RESOLUTION 06-01-2017

DIGEST
Criminal Law: Pretrial Diversion for Military Personnel
Amends Penal Code section 1001.80 to clarify that military diversion includes non-combatants and encompasses misdemeanor charges of driving under the influence (DUI).

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution amends Penal Code section 1001.80 to clarify that military diversion includes non-combatants and encompasses misdemeanor charges of driving under the influence (DUI). This resolution should be disapproved because there is no need to amend the law to expressly include noncombatants as persons eligible for military diversion, when existing law draws no such distinction.

Currently, there is a split of authority regarding whether military diversion applies to DUIs. In *People v. VanVleck* (2016) 2 Cal.App.5th 355, the Fourth District held that Vehicle Code section 23640 bars diversion as a matter of statutory construction. The Second District took the opposite view in *Hopkins v. Superior Court* (2016) 2 Cal.App.5th 1275. This resolution clarifies the Legislature's intent in a manner consistent with the fact that military diversion is already permitted for such crimes as vehicular manslaughter, child molestation, distribution of child pornography, domestic violence, sexual battery, and willful animal cruelty.

An additional concern with this resolution is that it permits "any and all evidence that supports the defendant's assertions … including the defendant's own oral representations" to establish that the defendant suffers from psychological trauma or has substance abuse issues stemming from military service. Such evidence would be offered without an opportunity for cross-examination and without the penalty of perjury.

This resolution is related to Resolution 10-02-2017 and Senate Bill No. 725 (Jackson), and Senate Bill No. 725 (Jackson), which was signed into law effective August 7, 2017. (Stats. 2017, ch. 179.) Both Resolution 10-02-2017 and Senate Bill No. 725 address the current conflict in law by including DUIs within the ambit of military diversion.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Penal Code section 1001.80 to read as follows:

§1001.80

(a) This chapter shall apply whenever a case is before a court on an accusatory pleading alleging the commission of a misdemeanor offense, including, but not limited to alleged violations of Vehicle Code sections 23152, 23153, and both of the following apply to the defendant:

(1) The defendant was, or currently is, a member of the United States military, regardless if the defendant engaged in, or currently engages in, combat during military service.

(2) The defendant may be suffering from sexual trauma, traumatic brain injury, post-traumatic stress disorder, substance abuse, or mental health problems as a result of his or her military service. The court may request, using existing resources, an assessment to aid in the determination that this paragraph applies to a defendant, including, but not limited to appointing a physician to evaluate the defendant. The court may use any and all evidence to support the defendant's assertions that he or she may be suffering from sexual trauma, traumatic brain injury, post-traumatic stress disorder, substance abuse, or mental health problems, including the defendant's oral representations.

(b) If the court determines that a defendant charged with an applicable offense under this chapter is a person described in subdivision (a), the court, with the consent of the defendant and a waiver of the defendant's speedy trial right, may place the defendant in a pretrial diversion program, as defined in subdivision (k).

(c) If it appears to the court that the defendant is performing unsatisfactorily in the assigned program, or that the defendant is not benefiting from the treatment and services provided under the diversion program, after notice to the defendant, the court shall hold a hearing to determine whether the criminal proceedings should be reinstituted. If the court finds that the defendant is not performing satisfactorily in the assigned program, or that the defendant is not benefiting from diversion, the court may end the diversion and order resumption of the criminal proceedings. If the defendant has performed satisfactorily during the period of diversion, at the end of the period of diversion, the criminal charges shall be dismissed.

(d) If a referral is made to the county mental health authority as part of the pretrial diversion program, the county shall be obligated to provide mental health treatment services only to the extent that resources are available for that purpose, as described in paragraph (5) of subdivision (b) of Section 5600.3 of the Welfare and Institutions Code. If mental health treatment services are ordered by the court, the county mental health agency shall coordinate appropriate referral of the defendant to the county veterans service officer, as described in paragraph (5) of subdivision (b) of Section 5600.3 of the Welfare and Institutions Code. The county mental health agency shall not be responsible for providing services outside its traditional scope of services. An order shall be made referring a defendant to a county mental health agency only if that agency has agreed to accept responsibility for all of the following:

(1) The treatment of the defendant.

(2) The coordination of appropriate referral to a county veterans service officer. (3) The filing of reports pursuant to subdivision (h).

(e) When determining the requirements of a pretrial diversion program pursuant to this chapter, the court shall assess whether the defendant should be ordered to participate in a federal or community based treatment service program with a demonstrated history of specializing in the treatment of mental health problems, including substance abuse, post- traumatic stress disorder, traumatic brain injury, military sexual trauma, and other related mental health problems.

(f) The court, in making an order pursuant to this section to commit a defendant to an established treatment program, shall give preference to a treatment program that has a history of successfully treating veterans who suffer from sexual trauma, traumatic brain injury, post-traumatic stress disorder, substance abuse, or mental health problems as a result of military service, including, but not limited to, programs operated by the United States Department of Defense or the United States Department of Veterans Affairs.

(g) The court and the assigned treatment program may collaborate with the Department of Veterans Affairs and the United States Department of Veterans Affairs to maximize benefits and services provided to the veteran.

(h) The period during which criminal proceedings against the defendant may be diverted shall be no longer than two years. The responsible agency or agencies shall file reports on the defendant's progress in the diversion program with the court and with the prosecutor not less than every six months.

(i) A record filed with the Department of Justice shall indicate the disposition in those cases diverted pursuant to this chapter. Upon successful completion of a diversion program, the arrest upon which the diversion was based shall be deemed to have never occurred. The defendant may indicate in response to a question concerning his or her prior criminal record that he or she was not arrested or diverted for the offense, except as specified in subdivision (j). A record pertaining to an arrest resulting in successful completion of a diversion program shall not, without the defendant's consent, be used in any way that could result in the denial of any employment, benefit, license, or certificate.

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

(k)(1) As used in this chapter, "pretrial diversion" means the procedure of postponing prosecution, either temporarily or permanently, at any point in the judicial process from the point at which the accused is charged until adjudication.

(2) A pretrial diversion program shall utilize existing resources available to current or former members of the United States military to address and treat those suffering from sexual trauma, traumatic brain injury, post-traumatic stress disorder, substance abuse, or mental health problems as a result of military service.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Bay Area Lawyers for Individual Freedom

STATEMENT OF REASONS

The Problem: Allows pretrial diversion program for current and former members of the U.S. military who are charged with a misdemeanor offense(s). Meaning, defendants who are current or former members of the military currently facing misdemeanor charges --who may be may be suffering from sexual trauma, traumatic brain injury, post- traumatic stress disorder, substance abuse, or mental health problems as a result of his or her military service -- can temporarily suspend their criminal matter to seek assistance from a mental health program. Upon successful completion of that program, the pending criminal matter will be dismissed.

Often times, Prosecutors will not agree to the imposition of military diversion, thereby forcing the criminal defense attorneys to file a motion seeking an order from the court, allowing military members or veterans to participate in military diversion. In opposing this motion, Prosecutors assert several arguments, including the fact that a veteran or current military member has not participated in combat and therefore should not benefit from military diversion. These assertions are harmful and counter to the legislative history of military diversion.

Participation in combat was never a prerequisite for military members or veterans to participate in military diversion. This assertion also ignores the fact that more than half of military members attempt suicide before they ever see combat. (*See* NBC News - Military Suicide: Most Attempts Come Before Soldiers Ever See Combat; available at http://www.nbcnews.com/health/health-news/military-suicides-most-attempts-come-soldiers-ever-see-combat-n580276; *see also* JAMA Psychiatry - Risk Factors, Methods, and Timing of Suicide Attempts Among US Army Soldiers; available at http://jamanetwork.com/journals/jamapsychiatry/article-abstract/2524845).

Prosecutors also oppose these motions on the basis that military diversion does not apply to charges involving a violation of Vehicle Code sections 23152 and 23153 (commonly referred to as a D.U.I.). This again is harmful and counter to the legislative history of veterans' diversion. There is no explicit exclusion of DUI misdemeanor offenses in this statute. Additionally, this argument ignores the fact that 20% of Veterans with PTSD also have Substance Abuse Disorder, which includes alcohol abuse. (*See* U.S. Department of Veterans Affairs – PTSD: National Center for PTSD, available at http://www.ptsd.va.gov/PUBLIC/PROBLEMS/PTSD_SUBSTANCE_ABUSE_VETERANS.ASP).

Military members and veterans have done so much for this country. Unfortunately, at times, they become involved in the criminal judicial system. It is in everyone's best interest to assist military members or veterans throughout the criminal process, especially if they may be suffering from sexual trauma, traumatic brain injury, post-traumatic stress disorder, substance abuse, or mental health problems. By clarifying who qualifies for military diversion as well as which charges, military professionals have more access to helpful programs that can ultimately allow them to seek treatment and avoid a criminal conviction.

The Solution: Amends Penal Code section 1001.80, to clarify which person and charges qualify for military diversion, a program that would temporarily suspend criminal proceedings and allow

military members or veterans to seek assistance through the Department of Veterans Affairs, or a like program.

IMPACT STATEMENT
The resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION
SB 1227 (Hancock) Diversion: Members of Military (Filed with Secretary of State September 27, 2014)

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RESOLUTION 06-02-2017

DIGEST
Penal Code: Redefines "Sex" As "Gender"
Amends Penal Code section 422.57 to globally define "sex" as meaning "gender" when used in the Penal Code.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution amends Penal Code section 422.57 to globally define "sex" as meaning "gender" when used in the Penal Code. This resolution should be disapproved because a problem with the current language is not apparent, and to so narrowly define "sex" within the entire Penal Code would create confusion and unintended consequences in a variety of different contexts.

Title 11.6 of the Penal Code addresses the issue of civil rights and hate crimes. Penal Code section 422.55 defines "hate crime" as one committed against a victim because of certain characteristics. These characteristics include disability, nationality, race or ethnicity, religion, sexual orientation, and gender. Penal Code section 422.57, which applies to the entire Penal Code, not just Title 11.6, states that "gender" has the same meaning as that defined in Penal Code section 422.56 (which says gender "means sex, and includes a person's gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth.") While clarifying that the broadly, and well-defined term "gender" includes "sex," the converse is not always true. To define "sex" as meaning "gender" poses an anomalous provision which essentially declares "gender" means "gender." The need for this restrictive definition of "sex" is not apparent.

