary for a successful prosecution, that will not be tested because the lab's resources will be devoted to testing of sexual assault evidence. The bill requires the sexual assault evidence be analyzed and the profiles be uploaded to CODIS regardless of whether the crime has been solved and the suspect convicted. This bill, if passed, will be an expensive unfunded mandate, the cost of which will need to be reimbursed by the state at a time when the state's financial situation is of tremendous concern.

"How crime laboratories allocate limited resources should not be micromanaged by the state legislature. While the testing of DNA evidence from sexual assault cases is important, it is not more important than DNA testing on items of evidence collected in the investigation of other types of violent crime such as homicides, kidnapping or assaults. Moreover, this bill would require evidence from a sexual assault case be tested by January 31, 2026, regardless of whether conducting such testing would prevent the laboratory from testing evidence from other types of cases when the results of the DNA testing are required for prosecution. In other words, this bill might actually put prosecutions in jeopardy because of the time constraints it imposes on crime labs. Meeting the time limits imposed by this bill could also put on hold DNA testing that might tend to exonerate someone being held in custody for a crime he did not commit.

"This is a poorly conceived bill. Crime laboratories in this state should be permitted to prioritize their work with the guidance from prosecutors. The state legislature should not be in the business of prioritizing a crime lab's workload. Additionally, the state should not be throwing money away to ensure evidence from one type of case is tested first regardless of the import of the evidence to a criminal prosecution.

"For these reasons, CPDA strongly opposes AB 1368 and respectfully urges your 'NO' vote on AB 1368 when it comes before you in the Assembly Public Safety Committee."

6) **Prior Legislation**:

   a) AB 18 (Lackey), of the 2021-2022 Legislative Session, was nearly identical to this bill. AB 18 was held in the Assembly Committee on Appropriations Suspense File.

b) SB 916 (Leyva), Chapter 916, Statutes of 2022, entitles a sexual assault victim to access the DOJ SAFE-T database portal for information involving their own forensic evidence kit and the status of the kit.

c) AB 2481 (Lackey), of the 2019-2020 Legislative Session, was nearly identical to this bill. AB 2481 was held in the Assembly Committee on Appropriations Suspense File.

d) SB 215 (Leyva), Chapter 634, Statutes of 2021, required the DOJ to establish, on or before July 1, 2022, a process that allows a survivor of sexual assault to privately, securely and electronically track and receive updates regarding the status, location and information of their sexual assault evidence kit in the DOJ SAFE-T database.

e) AB 358 (Low), of the 2019-2020 Legislative Session, would have required DOJ, no later than July 1, 2023, to create a statewide tracking system that allows a sexual assault victim to monitor the testing and processing of the sexual assault forensic evidence collected in their case. AB 358 was held on the Assembly Committee on Appropriations Suspense File.

f) AB 1496 (Frazier), of the 2019-2020 Legislative Session, would have required a law enforcement agency to either submit sexual assault forensic evidence to a crime lab or ensure a rapid turnaround DNA program is in place and require a crime lab to either process the evidence or transmit the evidence to another crime lab for processing within existing specified time frames. AB 1496 was held on the Assembly Committee on Appropriations Suspense File.

g) SB 22 (Levya), Chapter 588, Statutes of 2019, requires law enforcement agencies to either submit sexual assault forensic evidence to a crime lab or ensure a rapid turnaround DNA program is in place. This law also requires crime labs to either process evidence for DNA profiles and upload them into the CODIS or transmit the evidence to another crime lab for processing and uploading.

h) AB 41, Chapter 694, Statutes of 2017, requires local law enforcement agencies to periodically update the Sexual Assault Forensic Evidence Tracking (SAFE-T) database on the disposition of all sexual assault evidence kits in their custody.

i) AB 280 (Low), Chapter 698, Statutes of 2017, established the Rape Kit Back Log Voluntary Tax Contribution Fund and allowed taxpayers to contribute their own funds to the Fund through a designation on the state personal income tax return.

j) AB 1744 (Chiu), Chapter 857, Statutes of 2016, requires the Department of Justice's Bureau of Forensic Services, the California Association of Crime Laboratory Directors, and the California Association of Criminalists to work collaboratively with public crime laboratories, in conjunction with the California Clinical Forensic Medical Training Center, to develop a standardized sexual assault forensic medical evidence kit, containing minimum basic components, to be used by all California jurisdictions.

REGISTERED SUPPORT / OPPOSITION:

Support

Joyful Heart Foundation (Sponsor)
Natasha's Justice Project (Co-Sponsor)
California District Attorneys Association
National Association of Social Workers, California Chapter
San Diegans Against Crime
San Diego County District Attorney's Office
San Diego Deputy District Attorneys Association

Oppose

California Public Defenders Association (CPDA)

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