Further, "sex" does not necessarily mean "gender," particularly when used as a verb or modifier, as well as a noun. The proposed definition would apply to the entire Penal Code, not just the part of the Code concerning discrimination or hate crimes. Narrowly defining "sex" as proposed will likely create confusion and unintended consequences, ranging from registration for sex offenders to making physical sex crimes unenforceable.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Penal Code section 422.57 to read as follows:

§ 422.57

For purposes this code, unless an explicit provision of law or the context clearly requires a different meaning, "gender" has the same meaning as in Section 422.56 and "sex" shall have the same meaning as "gender" as defined under Section 422.56.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Bay Area Lawyers for Individual Freedom

STATEMENT OF REASONS

The Problem: Penal Code section 422.56 currently states, "'Gender' means sex, and includes a person's gender identity and gender expression. 'Gender expression' means a person's gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth." However, the Penal Code does not explicitly define "sex" while other CA statutes defining "sex" make it clear that "sex" means "gender". At least one statute references the definition of "sex" to mean "gender" as defined under penal code section 422.56. (See, e.g., Health and Saf. Code, § 1365.5(b).)

California law prohibits any program or activity that receives state financial assistance from discriminating on the basis of sex (See, Gov. Code, § 11135(a)). However, the penal code does not explicitly define "sex", which has caused some confusion for law enforcement as to what constitutes "sex" in regards to policies and procedures.

In practice, most law enforcement departments and agencies define "sex" to mean an individual's genitalia, which runs afoul of the clear understanding of "sex" as it is defined in other California codes. Other state laws provide comprehensive nondiscrimination protections based on gender identity and expression, including requiring that transgender and intersex people be recognized as the sex that corresponds to their gender identity in virtually every facet of society, including employment, housing, education, public accommodations, insurance contracts, hate crimes, and even death certificates. (See, e.g., Gov. Code, § 12940(a); Gov. Code, § 12955(a); Civ. Code, § 51(b); Educ. Code. § 221.5(f); Health and Saf. Code, § 1365.5(b); Educ. Code, § 200 *et seq*.; Civ. Code, § 51.7; Pen. Code, § 422.55(a)(2); Health & Saf. Code, § 102875 ("[A] person completing the [death] certificate shall record the decedent's sex to reflect the decedent's gender identity.")).)

California criminal justice and penal systems use search procedures to determine a person's anatomy for the misguided, problematic and invasive purpose of identifying a person's "sex". Nowhere has this issue been more apparent as when a transgender or intersex person comes into contact with the criminal justice system. In every other facet of their lives in California, transgender and intersex people are treated in a manner consistent with their gender identity, and not their anatomy. In fact, California Gov. Code §11135 prohibits discrimination based on sex and gender identity, yet it is commonplace to discriminate based on these classifications in California law enforcement and correctional facilities.

The Solution: This resolution would make the Penal Code consistent with other statutes, rules and regulations, which define "sex" to mean "gender" and "gender" to mean "sex". By explicitly defining "sex" in the Penal Code to mean "gender", there will no longer be any confusion regarding law enforcement and correctional policies and procedures as they relate to sex and gender. It would make the Penal Code consistent with other California comprehensive

nondiscrimination protections based on gender identity and expression, including requiring that transgender people be recognized as the sex that corresponds to their gender identity in every facet of society.

IMPACT STATEMENT
The resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION
None known

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RESOLUTION 06-03-2017

DIGEST
Incarceration: National Standards to Prevent, Detect and Respond to Prison Rape
Adds Penal Code sections 2635.5, 2644, 2645, and 2646, and amends sections 2635 and 2636 to require the adoption of DOJ's National Standards to Prevent, Detect, and Respond to Prison Rape.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
Similar to Resolutions 06-12-2014 and 08-03-2015, which were approved in principle, and Resolution 01-09-2016, which was disapproved.

Reasons:
This resolution adds Penal Code sections 2635.5, 2644, 2645, and 2646, and amends sections 2635 and 2636 to require the adoption of DOJ's National Standards to Prevent, Detect and Respond to Prison Rape. This resolution should be disapproved because California is already on its way to full adoption of the national standards by December 2022.

The Federal Prison Rape Elimination Act of 2003 ("PREA") authorized the Attorney General to promulgate national standards to combat prison rape. (See 42 U.S.C. §§ 15606, 15607.) In 2012, the Department of Justice published a 268-page report setting forth its national standards. (See 28 C.F.R. §§ 115.5-115.501.) To ensure that each state becomes PREA-compliant, DOJ withholds five percent of its prison grant money unless the governor certifies that the standards: (1) are fully implemented, or (2) provides assurance of progress towards full implementation with a funding commitment of at least five percent of impacted DOJ grant money. (See, 42 U.S.C. § 15607(e).) In 2016, the Justice for All Reauthorization Act amended PREA to sunset the "assurance" option by December 2022, requiring each state to fully implement PREA by that deadline or lose federal funding. California is among 40 jurisdictions working towards full compliance.

There is no evidence that California is not on track to meet the existing deadline. California has made significant progress in revising agency regulations to conform with DOJ's national standards. (See *Operations Manual*, California Department of Corrections and Rehabilitation <http://www.cdcr.ca.gov/PREA/docs/2016-DOM-54040.pdf>.) Additionally, every correctional facility that has been audited thus far has met or exceeded the national standards. (See *Prison Rape and Elimination Act (PREA) Audits and Reports*, California Department of Corrections and Rehabilitation <http://www.cdcr.ca.gov/PREA/Reports-Audits.html>.)

This resolution is similar to Senate Bill No. 716 (Lara) (Reg. Sess. 2013-2014), which died in the Assembly due to cost concerns.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to add Penal Code sections 2635.5, 2644, 2645 and 2646 and amend sections 2635 and 2636 to read as follows:

§ 2635

The Department of Corrections and Rehabilitation shall review informational handbooks regarding sexual abuse in detention published by outside organizations. Upon approving the content thereof, handbooks provided by one or more outside organizations shall be made available to inmates and wards.

The Department of Corrections and Rehabilitation, each local corrections agency; each city, county, and regional juvenile justice agency; each city, county, and regional police lockup; and each private confinement company shall create a safe environment free from sexual abuse for inmates, wards or arrestees, including those inmates, wards or arrestees subject to a United States Immigration and Customs Enforcement hold and/or who identify as lesbian, gay, bisexual, transgender, intersex (LGBTI) and/or gender variant, by adopting policies and procedures fully implementing the National Standards to Prevent, Detect, and Respond to Prison Rape.

§ 2635.5

For purposes of this article, the following definitions shall apply:

(a) "Detainee" means a person confined in a facility under government authority, including arrestees, pretrial and post conviction inmates, prisoners, minors in the juvenile justice system, and federal detainees held in any city, county, city and county, regional, or private facility.

(b) "Full implementation" means that every facility of an agency, department, or company shall be compliant with all material requirements of the policies and procedures produced pursuant to this article. Full compliance may be achieved with de minimus violations or discrete and temporary violations during otherwise sustained periods of compliance.

(c)"Gender variant" means a person whose identity, appearance or manner does not conform to traditional societal gender expectations.

(d) "Inmate" means any person incarcerated or detained in a prison or jail.

(e) "Intersex" means a person whose sexual or reproductive anatomy or chromosomal pattern does not fit typical definitions of male or female. Intersex medical conditions are sometimes referred to as disorders of sex development.

(f) "Jail" means a confinement facility of a city, county, city and county, or regional law enforcement agency that has, as its primary use, the detention of persons pending adjudication of criminal charges, persons committed to confinement for a misdemeanor or pursuant to subdivision (h) of §1170, persons adjudicated guilty who are awaiting transfer to a state prison, or person held under the authority of the federal government.

(g) "Lockup" means a facility belonging to a state, county, or local law enforcement agency that contains holding cells, cell blocks, or other secure enclosures that are:

(1) Under the control of a law enforcement, court, or custodial officer; and

(2) Primarily used for the temporary confinement of individuals who have recently been arrested, detained, or are being transferred to or from a court, jail, prison, or other agency.

(h) "Medical practitioner" means a health professional who, by virtue of education,

credentials, and experience, is permitted by law to evaluate and care for patients within the scope of his or her professional practice. A ‘‘qualified medical practitioner’’ refers to such a professional who has also successfully completed specialized training for treating sexual abuse victims.

(i) Pat-down search means a running of the hands over the clothed body of an inmate, detainee, or resident by an employee to determine whether the individual possesses contraband.

(j) “Private confinement company” means a for-profit or non-profit company operating in the state that detains individuals, or that manages a facility that detains individuals, on behalf of a federal, city, county, or regional government.

(k) “Strip search” means a search that requires a person to remove or arrange some or all clothing so as to permit a visual inspection of the person’s breasts, buttocks, or genitalia. Substantiated allegation means an allegation that was investigated and determined to have occurred.

(l) “Transgender” means a person whose gender identity (i.e., internal sense of feeling male or female) is different from the person’s assigned sex at birth.

§ 2636

For purposes of this section, all references to classification of wards shall take effect upon the adoption of a classification system for wards developed by the Department of Corrections and Rehabilitation in compliance with Farrell v. Allen, Alameda County Superior Court Case No. RG 03079344.

The following practices shall be instituted to prevent sexual violence and promote inmate and ward safety in the Department of Corrections and Rehabilitation:

(a) All inmates, wards and detainees in the custody of the California Department of Corrections and Rehabilitation, each local corrections agency; each city, county, and regional juvenile justice agency; each city, county, and regional police lockup; and each private confinement company shall be assessed during an intake screening and upon transfer to another facility for their risk of being sexually abused by other inmates or sexually abusive toward other inmates, wards or detainees.

(b) Intake screening shall ordinarily take place within 72 hours of arrival at the facility.

(c) Such assessments shall be conducted using an objective screening instrument.

~~(a)~~ (d) The Department of Corrections and Rehabilitation, each local corrections agency; each city, county, and regional juvenile justice agency; each city, county, and regional police lockup; and each private confinement company ~~inmate~~ classification and housing assignment procedures shall take into account risk factors that can lead to inmates, detainees, and wards becoming the target of sexual victimization or of being sexually aggressive toward others. ~~Relevant considerations include~~ The following must be considered:

(1) Age of the inmate, detainee or ward.

(2) Whether the ~~offender is a violent or nonviolent offender~~ inmate, detainee or ward’s criminal history is exclusively nonviolent;

(3) Whether the inmate, detainee or ward served a prior term of commitment.

(4) Whether the inmate, detainee or ward has a ~~history of mental illness~~ mental, physical, or developmental disability.

(5) Whether the inmate, detainee or ward has prior convictions for sex offenses against an adult or child.

(6) The physical build of the inmate, detainee or ward.

(7) Whether the inmate, detainee or ward is or is perceived to be gay, lesbian, bisexual, transgender, intersex, or gender variant.

(8) Whether the inmate, detainee or ward has previously experienced sexual victimization.

(9) The inmate, detainee or ward's own perception of vulnerability

(10) Whether the inmate, detainee or ward is detained solely for civil immigration purposes.

(e) The information from the risk screening required by (d) shall be used to inform housing, bed, work, education, and program assignments with the goal of keeping separate those inmates, detainees and wards at high risk of being sexually victimized from those at high risk of being sexually abusive.

(f) Individualized determinations shall be made about how to ensure the safety of each inmate, detainee or ward.

(g) In deciding whether to assign a transgender or intersex inmate, detainee or ward to a facility for male or female inmates or wards, and in making other housing and programming assignments, placements shall be considered on a case-by-case basis as to whether the placement would ensure the inmate, detainee or ward's health and safety, and whether the placement would present management or security problems.

(h) Placement and programming assignments for each transgender or intersex inmate, detainee or ward shall be reassessed at least twice each year to review any threats to safety experienced by the inmate, detainee or ward.

(i) A transgender or intersex inmate, detainee or ward's own views with respect to their own safety shall be given serious consideration.

(j) Transgender and intersex inmates, detainees or wards shall be given the opportunity to shower separately from other inmates, detainees or wards.

(k) Lesbian, gay, bisexual, transgender, or intersex inmates, detainees or wards shall not be placed in dedicated facilities, units, or wings solely on the basis of such identification or status, unless such placement is in a dedicated facility, unit, or wing established in connection with a consent decree, legal settlement, or legal judgment for the purpose of protecting such inmates, detainees or wards.

(l) Within a set time period, not to exceed 30 days from the inmate, detainee or ward's arrival at a facility, the facility shall reassess the inmate, detainee or ward's risk of victimization or abusiveness based upon any additional, relevant information received by the facility since the intake screening.

(m) An inmate, detainee or ward's risk level shall be reassessed when warranted due to a referral, request, incident of sexual abuse, or receipt of additional information that bears on the inmate, detainee or ward's risk of sexual victimization or abusiveness.

(n) Inmates, detainees or wards may not be disciplined for refusing to answer, or for not disclosing complete information in response to, questions asked pursuant to paragraphs (d)(4), (d)(7), (d)(8), or (d)(9) of this section.

(o) Each facility shall implement appropriate controls on the dissemination within the facility of responses to questions asked pursuant to this standard in order to ensure that sensitive information is not exploited to the inmate, detainee or ward's detriment by staff or other inmates, detainees or wards.

~~(b)~~ (p) The Department of Corrections and Rehabilitation, each local corrections agency; each city, county, and regional juvenile justice agency; each city, county, and regional police

lockup; and each private confinement company shall ensure that staff members intervene when an inmate, detainee or ward appears to be the target of sexual harassment or intimidation.

§ 2644

a) Inmates, detainees and wards at high risk for sexual victimization shall not be placed in involuntary segregated housing unless an assessment of all available alternatives has been made, and a determination has been made that there is no available alternative means of separation from likely abusers. If a facility cannot conduct such an assessment immediately, the facility may hold the inmate, detainee or ward in involuntary segregated housing for less than 24 hours while completing the assessment.

(b) Inmates, detainees and wards placed in segregated housing for this purpose shall have access to programs, privileges, education, and work opportunities to the extent possible. If the facility restricts access to programs, privileges, education, or work opportunities, the facility shall document:

(1) The opportunities that have been limited;

(2) The duration of the limitation; and

(3) The reasons for such limitations.

(c) Inmates shall only be assigned to such involuntary segregated housing until an alternative means of separation from likely abusers can be arranged, and such an assignment shall not ordinarily exceed a period of 14 days.

(d) If an involuntary segregated housing assignment is made pursuant to paragraph (a) of this section, the facility shall clearly document:

(1) The basis for the facility's concern for the inmate's safety; and

(2) The reason why no alternative means of separation can be arranged.

(e) Every 14 days, the facility shall afford each such inmate a review to determine whether there is a continuing need for separation from the general population.

§ 2645

(a) The California Department of Corrections and Rehabilitation, each local corrections agency; each city, county, and regional juvenile justice agency; each city, county, and regional police lockup; and each private confinement company shall not conduct cross-gender strip searches or cross-gender visual body cavity searches (meaning a search of the anal or genital opening) except in exigent circumstances or when performed by medical practitioners.

b) All cross-gender and strip searches, cross-gender visual body cavity searches and all cross-gender patdown searches of female and transgender inmates, detainees and wards shall be documented.

(c) The facility shall implement policies and procedures that enable inmates, detainees and wards to shower, perform bodily functions, and change clothing without nonmedical staff of another gender viewing their breasts, buttocks, or genitalia, except in exigent circumstances or when such viewing is incidental to routine cell checks. Such policies and procedures shall require staff of another gender to announce their presence when entering an inmate, detainee or ward housing unit.

(d) Staff shall not search or physically examine a transgender or intersex inmate, detainee or ward for the sole purpose of determining their genital status.

(e) The agency shall train security staff in how to conduct cross-gender patdown searches, and searches of transgender and intersex inmates, detainees or wards in a professional

and respectful manner, and in the least intrusive manner possible, consistent with security needs.

§ 2646

The California Department of Corrections and Rehabilitation, all lockups, state, county, and local juvenile justice agencies, and private confinement companies shall adopt and implement policies or procedures consistent with the requirements of sections 2636, 2637, 2638, 2639, 2644, and 2645. Adoption of these policies or procedures shall take place no later than July 1, 2020.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Bay Area Lawyers for Individual Freedom

STATEMENT OF REASONS

The Problem: Does not comply with federal law. The National Standards to Prevent, Detect, and Respond to Prison Rape, known as the PREA Standards, include several provisions that direct agencies to pay particular attention to protecting lesbian, gay, bisexual, transgender and intersex (LGBTI) individuals. Prisons are required, and jails are strongly incentivized and in some cases required, to comply with these standards. California has not been able to certify compliance with the PREA Standards and is at risk of losing federal funding. Although the PREA Standards apply to state and local facilities, existing California laws, policies and procedures do not incorporate the standards that specifically address the safety of the most vulnerable in custody.

Sexual violence is a rampant problem across all correctional and detention settings in California causing extreme psychological trauma and undue punishment beyond that of a person's incarceration or detention. LGBTI protections under the PREA Standards have yet to be adopted in California placing LGBTI prisoners, particularly transgender women, in serious physical and psychiatric danger. LGBTI inmates, detainees and wards are particularly vulnerable to sexual violence. LGBTI prisoners experience "the highest rates of sexual victimization" while in custody according to the U.S. Department of Justice. A study conducted by the University of California at Irvine with 315 transgender women as participants found transgender women in the custody of the California Department of Corrections and Rehabilitation (CDCR) were 13 times more likely to be sexually assaulted in prison than individuals in the general population. Transgender women are also subjected to coercive sex from fellow prisoners and correctional staff. Coercive sex "is oftentimes exchanged for protection or special privileges and is too often seen by officials as consensual." Unfortunately, because of the high incidents of sexual assault, transgender women are often housed in solitary confinement "for their own protection" either preemptively or as punishment for reporting abuses.

The Solution: Would require prisons, jails, and other custodial facilities, including private confinement companies, to adopt federal policies and procedures under PREA and its implementing regulations to create a safe environment free from sexual abuse for inmates or arrestees, including LGBT prisoners and those prisoners subject to a U.S. Immigration and Customs enforcement hold. By putting all correctional facilities in California in line with many of the carefully considered federal guidelines under the PREA to protect prisoners from sexual

violence both by guards and other prisoners, this resolution would establish a number of important protections set forth in federal regulations to keep people from facing further punitive measures - including confinement in administrative segregation - for their own protection

IMPACT STATEMENT
The resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION
AB 550 (Goldberg) 2005 - Sexual Abuse in Detention Elimination Act – Filed with Secretary of State on September 22, 2005.
AB 382 (Ammiano) - 2009 – Vetoed by Governor on August 17, 2009
AB 633 (Ammiano) - 2010 – Vetoed by Governor on September 23, 2010
SB 716 (Lara) - 2013 – Passed Senate, died in Assembly.

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RESPONSIBLE FLOOR DELEGATE: Jennifer Orthwein

RESOLUTION 06-04-2017

DIGEST
Prisons and Civil Rights: Prevention of Disparate Treatment Based on a Protected Class
Amends Penal Code section 2600 to prevent disparate treatment of prisoners based solely on one's status as a member of a protected class.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution amends Penal Code section 2600 to prevent disparate treatment of prisoners based solely on one's status as a member of a protected class. This resolution should be disapproved because it is overbroad and may prohibit classifications when there is a compelling reason to do so that would survive strict scrutiny.

Penal Code section 2600 provides that people in custody in state prisons and county jails pursuant to realignment may be "deprived of such rights, and only such rights, as is reasonably related to legitimate penological interests." (Pen. Code, § 2600, subd. (a).) Government Code section 11135 provides that the state may not discriminate on the basis of "sex, race, color, religion, ancestry, national origin, ethnic group identification . . or sexual orientation.. . ." (Gov. Code, § 11135, subd. (a).) Thus, the statutes already prohibit classifications and differential treatment based solely on race if it is not related to legitimate penological interests

California's Department of Corrections and Rehabilitation (CDCR) has a longstanding practice of segregating inmates and imposing discipline on the basis of race or ethnicity for legitimate safety reasons. The segregation is necessary because of gangs and interracial violence. In 2013, the Court of Appeal determined that the CDCR's practice of segregating inmates or imposing discipline, loss of privileges, etc., solely on the basis of race, ethnicity, and national origin because of an inmate's perceived affiliation with a racial group violates the United States and California Constitution. (*In re Morales* (2013) 212 Cal.App.4th 1410, 1427.) The Court of Appeal held that if the CDCR wants to classify prisoners on the basis of race, the classifications and restrictions must survive strict scrutiny, i.e. they must narrowly tailor the classifications and restrictions and articulate a compelling government interest for doing so. (*Id*. at p. 1424.) There is no evidence that the CDCR is not following the holding in *In re Morales*. In addition, with the exception of Pelican Bay, which was the subject of this lawsuit, since 2008, the CDCR has been implementing regulations to racially integrate the prisons with the intention that "[a]n inmate's race will not be used as a primary determining factor in housing an institution's inmate population." (Cal. Code Regs., tit. 15, § 3269.1.) Finally, this resolution may have the unintended consequence of prohibiting the CDCR from ever considering race or ethnicity in its decision-making process even when it has a compelling reason to do so that would survive strict scrutiny by the courts.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Penal Code section 2600 to read as follows:

§ 2600

(a) A person sentenced to imprisonment in a state prison or to imprisonment pursuant to subdivision (h) of Section 1170 may during that period of confinement be deprived of such rights, and only such rights, as is reasonably related to legitimate penological interests.

(b) Nothing in this section shall be construed to overturn the decision in Thor v. Superior Court, 5 Cal. 4th 725.

(c) A person sentenced to imprisonment in a state prison or pursuant to subdivision (h) of Section 1170 shall not be deprived of any rights solely on any of the protected bases under Government Code section 11135.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Bay Area Lawyers for Individual Freedom

STATEMENT OF REASONS

The Problem: Penal Code section 2600 allows those imprisoned to be denied certain rights if they are "reasonably related to legitimate penological interests" applying the *Turner v. Safley* rational basis standard of review to determine which rights prisoners may be denied. There is no exception provided in the penal code for protected civil rights, which require a higher level of scrutiny than the one applied in *Turner* and the California Penal Code.

In men's prisons across California, colored signs hang above cell doors: blue for black inmates, white for white, red, green or pink for Hispanic, etc. On any given day, the color of a sign could mean the difference between a prisoner exercising or being confined to their cell. When prisoners attack guards or other inmates, California allows its corrections officers to restrict all prisoners of that same race or ethnicity to prevent further violence. California is the only state known to use race-based lockdowns. State and federal courts have ruled against the practice multiple times**.** Managing inmates on the basis of ethnicity is counterproductive, and instead increases hostilities among prisoners (*In re Morales,* 212 Cal.App.4th 1410 (2013)).

California prisoners also continue to be discriminated against solely based on their "sex", "gender identity", "gender expression" and "sexual orientation". Lesbian, gay, bisexual, transgender and intersex individuals continue to be placed in isolated units and in solitary confinement solely based on their sexual orientation, gender expression and gender identity, where they are often denied opportunities to work and program. Transgender prisoners in California are housed in facilities for men or women solely based on their genitalia, which places them at extreme risk of sexual assault, particularly transgender women housed in facilities with men. Furthermore, transgender people are forced to undergo strip searches by law enforcement of a different gender, which too often leads to sexual harassment and assault.

California's penal systems use of protected classifications to discriminate against prisoners has devastating and dangerous consequences. These practices make prisons more dangerous, strip people of their Constitutional rights without due process and run counter to the penological purposes claimed to support them.

The Solution: This resolution would make it clear that prisons can no longer solely use protected bases to discriminate and ensures California and federal civil rights nondiscrimination laws extend to our penal institutions. In Johnson v. California et al., the U.S. Supreme Court held a heightened level of scrutiny applies under the Fourteenth Amendment Equal Protection Clause when discriminating against prisoners. The Court rejected the State's arguments that the standard set forth in Turner applied to a protected class. Even the Court in Turner acknowledged the difference between the standard of review when it came to Constitutional protections. "Prison walls do not form a barrier separating prison inmates from the protections of the Constitution." "[P]risoners retain the constitutional right to petition the government for the redress of grievances [citation]; they are protected against invidious racial discrimination by the Equal Protection Clause of the Fourteenth Amendment [citation]; and they enjoy the protections of due process."

IMPACT STATEMENT
The resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION
None known

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COUNTERARGUMENTS AND STATE BAR SECTION COMMENTS

BAR ASSOCIATION OF NORTHERN SAN DIEGO COUNTY

We have concerns as to the germaneness of this resolution. In our view, the internal management of prisons should be left to the professionals. There are legitimate reasons for the policies of which the proponent complains, including prevention of riots, suppression of security threat groups, and inmate safety.

RESOLUTION 06-05-2017

DIGEST
Criminal Law: Permitting Secret Recordings to Obtain Evidence of Violence
Amends Penal Code section 633.5 to allow secret recording of private communications for purposes of gathering admissible evidence of acts of violence for use in court.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution amends Penal Code section 633.5 to allow secret recording of private communications for purposes of gathering admissible evidence of acts of violence for use in court. This resolution should be disapproved because it is vague and overly broad.

The Privacy Act of 1967 was intended to protect individual privacy rights. (See *Coulter v. Bank of America* (1994) 28 Cal.App.4th 923, 928.) However, the Legislature recognized some confidential communications may be strong evidence of a serious crime, and created the narrow exception found in Penal Code section 633.5. That section foregoes the two-party consent requirement if a party to the communication reasonably believes it will preserve evidence that the other person is committing or has committed extortion, kidnapping, bribery, any felony involving violence against the person, or a violation of section 653m. This resolution seeks to broaden the exception.

The resolution would strike the requirement the communication constitute potential evidence of a violent felony. Instead, it need only relate to an "action" involving violence. "Action" is undefined, making the proposed amendment vague. It is also overly broad. A slap in the face may be an illegal battery, but it should not justify secretly recording a communication that might mention it. Indeed, the wording of the resolution would not even require the action be criminal so long as it involved violence against a person.

This resolution would allow the use of such secretly recorded communications in any court proceeding. In contrast, section 633.5 makes the permitted communications admissible only in prosecutions for the enumerated crimes. Additionally, in *People v. Guzman* (2017) 11 Cal.App.5th 184, the Second District Court of Appeal held that the exclusionary rule for secretly recorded communications was abrogated by adoption of California Constitution, article 1, section 28(f)(2) (Prop. 8) in all criminal prosecutions. The exceptions to confidentiality created by section 633.5, and the intentions of Proposition 8, were intended to prevent or expose serious criminal acts; it is only then that the important protections of individual privacy might be outweighed. Recordings made pursuant to that exception should not be allowed in all other proceedings, such as dissolution of marriage or wrongful termination case.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Association recommends that legislation be sponsored to amend Penal Code section 633.5 to read as follows:

§ 633.5

Nothing in Section 631, 632, 632.5, 632.6, or 632.7 prohibits one party to a confidential communication from recording the communication for the purpose of obtaining evidence reasonably believed to relate to the commission by another party to the communication of the crime of extortion, kidnapping, bribery, any ~~felony~~ action involving violence against ~~the~~ a person, or a violation of Section 653m. Nothing in Section 631, 632, 632.5, 632.6, or 632.7 renders any evidence so obtained inadmissible in court. ~~in a prosecution for extortion, kidnapping, bribery, any felony involving violence against the person, a violation of Section 653m, or any crime in connection therewith.~~

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: San Diego County Bar Association

STATEMENT OF REASONS

The Problem: Under existing law, recording a communication is prohibited unless all parties consent. A few exceptions exist, including a recording done for the purpose of obtaining evidence reasonably believed to relate to any *felony* involving violence against *the* person doing the recording. In other words, lay people are expected to check the Penal Code to determine whether a particular act of violence against them is a felony before recording evidence of the violence against them, and if they try submitting recorded proof of a violent action that isn't a felony, they open themselves up to prosecution. Additionally, people cannot record evidence of violence having been done to someone else, including their spouse, children, or anyone else significant to them because the exception only applies to violent felonies against *the* person doing the recording.

The Solution: This resolution fixes both problems. It replaces "felony involving violence" with "action involving violence" so nobody opens themselves up to prosecution by recording evidence of violence against them if the recorded violent act is not a felony. It also replaces "against the person" with "against a person" because people should be able to collect evidence of violence even if they are not the victim. That enables safer scenarios and prevents the victim from having to confront the perpetrator again.

IMPACT STATEMENT

The resolution does not affect any other law statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION

AB 413 (2017).

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RESOLUTION 06-06-2017

DIGEST
Criminal Law: Repeal Bathhouse Ban
Amends Penal Code section 11225 to repeal the public nuisance ban on bathhouses.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution amends Penal Code section 11225 to repeal the public nuisance ban on bathhouses. This resolution should be disapproved because as modified, the prohibition on any "place" that permits sexual intercourse as a primary activity would be exceedingly overbroad.

The statute's focus on bathhouses may seem arbitrary, but it was narrowly tailored to a particular health issue. Penal Code section 11225 was amended to add what is now subdivision (c) in 1988, in order to bolster efforts by public health departments in San Francisco, Los Angeles, and San Diego to address a public health emergency centered on bathhouses that served as venues for unprotected sex for populations at high risk for contracting HIV. Prior to the amendment, for example, San Francisco's Department of Public Health attempted to shut down bathhouses where the unwitting transmission of the HIV virus had been confirmed, but lost a motion for a preliminary injunction brought by one of the proprietors, resulting in a remedy requiring on-site observers and removal of the doors from formerly private rooms. (See generally, *Agnost v. Owen* (filed Oct. 10, 1984) San Francisco Superior Court Case No. 830-321.)

Most of the bathhouses subject to this law have been closed for many years, and there may no longer be a need for a specific provision declaring bathhouses, in particular, to be public nuisances. However, simply eliminating the reference to bathhouses would render the statute overbroad. The only potential limiting language is the term "primary activity." But this term is not defined in the statute, is not used in the other subdivisions of the statute, and has not been interpreted by the courts. At its most expansive, after the proposed amendment, the statute would declare a public nuisance "[e]very … place which as a primary activity … permits … anal intercourse, oral copulation, or vaginal intercourse[.]" Of course, this would mean that hotel rooms, and even bedrooms in private homes, constitute public nuisances that must be abated. Because the resolution would render the statute unduly overbroad, it should be disapproved.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Penal Code section 11225, to read as follows:

§ 11225

(a) (1) Every building or place used for the purpose of illegal gambling as defined by

state law or local ordinance, lewdness, assignation, or prostitution, and every building or place in or upon which acts of illegal gambling as defined by state law or local ordinance, lewdness, assignation, or prostitution, are held or occur, is a nuisance which shall be enjoined, abated, and prevented, and for which damages may be recovered, whether it is a public or private nuisance.

(2) Nothing in this subdivision shall be construed to apply the definition of a nuisance to a private residence where illegal gambling is conducted on an intermittent basis and without the purpose of producing profit for the owner or occupier of the premises.

(b) (1) Notwithstanding any other law, every building or place used for the purpose of human trafficking, and every building or place in or upon which acts of human trafficking are held or occur, is a nuisance which shall be enjoined, abated, and prevented, and for which damages may be recovered, whether it is a public or private nuisance.

(2) For purposes of this subdivision, human trafficking is defined in Section 236.1.

(c)(1) Every building or place ~~used as a bathhouse~~ which as a primary activity encourages or permits conduct that according to the guidelines of the federal Centers for Disease Control can transmit AIDS, including, but not limited to, anal intercourse, oral copulation, or vaginal intercourse, is a nuisance which shall be enjoined, abated, and prevented, and for which damages may be recovered, whether it is a public or private nuisance.

~~(2) For purposes of this subdivision, a "bathhouse" is to be defined as a business which, as its primary purpose, provides facilities for a spa, whirlpool, communal bath, sauna, steam bath, mineral bath, mud bath, or facilities for swimming.~~

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: San Diego County Bar Association

STATEMENT OF REASONS

The Problem: The ban on bathhouses was passed in the early 1980's as a reaction to AIDS. The reference to bathhouses makes no sense. If our government regards as a nuisance places that encourage or permit conduct that spreads AIDS, as a primary activity, it should apply the same standard to everywhere and not have a special rule for bathhouses. Bathhouses should not be subject to special scrutiny regarding whether they encourage or allow such behavior as a primary activity. Furthermore, singling out bathhouses is discriminatory against gays because other places that permit or encourage such conduct as a primary activity but mainly involve heterosexual sex, such as massage parlors, are not included.

The Solution: This resolution removes the element of "bathhouse" in the ban on buildings and places that encourage or permit a primary activity of conduct that can spread AIDS. The result is the same standard applied to all places that permit or encourage conduct that can spread AIDS.

IMPACT STATEMENT

The resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION

None known.

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RESOLUTION 06-07-2017

DIGEST
Burglary: To Include Recreational Vehicles And Inhabited Cars
Amends Penal Code section 460 to include the burglary of an inhabited recreational vehicle or house car as first degree burglary.

RESOLUTIONS COMMITTEE RECOMMENDATION
APPROVE IN PRINCIPLE

History:
No similar resolutions found.

Reasons:
This resolution amends Penal Code section 460 to include the burglary of an inhabited recreational vehicle or house car as first degree burglary. This resolution should be approved in principle because it recognizes the severity and intrusiveness of a burglary to a residence, regardless of whether the residence is a vehicle or a more traditional dwelling.

Residential burglaries are punished more severely than other burglaries, because of the danger and intrusiveness of the act. There is a strong public policy that people should feel secure in their homes. Penal Code section 460, subdivision (a) states that a residential burglary is of "an inhabited dwelling house, vessel . . .which is inhabited and designed for habitation, floating home, . . . or trailer coach… or the inhabited portion of any other building. . .." It recognizes that a person's "home" is not necessarily a conventional brick-and-mortar dwelling. People live in a variety of unconventional homes, but they are homes nonetheless.

Although Penal Code section 460, subdivision (a) does not specifically include an inhabited recreational vehicle or house car, case law has consistently applied this statute to dwellings other than those specifically listed in the statute. "[I]t is the element of habitation, not the nature of the structure that elevates the crime of burglary to first degree." (*People v. Wilson* (1992) 11 Cal.App.4th 1483, 1489). In *People v. Trevino* (2016) 1 Cal.App.5th 120, the court applied this logic to an inhabited recreational vehicle. This interpretation has been adopted in the CALCRIM jury instructions. (See CALCRIM No. 1702, bench note.) This resolution should be approved in principle to codify and clarify that recreational vehicles or house cars are embraced within the definition of inhabited dwelling for purposes of the crime of first degree burglary.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Penal Code section 460 to read as follows:

§ 460.

(a) Every burglary of an inhabited dwelling house, vessel, as defined in the Harbors and Navigation Code, which is inhabited and designed for habitation, floating home, as defined in subdivision (d) of Section 18075.55 of the Health and Safety Code, recreational vehicle or house car, or trailer coach, as defined by the Vehicle Code, or the inhabited portion of any other

building, is burglary of the first degree.

(b) All other kinds of burglary are of the second degree.

(c) This section shall not be construed to supersede or affect Section 464 of the Penal Code.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Bar Association of Northern San Diego County

STATEMENT OF REASONS

The Problem: Currently, the definition of first degree burglary in Penal Code section 460 does not include inhabited recreational vehicles or house cars. This omission required the Second District Court of Appeal in *People v. Trevino* (2016) 1 Cal.App.5th 120, to imply the inclusion of such inhabited dwellings within the definition of first degree burglary in section 460.

The Solution: This resolution would add the language inferred by the *Trevino* court to clarify the issue and obviate the necessity of resorting to case law such as *Trevino* for clarification of this element of the crime.

IMPACT STATEMENT
The resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR RELATED LEGISLATION
None known.

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RESOLUTION 06-08-2017

DIGEST
Statutes of Limitation: Discovery Rule for Computer Hacking Crimes
Amends Penal Code section 803.5 to provide that the statute of limitations for computer hacking under section 502 is subject to the discovery rule.

WITHDRAWN BY PROPONENT

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Penal Code section 803 to read as follows:

§ 803.5

With respect to a violation of Section 115, 502, or 530.5, a limitation of time prescribed in this chapter does not commence to run until the discovery of the offense.

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: Los Angeles County Bar Association

STATEMENT OF REASONS

The Problem: On December 14, 2016, Yahoo reported that someone apparently breached its corporate network sometime in August 2013 and compromised over 1 billion user accounts. (Goel and Perlroth, *Yahoo Says 1 Billion User Accounts Were Hacked* (Dec. 14, 2016) New York Times https://www.nytimes.com/2016/12/14/technology/yahoo-hack.html.) However, no criminal case for computer hacking under Penal Code section 502 will ever arise from this historic breach, because it is beyond the 3-year statute of limitations, which runs from the date of the offense. (*See* Cal. Pen. Code § 801.)

Unlike a physical assault, computer hacking is usually not noticed by the victim as it occurs, and often involves concealment of both the identity of the perpetrator and the fact of the breach itself. The surreptitious nature of digital intrusions, and the long lead time needed to investigate a breach, means that criminal prosecution may be impossible or impractical, assuming that the computer intrusion is discovered by the victim or brought to the attention of law enforcement at all.

Under existing law, the statute of limitations for similar 'white collar' crimes (e.g., grand theft, money laundering, identity theft, fraud, forgery, perjury, etc.) does not run until the date of discovery. (*See* Cal. Pen. Code, §§ 803(c), 803.5.) "Discovery" means the date that the crime was actually discovered, or should have been discovered, by either the victim or law

enforcement. (*See People v. Zamora* (1976) 18 Cal.3d 538, 561-562; *People v. Kronemeyer* (1987) 189 Cal.App.3d 314, 333-335).) Moreover, a civil action under Penal Code section 502 may be brought within 3 years of the date of discovery. (Cal. Pen. Code, § 502, subd. (e)(5).)

The Solution: This resolution amends Penal Code section 803.5 so that the statute of limitations for a criminal violation of Penal Code section 502 does not commence to run until the discovery of the offense. This reflects the same rule that applies to other white collar crimes and also to the civil action for computer hacking.

IMPACT STATEMENT
The resolution does not affect laws other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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RESPONSIBLE FLOOR DELEGATE: Steven Wang

RESOLUTION 06-09-2017

DIGEST
Criminal Law: Creating a Tiered Sex-Offender Registry
Amends Penal Code sections 290, 290.006, and 290.011 to create a tiered sex offender registry.

RESOLUTIONS COMMITTEE RECOMMENDATION
APPROVE IN PRINCIPLE

History:
No similar resolutions found.

Reasons:
This resolution amends Penal Code sections 290, 290.006, and 290.011 to create a tiered sex offender registry. This resolution should be approved in principle because lifetime registration is an onerous burden that should be reserved for only the most serious sex offenses and repeat sex offenders.

This resolution seeks to replace the lifetime registration requirement for sex offenders with a registration requirement that lasts for 10 years, 20 years, or life, depending on the type of sex offense that was committed, the offender's score on the State-Authorized Risk Assessment Tool for Sex Offenders (SARATSO), and any subsequent criminal history. Currently, Senate Bill No. 421 (Wiener) proposes a substantially similar three-tiered sex offender registry (10 years, 20 years, or life) to replace the lifetime registration requirement. The only significant difference between this resolution and Senate Bill No. 421 is that the latter would require the sex offender to file a petition with a court to terminate the registration requirement and provide notice to the district attorney. The petition must be granted following completion of the minimum registration period, unless the petitioner is on probation or supervised release, faces pending charges that could extend the registration period, or poses an unreasonable risk to community safety if registration is discontinued, placing the burden of proof on the district attorney.

Since this resolution is similar to Senate Bill No. 421 (Wiener), it may be action unnecessary by the time of the Conference.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Penal Code sections 290, 290.006, and 290.011 to read as follows:

§ 290

(a) Sections 290 to 290.024, inclusive, shall be known and may be cited as the Sex Offender Registration Act. All references to "the Act" in those sections are to the Sex Offender Registration Act.

(b) Every person described in subdivision (c), for the ~~rest of his or her life~~ period specified in subdivision (d) while residing in California, or while attending school or working in California, as described in Sections 290.002 and 290.01, shall be required to register with the

chief of police of the city in which he or she is residing, or the sheriff of the county if he or she is residing in an unincorporated area or city that has no police department, and, additionally, with the chief of police of a campus of the University of California, the California State University, or community college if he or she is residing upon the campus or in any of its facilities, within five working days of coming into, or changing his or her residence within, any city, county, or city and county, or campus in which he or she temporarily resides, and shall be required to register thereafter in accordance with the Act.

(c) The following persons shall be required to register:

Every person who, since July 1, 1944, has been or is hereafter convicted in any court in this state or in any federal or military court of a violation of Section 187 committed in the perpetration, or an attempt to perpetrate, rape or any act punishable under Section 286, 288, 288a, or 289, Section 207 or 209 committed with intent to violate Section 261, 286, 288, 288a, or 289, Section 220, except assault to commit mayhem, subdivision (b) ~~and~~ *or* (c) of Section 236.1, Section 243.4, paragraph (1), (2), (3), (4), or (6) of subdivision (a) of Section 261, paragraph (1) of subdivision (a) of Section 262 involving the use of force or violence for which the person is sentenced to the state prison, Section 264.1, 266, or 266c, subdivision (b) of Section 266h, subdivision (b) of Section 266i, Section 266j, 267, 269, 285, 286, 288, 288a, 288.3, 288.4, 288.5, 288.7, 289, or 311.1, subdivision (b), (c), or (d) of Section 311.2, Section 311.3, 311.4, 311.10, 311.11, or 647.6, former Section 647a, subdivision (c) of Section 653f, subdivision 1 or 2 of Section 314, any offense involving lewd or lascivious conduct under Section 272, or any felony violation of Section 288.2; any statutory predecessor that includes all elements of one of the above-mentioned offenses; or any person who since that date has been or is hereafter convicted of the attempt or conspiracy to commit any of the above-mentioned offenses.

(d) (1) For purposes of this subdivision, the following definitions apply:

(A) "Registerable offense" means an offense or punishable act described in subdivision (c).

(B) "Initial registration date" means either the date the person was released from prison after incarceration for conviction of a registerable offense, or the date of conviction for a registerable offense for a person who was not sentenced to prison.

(C) "Violent felony" means a felony described in subdivision (c) of Section 667.5.

(D) "Violent registerable offense" means an offense that is both a registerable offense and a violent felony.

(E) "SARATSO" means the State-Authorized Risk Assessment Tool for Sex Offenders as described in Section 290.04.

(2) Every person described in subdivision (c), and every person who is otherwise required to register pursuant to the Act, shall be required to register as a tier one, tier two, or tier three offender, and for a period commencing on that person's initial registration date, except as otherwise provided in this section, of 10 years, 20 years, or life, depending on which of the three tiers the offender is placed, pursuant to paragraphs (3) to (5), inclusive.

(3) A tier one offender shall be subject to the registration requirements of the Act for a period of 10 years. A person is a tier one offender if all of subparagraphs (A) to (D), inclusive, apply, or if subparagraph (E) applies:

(A) The person was convicted of a registerable offense that is not a violent offense.

(B) The person's score on the SARATSO is low, low-moderate, or moderate, or the person is not eligible for assessment under the applicable coding rules, pursuant to Section 290.06.

(C) For a period of 10 years, commencing with the person's initial registration date, the person is not convicted of a registerable offense or for a violent felony.

(D) For a period of 10 years, commencing with the person's initial registration date, the person is not convicted of more than one felony violation of the Act.

(E) The person is required by the court to register as a tier one offender, pursuant to Section 290.006.

(4) A tier two offender shall be subject to the registration requirements of the Act for a period of 20 years. A person is a tier two offender if subparagraphs (A) to (C), inclusive, all apply, or if subparagraphs (D) to (F), inclusive, all apply, or if subparagraph (G) applies:

(A) The person's score on the SARATSO is moderate-high risk, the person was convicted of a violent registerable offense, or the person was convicted of a violation of Section 647.6.

(B) For a period of 20 years, commencing with the person's initial registration date, the person is not convicted of a violent registerable offense.

(C) For a period of 20 years, commencing with the person's initial registration date, the person is not convicted of more than one felony violation of the Act.

(D) The person was a tier one offender, but was convicted of more than one felony violation of the Act, or was convicted of a registerable offense or a violent felony, within 10 years from the person's initial registration date.

(E) For a period of 20 years, commencing with the person's conviction described in subparagraph (D), the person is not convicted of a violent registerable offense.

(F) For a period of 20 years, commencing with the person's conviction described in subparagraph (D), the person is not convicted of a violation of the Act.

(G) The person is required by the court to register as a tier two offender, pursuant to Section 290.006.

(5) A tier three offender shall be subject to the registration requirements of the Act for life. A person is a tier three offender if any of the following apply:

(A) The person's score on the SARATSO is high risk.

(B) Within 20 years of the person's initial registration date, the person is convicted of a violent registerable offense.

(C) The person has at any time been committed to a state mental hospital as a sexually violent predator pursuant to Article 4 (commencing with Section 6600) of Chapter 2 of Part 2 of Division 6 of the Welfare and Institutions Code.

(D) The person was a tier two offender and subsequently was convicted of more than one felony violation of the Act, or the person is convicted of any violation of the Act after becoming a tier two offender having previously been a tier one offender.

(E) The person is required to register pursuant to Section 290.004.

(F) The person is required by the court to register as a tier three offender pursuant to Section 290.006.

(G) The person has been convicted of a violation of subdivision (b) or (c) of Section 236.1.

(6) Persons required to register pursuant to Section 290.005 shall be placed in the appropriate tier if the offense is assessed as equivalent to a registerable offense. If the person's duty to register pursuant to Section 290.005 is based solely on the requirement of registration in another jurisdiction, the person shall be placed in tier two, except that the person shall be placed in tier three if any of the following apply:

(A) The person's score on the SARATSO is high risk.

(B) Within 20 years of the person's initial registration date, the person is convicted of a violent registerable offense.

(C) The person has at any time been committed to a state mental hospital or mental health facility in a proceeding similar to civil commitment as a sexually violent predator pursuant to Article 4 (commencing with Section 6600) of Chapter 2 of Part 2 of Division 6 of the Welfare and Institutions Code.

(7) A person required to register as a tier two offender may, by filing an application on a form approved by the Department of Justice, petition the department for tier one status if the person was convicted of a registerable offense, or adjudicated for an offense described in subdivision (c) of Section 290.008, against no more than one victim 12 to 17 years of age, inclusive; the person was not more than 10 years older than the victim; and the act was illegal due solely to the age of the minor. If the department determines that the person meets the requirements for tier one status, the department shall grant the petition. The petitioner bears the burden of proving the facts that make the petitioner eligible for tier one status.

§ 290.006

Any person ordered by any court to register pursuant to the Act for any offense not included specifically in subdivision (c) of Section 290, shall so register, if the court finds at the time of conviction or sentencing that the person committed the offense as a result of sexual compulsion or for purposes of sexual gratification. The court shall state on the record the reasons for its findings and the reasons for requiring registration. The person shall register as a tier one offender pursuant to Section 290, unless the court states on the record the reasons for requiring the person to register as a tier two or tier three offender pursuant to Section 290.

§ 290.011

Every person who is required to register pursuant to the act who is living as a transient shall be required to register ~~for the rest of his or her life~~ as follows:

(a) He or she shall register, or reregister if the person has previously registered, within five working days from release from incarceration, placement or commitment, or release on probation, pursuant to subdivision (b) of Section 290, except that if the person previously registered as a transient less than 30 days from the date of his or her release from incarceration, he or she does not need to reregister as a transient until his or her next required 30-day update of registration. If a transient convicted in another jurisdiction enters the state, he or she shall register within five working days of coming into California with the chief of police of the city in which he or she is present or the sheriff of the county if he or she is present in an unincorporated area or city that has no police department. If a transient is not physically present in any one jurisdiction for five consecutive working days, he or she shall register in the jurisdiction in which he or she is physically present on the fifth working day following release, pursuant to subdivision (b) of Section 290. Beginning on or before the 30th day following initial registration upon release, a transient shall reregister no less than once every 30 days thereafter. A transient shall register with the chief of police of the city in which he or she is physically present within that 30-day period, or the sheriff of the county if he or she is physically present in an unincorporated area or city that has no police department, and additionally, with the chief of police of a campus of the University of California, the California State University, or community college if he or she is physically present upon the campus or in any of its facilities. A transient shall reregister no

less than once every 30 days regardless of the length of time he or she has been physically present in the particular jurisdiction in which he or she reregisters. If a transient fails to reregister within any 30-day period, he or she may be prosecuted in any jurisdiction in which he or she is physically present.

(b) A transient who moves to a residence shall have five working days within which to register at that address, in accordance with subdivision (b) of Section 290. A person registered at a residence address in accordance with that provision who becomes transient shall have five working days within which to reregister as a transient in accordance with subdivision (a).

(c) Beginning on his or her first birthday following registration, a transient shall register annually, within five working days of his or her birthday, to update his or her registration with the entities described in subdivision (a). A transient shall register in whichever jurisdiction he or she is physically present on that date. At the 30-day updates and the annual update, a transient shall provide current information as required on the Department of Justice annual update form, including the information described in paragraphs (1) to (3), inclusive, of subdivision (a) of Section 290.015, and the information specified in subdivision (d).

(d) A transient shall, upon registration and reregistration, provide current information as required on the Department of Justice registration forms, and shall also list the places where he or she sleeps, eats, works, frequents, and engages in leisure activities. If a transient changes or adds to the places listed on the form during the 30-day period, he or she does not need to report the new place or places until the next required reregistration.

(e) Failure to comply with the requirement of reregistering every 30 days following initial registration pursuant to subdivision (a) shall be punished in accordance with subdivision (g) of Section 290.018. Failure to comply with any other requirement of this section shall be punished in accordance with either subdivision (a) or (b) of Section 290.018.

(f) A transient who moves out of state shall inform, in person, the chief of police in the city in which he or she is physically present, or the sheriff of the county if he or she is physically present in an unincorporated area or city that has no police department, within five working days, of his or her move out of state. The transient shall inform that registering agency of his or her planned destination, residence or transient location out of state, and any plans he or she has to return to California, if known. The law enforcement agency shall, within three days after receipt of this information, forward a copy of the change of location information to the Department of Justice. The department shall forward appropriate registration data to the law enforcement agency having local jurisdiction of the new place of residence or location.

(g) For purposes of the act, transient means a person who has no residence. Residence means one or more addresses at which a person regularly resides, regardless of the number of days or nights spent there, such as a shelter or structure that can be located by a street address, including, but not limited to, houses, apartment buildings, motels, hotels, homeless shelters, and recreational and other vehicles.

(h) The transient registrant s duty to update his or her registration no less than every 30 days shall begin with his or her second transient update following the date this section became effective.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Sacramento County Bar Association

STATEMENT OF REASONS

The Problem: *Four* states in America impose a lifetime registration for all sex offenses (California, Florida, South Carolina, Alabama). Lifetime registration for *all* sex offenses is unduly punitive, unnecessarily costly, counterproductive, and increases recidivism rates, making Californians less safe.

California's current system has created a large, unwieldy registry including many individuals who don't pose a risk to the community. The registry is counterproductive to public safety as neither law enforcement nor the community are able to identify or effectively monitor those who are high risk/likely to reoffend.

The effects of lifetime registration are unnecessarily burdensome for low risk individuals. The consequences registrants and their families face include serious obstacles to finding appropriate (if any) housing or employment, development of positive support systems or close relationships, and successful reintegration into communities *for the rest of their lives.* Registration prevents individuals from accessing resources including VA housing programs and can bar individuals from many retirement, convalescent, and hospice facilities. These consequences have actually been shown to increase the risk of re-offending. An effective registration system needs to distinguish between those who should be subject to these consequences for life, and those who are not a long-term danger to the public.

The Solution: This resolution would create a tiered sex registration system (10 years/20 years/life), which the California Sex Offender Management Board (CASOMB) has recommended since the board was created in 2006 by Governor Arnold Schwarzenegger. The proposed amendments reflect many of the specific changes recommended by CASOMB. Research on sex offender risk and recidivism offers little justification for continuing the current system. Research indicates that after approximately 17 years of living in the community, free of any type of criminal offense, even high risk sex offenders are no more likely to commit a new sex offense than are individuals who had been convicted of any non-sexual crime. Moderate risk sex offenders are no more likely than non-sexual offenders to commit a new sex crime after 10-14 years. Society is better protected when attention is focused on those who truly present a long-term risk, while allowing low-risk offenders to focus on moving forward with their lives.
The proposed amendments refer to use of the SARATSO Static 99 test, which is the official risk assessment instrument adopted in California to measure risk of sexual re-offense based on static, unchanging criminal history factors. Studies show the Static-99R is working well across the diverse population in California. It has accurately predicted which offenders would commit a new sex offense in about 82% of cases. Low risk offenders have been shown to have a recidivism rate of only 1.6%.

The changes proposed here do not affect the current ability of a judge to impose up to lifetime registration for *any criminal conviction.*

The tiered sex-registry approach is evidence-based legislation. Re-structuring California's broken, cumbersome sex-registry system will make all Californians safer.

IMPACT STATEMENT
The resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION
Similar to AB 702 2013/2014 and Similar to SB 695 2017/2018

AUTHORS AND/OR PERMANENT CONTACTS: Robert Sorokolit, 700 H St, Suite 0270, Sacramento, CA 95814; Telephone: (916) 874-6879; Fax (916) 874-8223; email: sorokolitr@saccounty.net

RESPONSIBLE FLOOR DELEGATE: Robert Sorokolit

RESOLUTION 06-10-2017

DIGEST
Child Prostitution: Eliminate Harmful Language Regarding Exploited Children
Amends Penal Code sections 261.9, 266, 266h, 267, 315, 653.20, and 11165.1 to remove statutory references to children as engaging in prostitution or being prostitutes.

RESOLUTION COMMITTEE RECOMMENDATION
DISAPPROVE

History:
Similar to Resolutions 06-10-2014 and 07-04-2016, which were withdrawn, and Resolution 09-09-2013, which was disapproved.

Reasons:
This resolution amends Penal Code sections 261.9, 266, 266h, 267, 315, 653.20, and 11165.1 to remove statutory references to children as engaging in prostitution or being prostitutes. This resolution should be disapproved because the proposed language creates confusion, has possible unintended consequences, and goes beyond the stated purpose and goal of the resolution.

In 2016, the Legislature amended Penal Code sections 647 and 653.22, to make it legally impossible for a child, defined as anyone under 18 years of age, to be capable of committing prostitution. Although the language in the above-mentioned code sections continues to use the term prostitute when referring to a child under the age of 18, which, as stated, is a legal impossibility, the resolution is inconsistent with the amendments to Penal Code sections 647 and 653.22 and impacts other laws not related to child prostitution. While we appreciate the goal of the proponent, it does not appear that this resolution properly addresses the concern.

Penal Code section 647, subdivision (b) refers to minors as "commercially exploited children." The proposed amendment to Penal Code section 261.9 does not use that language, using instead the word "minor." This may create unnecessary confusion.

The proposed amendment to Penal Code section 315 does not mention or make reference to commercially exploited children. Instead, the proposed language adds the word "adult" to Penal Code section 315. The purpose of adding adult is to ensure that only an adult can be convicted of living in a house of ill-repute. It does nothing to stop or reduce or prevent commercially exploited children.

The changes to Penal Code sections 647 and 653.22 are explicit in that minors cannot commit prostitution, so adding that language to Penal Code section 653.20 is unnecessary and duplicative.

Finally, the proposed changes to Penal Code section 11165.1 amend the law relating to prostitution by adults, not by minors. As a result of this potential confusion, the resolution should be disapproved.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Penal Code sections 261.9, 266, 266h, 266i, 267, 315, 653.20, and 11165.1, to read as follows:

§ 261.9

(a) Any person convicted of seeking to commercially sexually exploit a minor ~~to procure or procuring the sexual services of a prostitute in violation of subdivision (b) of Section 647, if prostitute is under 18 years of age~~, shall be ordered by the court, in addition to any other penalty or fine imposed, to pay an additional fine in an amount not to exceed twenty-five thousand dollars ($25,000).

(b) Every fine imposed and collected pursuant to this section shall, upon appropriation by the Legislature, be available to fund programs and services for commercially sexually exploited minors in the counties where the underlying offenses are committed.

§ 266

Every person who inveigles or entices any unmarried female, of previous chaste character, under the age of 18 years, into any house of ill fame, or of assignation, or elsewhere, for the purpose of ~~prostitution~~ commercial sexual exploitation~~, or to have illicit carnal connection with any man~~; and every person who aids or assists in such inveiglement or enticement; and every person who, by any false pretenses, false representation, or other fraudulent means, procures any female to have illicit carnal connection with any man, is punishable by imprisonment in the state prison, or by imprisonment in a county jail not exceeding one year, or by a fine not exceeding two thousand dollars ($2,000), or by both such fine and imprisonment.

§ 266h

(a) Except as provided in subdivision (b), any person who, knowing another person is a prostitute, lives or derives support or maintenance in whole or in part from the earnings or proceeds of the person's prostitution, or from money loaned or advanced to or charged against that person by any keeper or manager or inmate of a house or other place where prostitution is practiced or allowed, or who solicits or receives compensation for soliciting for the person, is guilty of pimping, a felony, and shall be punishable by imprisonment in the state prison for three, four, or six years.

(b) Any person who, knowingly sexually exploits a minor ~~another person is a prostitute~~, lives or derives support or maintenance in whole or in part from the earnings or proceeds of the commercial sexual exploitation of a minor ~~person's prostitution~~, or from money loaned or advanced to or charged against that ~~person~~ minor by any keeper or manager or inmate of a house or other place where commercial sexual exploitation ~~prostitution~~ is practiced or allowed, or who solicits or receives compensation for soliciting the minor ~~for the person~~, when the commercial sexual exploitation ~~prostitute~~ is of a minor, is guilty of pimping a minor, a felony, and shall be punishable as follows:

(1) If the victim of commercial sexual exploitation ~~prostitute~~ is a minor 16 years of age or older, the offense is punishable by imprisonment in the state prison for three, four, or six years.

(2) If the victim of commercial sexual exploitation ~~prostitute~~ is under 16 years of age, the offense is punishable by imprisonment in the state prison for three, six, or eight years.

§ 266i

(a) Except as provided in subdivision (b), any person who does any of the following is guilty of pandering, a felony, and shall be punishable by imprisonment in the state prison for three, four, or six years:

(1) Procures another person for the purpose of prostitution or commercial sexual exploitation.

(2) By promises, threats, violence, or by any device or scheme, causes, induces, persuades, or encourages another person to become a prostitute or to be commercially sexually exploited.

(3) Procures for another person a place as an inmate in a house of prostitution or commercial sexual exploitation or as an inmate of any place in which prostitution or commercial sexual exploitation is encouraged or allowed within this state.

(4) By promises, threats, violence, or by any device or scheme, causes, induces, persuades, or encourages an inmate of a house of prostitution or commercial sexual exploitation, or any other place in which prostitution or commercial sexual exploitation is encouraged or allowed, to remain therein as an inmate.

(5) By fraud or artifice, or by duress of person or goods, or by abuse of any position of confidence or authority, procures another person for the purpose of prostitution or commercial sexual exploitation, or to enter any place in which prostitution or commercial sexual exploitation is encouraged or allowed within this state, or to come into this state or leave this state for the purpose of prostitution or commercial sexual exploitation.

(6) Receives or gives, or agrees to receive or give, any money or thing of value for procuring, or attempting to procure, another person for the purpose of prostitution or commercial sexual exploitation, or to come into this state or leave this state for the purpose of prostitution or commercial sexual exploitation.

(b) Any person who does any of the acts described in subdivision (a) with another person who is a minor is guilty of pandering, a felony, and shall be punishable as follows:

(1) If the other person is a minor 16 years of age or older, the offense is punishable by imprisonment in the state prison for three, four, or six years.

(2) If the other person is under 16 years of age, the offense is punishable by imprisonment in the state prison for three, six, or eight years.

§ 267

Every person who takes away any other person under the age of 18 years from the father, mother, guardian, or other person having the legal charge of the other person, without their consent, for the purpose of commercial sexual exploitation ~~prostitution~~, is punishable by imprisonment in the state prison, and a fine not exceeding two thousand dollars ($2,000).

§ 315

Every person who keeps a house of ill-fame in this state, resorted to for the purposes of prostitution or lewdness, or an adult who willfully resides in such house, is guilty of a misdemeanor; and in all prosecutions for keeping or resorting to such a house common repute may be received as competent evidence of the character of the house, the purpose for which it is kept or used, and the character of the women inhabiting or resorting to it.

§ 653.20

For purposes of this chapter, the following definitions apply:

(a) “Commit prostitution” means to engage in sexual conduct for money or other consideration, but does not include sexual conduct engaged in as a part of any stage performance, play, or other entertainment open to the public. A minor is not capable of committing prostitution because such a minor is a victim of commercial sexual exploitation.

(b) “Public place” means an area open to the public, or an alley, plaza, park, driveway, or parking lot, or an automobile, whether moving or not, or a building open to the general public, including one which serves food or drink, or provides entertainment, or the doorways and entrances to a building or dwelling, or the grounds enclosing a building or dwelling.

(c) “Loiter” means to delay or linger without a lawful purpose for being on the property and for the purpose of committing a crime as opportunity may be discovered.

§ 11165.1

As used in this article, "sexual abuse" means sexual assault or sexual exploitation as defined by the following:

(a) "Sexual assault" means conduct in violation of one or more of the following sections: Section 261 (rape), subdivision (d) of Section 261.5 (statutory rape), Section 264.1 (rape in concert), Section 285 (incest), Section 286 (sodomy), subdivision (a) or (b), or paragraph (1) of subdivision (c) of Section 288 (lewd or lascivious acts upon a child), Section 288a (oral copulation), Section 289 (sexual penetration), or Section 647.6 (child molestation).

(b) Conduct described as "sexual assault" includes, but is not limited to, all of the following:

(1) Penetration, however slight, of the vagina or anal opening of one person by the penis of another person, whether or not there is the emission of semen.

(2) Sexual contact between the genitals or anal opening of one person and the mouth or tongue of another person.

(3) Intrusion by one person into the genitals or anal opening of another person, including the use of an object for this purpose, except that, it does not include acts performed for a valid medical purpose.

(4) The intentional touching of the genitals or intimate parts, including the breasts, genital area, groin, inner thighs, and buttocks, or the clothing covering them, of a child, or of the perpetrator by a child, for purposes of sexual arousal or gratification, except that it does not include acts which may reasonably be construed to be normal caretaker responsibilities; interactions with, or demonstrations of affection for, the child; or acts performed for a valid medical purpose.

(5) The intentional masturbation of the perpetrator's genitals in the presence of a child.

(c) "Sexual exploitation" refers to any of the following:

(1) Conduct involving matter depicting a minor engaged in obscene acts in violation of Section 311.2 (preparing, selling, or distributing obscene matter) or subdivision (a) of Section 311.4 (employment of minor to perform obscene acts).

(2) A person who knowingly promotes, aids, or assists, employs, uses, persuades, induces, or coerces a child, or a person responsible for a child's welfare, who knowingly permits or encourages a child to engage in, or assist others to engage in provision of food, shelter, or payment to a child in exchange for the performance of any sexual act, ~~prostitution~~ or a live performance involving obscene sexual conduct, or to either pose or model alone or with others

for purposes of preparing a film, photograph, negative, slide, drawing, painting, or other pictorial depiction, involving obscene sexual conduct. For the purpose of this section, "person responsible for a child's welfare" means a parent, guardian, foster parent, or a licensed administrator or employee of a public or private residential home, residential school, or other residential institution.

(3) A person who depicts a child in, or who knowingly develops, duplicates, prints, downloads, streams, accesses through any electronic or digital media, or exchanges, a film, photograph, videotape, video recording, negative, or slide in which a child is engaged in an act of obscene sexual conduct, except for those activities by law enforcement and prosecution agencies and other persons described in subdivisions (c) and (e) of Section 311.3.

(d) "Commercial sexual exploitation" refers to either of the following:

(1) The sexual trafficking of a child, as described in subdivision (c) of Section 236.1.

(2) The provision of food, shelter, or payment to a child in exchange for the performance of any sexual act described in this section or subdivision (c) of Section 236.1.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Queen's Bench Bar Association

STATEMENT OF REASONS

The Problem: Pursuant to a 2016 Penal Code amendment, children cannot be charged with the crime of prostitution. Unfortunately, the Penal Code has not been amended to eliminate the use of the legally and factually wrong references to children as prostitutes.

When he directed his staff to stop using the terms "child prostitute" and "underage prostitution," Los Angeles County Sherriff Jim McDonnell explained that using these misnomers strips responsibility from the traffickers and the people who pay to have sex with children. "We must remember that children cannot consent to sex under any circumstance," McDonnell stated. The continued use of these misnomers is a barrier to treating these children as victims of commercial sexual exploitation rather than as preparators of crime.

"No Such Thing" is a national campaign against child sex trafficking which seeks to end the use of these terms. In launching the campaign, Human Rights Project for Girls explained: "There is a very real way in which the term "child prostitute" diminishes the violence, harm, trauma and coercion that a trafficked child is subject to. The term child prostitute is therefore a misnomer, failing to capture the legal and moral context of what these children endure on a daily basis."

The Solution: This resolution would solve the problem by removing all reference to children as prostitutes or engaging in prostitution and replacing these references with the appropriate language of commercial sexual exploitation of a minor/child.

Please note that this resolution and 16-06-2017 propose complementary amendments to Penal Code sections 266 and 315. The amendments proposed in this resolution and in 16-05-2017 are intended to work together to eliminate use of outdated and discriminatory language.

IMPACT STATEMENT
The resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION
SB1322 – Amendment to Penal Code section 647 signed September 2016, implemented January 2017

AUTHOR AND/OR PERMANENT CONTACT: April Rose Sommer, Queen's Bench Bar Association Board Member, 1547 Palos Verdes Mall #196, Walnut Creek, CA 94597, Office (619) 363-6790, Cell (510) 913-3247, Fax (866) 356-9088, april.sommer@yahoo.com

RESPONSIBLE FLOOR DELEGATE: April Rose Sommer

RESOLUTION 06-11-2017

DIGEST
Prisoners: Credit for Good Behavior
Amends Penal Code Section 4019 to credit two days for every one day of time served.

RESOLUTION COMMITTEE RECOMMENDATION
APPROVE IN PRINCIPLE

History:
No similar resolutions found.

Reasons:
This resolution amends Penal Code Section 4019 to credit two days for every one day of time served. This resolution should be approved in principle because the current scheme is not equitable in its distribution and treatment of inmates, and is often confusing.

Determining credits for time served under Penal Code section 4019 can result in strange and inconsistent outcomes. Under the current system, inmates sentenced between one and three days serve their complete time in custody. However, an inmate sentenced to four days in custody only serves two days because good time credits allow the inmate to be released earlier. This system creates a perverse incentive for defendants to request a four or five-day sentence as opposed to a three-day sentence.

The current language also poses issues for defendants who are released from custody prior to reaching the four-day mark who are then picked back up for other potential violations (e.g. violation of probation terms). This creates confusion as to how time credits will be added together. If the defendant spends one day in custody on the first detention and three on the next, it is unclear whether the combined days equal four days for the purpose of this statute.

An attorney may not know the total time an inmate is entitled to because of confusion about the definition of confinement. Determining the how much time was served is often difficult because the current statutory language is unclear on how to determine the impact of a new violation prior to sentencing. Questions might arise, for example, regarding whether confinement is determined by the total time an inmate was in custody prior to sentencing or if it is broken up into discrete time periods based on how long the inmate was in custody prior to being released.

In addition, under the current language, it is not clear if a violation between terms of confinement impacts the calculation. Stripping the “four for two” language, as is proposed in the resolution, and replacing it with the more straightforward approach that for each day served on good behavior, a second day of credit will be granted (2 for 1), is a simpler calculation than what currently exists, will not result in perverse outcomes, and is less likely to result in math errors.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Penal Code section 4019 to read as follows:

§ 4019

(a) The provisions of this section shall apply in all of the following cases:

(1) When a prisoner is confined in or committed to a county jail, industrial farm, or road camp, or any city jail, industrial farm, or road camp, including all days of custody from the date of arrest to the date on which the serving of the sentence commences, under a judgment of imprisonment, or a fine and imprisonment until the fine is paid in a criminal action or proceeding.

(2) When a prisoner is confined in or committed to the county jail, industrial farm, or road camp or any city jail, industrial farm, or road camp as a condition of probation after suspension of imposition of a sentence or suspension of execution of sentence, in a criminal action or proceeding.

(3) When a prisoner is confined in or committed to the county jail, industrial farm, or road camp or any city jail, industrial farm, or road camp for a definite period of time for contempt pursuant to a proceeding, other than a criminal action or proceeding.

(4) When a prisoner is confined in a county jail, industrial farm, or road camp, or a city jail, industrial farm, or road camp following arrest and prior to the imposition of sentence for a felony conviction.

(5) When a prisoner is confined in a county jail, industrial farm, or road camp, or a city jail, industrial farm, or road camp as part of custodial sanction imposed following a violation of postrelease community supervision or parole.

(6) When a prisoner is confined in a county jail, industrial farm, or road camp, or a city jail, industrial farm, or road camp as a result of a sentence imposed pursuant to subdivision (h) of Section 1170.

(7) When a prisoner participates in a program pursuant to Section 1203.016 or Section 4024.2. Except for prisoners who have already been deemed eligible to receive credits for participation in a program pursuant to Section 1203.016 prior to January 1, 2015, this paragraph shall apply prospectively.

(b) Subject to the provisions of subdivision (d), for each ~~four-day~~ period in which a prisoner is confined in or committed to a facility as specified in this section, one day shall be deducted from his or her period of confinement for each day served unless it appears by the record that the prisoner has refused to satisfactorily perform labor as assigned by the sheriff, chief of police, or superintendent of an industrial farm or road camp.

(c) For each ~~four-day~~ period in which a prisoner is confined in or committed to a facility as specified in this section, one day shall be deducted from his or her period of confinement for each day served unless it appears by the record that the prisoner has not satisfactorily complied with the reasonable rules and regulations established by the sheriff, chief of police, or superintendent of an industrial farm or road camp.

(d) This section does not require the sheriff, chief of police, or superintendent of an industrial farm or road camp to assign labor to a prisoner if it appears from the record that the prisoner has refused to satisfactorily perform labor as assigned or that the prisoner has not

satisfactorily complied with the reasonable rules and regulations of the sheriff, chief of police, or superintendent of any industrial farm or road camp.

~~(e) A deduction shall not be made under this section unless the person is committed for a period of four days or longer.~~

~~(f) It is the intent of the Legislature that if all days are earned under this section, a term of four days will be deemed to have been served for every two days spent in actual custody.~~

(eg) The changes in this section as enacted by the act that added this subdivision shall apply to prisoners who are confined to a county jail, city jail, industrial farm, or road camp for a crime committed on or after the effective date of that act.

(fh) The changes to this section enacted by the act that added this subdivision shall apply prospectively and shall apply to prisoners who are confined to a county jail, city jail, industrial farm, or road camp for a crime committed on or after ?~~October 1, 2011~~. Any days earned by a prisoner prior to ?~~October 1, 2011~~, shall be calculated at the rate required by the prior law.

(gi) This section shall not apply, and no credits may be earned, for periods of flash incarceration imposed pursuant to Section 3000.08 or 3454.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Sacramento County Bar Association

STATEMENT OF REASONS

The Problem: Currently, Penal Code section 4019 is interpreted differently within and among jurisdictions across California. It is not unusual for a criminal defendant to serve numerous distinct “periods” of incarceration before being sentenced. Sometimes, the “periods” are blocked together before good time/work time calculations are made. Sometimes they are not, resulting in multiple “periods” that may fall below the four day minimum. Although there is case law that seems to suggest that the “period” should include all non-contiguous separate times served in a case, litigating the issue will not help those impacted as they will have already served the additional, unnecessary days by the time the issue is resolved.

Additionally, there doesn’t seem to be any rational basis for having “four for two” credits instead of the simpler “two for one” system proposed in this resolution.

The Solution: This resolution seeks to amend Penal Code Section 4019 to simplify and clarify the law for criminal defendants, representatives of penal institutions, attorneys, and judges. It would also bring the statute in line with case law that interprets it.

Changing credits from “four for two” to “two for one” would ensure that all criminal defendants get credit for the time they have served, accruing one day of good time/work time credit for every one day actually served.

IMPACT STATEMENT
This resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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