RESOLUTION 14-01-2017

DIGEST
Cannabis: Removing Increased Penalties for Criminal Violations of Statute
Amends Health and Safety Code sections 11358, 11359 and 11360 to eliminate increased penalties for prior convictions of marijuana-related offenses.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
Similar to Resolution 11-04-2002, which was withdrawn, Resolutions 09-06-2006, 09-07-2006, and 03-09-2007, which were approved in principle, and Resolution 10-03-2014, which was action unnecessary.

Reasons:
This resolution amends Health and Safety Code sections 11358, 11359 and 11360 to eliminate increased penalties for prior convictions of marijuana-related offenses. This resolution should be disapproved because a conviction under current law, for other marijuana or drug related offenses, or any other illegal activity, by a registered sex offender (Pen. Code, § 290, subd. (c)), or an individual with a history of multiple convictions for serious and/or violent felonies (Pen. Code, § 667, subd. (e)(2)(C)), warrants enhanced punishment.

Health & Safety Code section 11361.8 (aka Proposition 64), provides reduced penalties for qualified individuals for prior marijuana convictions. The current law does not single-out past crusaders for the legalization of marijuana, the LGBT community, African-Americans or other minority groups. Prior controlled substance offense is not the main target of the enhanced punishment provision in sections 11358, 11359 and 11360 of the Health and Safety Code, the principal argument advanced for the resolution. Yet that only concerns subparagraph (*i*) of Penal Code section 667, subdivision (e)(2)(C). The other subparagraphs refer to sex crimes and serious and violent felonies. The enhanced penalty for prior serious and/or violent felony convictions would currently apply to someone convicted of illegally cultivating marijuana (Health & Saf. Code, § 11358), possessing marijuana for sale without authorization (Health & Saf. Code, § 11359), or furnishing, importing or transporting marijuana into the state without authorization (Health & Saf. Code, § 11360). This is no different than other areas of criminal law which properly seek to deter convicted felons from continuing to violate the law.

The conduct which sections 11358, 11359 and 11360 address concerns unregulated criminal activity of a controlled substance, unrelated to the legal use of marijuana; those are not victimless crimes. Despite the legalization of marijuana use in California, the cultivation, transporting, furnishing and sale of marijuana, a controlled substance, remains a regulated industry subject to licensure by the State. These Health and Safety Code provisions, like other criminal statutes, deter through enhance punishment registered sex offenders and those convicted of serious and/or violent felonies from engaging in further criminal activity. There is no good reason to allow convicted sex offenders and felons to continue engaging in behavior and enterprises in the regulated area of marijuana law, knowing that if they do, the criminal consequences will be

minimal notwithstanding their criminal history.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Health and Safety Code sections 11358, 11359 and 11360 to read as follows:

§ 11358

Every person who plants, cultivates, harvests, dries, or processes marijuana plants, or any part thereof, except as otherwise provided by law, shall be punished as follows:

(a) Every person under the age of 18 who plants, cultivates, harvests, dries, or processes any marijuana plants shall be punished in the same manner provided in paragraph (1) of subdivision (b) of Section 11357.

(b) Every person at least 18 years of age but less than 21 years of age who plants, cultivates, harvests, dries, or processes not more than six living marijuana plants shall be guilty of an infraction and a fine of not more than one hundred dollars ($100).

(c) Every person 18 years of age or over who plants, cultivates, harvests, dries, or processes more than six living marijuana plants shall be punished by imprisonment in a county jail for a period of not more than six months or by a fine of not more than five hundred dollars ($500), or by both such fine and imprisonment.

(d) Notwithstanding subdivision (c), a person 18 years of age or over who plants, cultivates, harvests, dries, or processes more than six living marijuana plants, or any part thereof, except as otherwise provided by law, may be punished by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code if:

~~(1) The person has one or more prior convictions for an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 of the Penal Code or for an offense requiring registration pursuant to subdivision (c) of Section 290 of the Penal Code;~~

~~(2) The person has two or more prior convictions under subdivision (c); or~~

(3) The offense resulted in any of the following:

(A) Violation of Section 1052 of the Water Code relating to illegal diversion of water;

(B) Violation of Section 13260, 13264, 13272, or 13387 of the Water Code relating to discharge of waste;

(C) Violation of Fish and Game Code Section 5650 or Section 5652 of the Fish and Game Code relating to waters of the state;

(D) Violation of Section 1602 of the Fish and Game Code relating to rivers, streams and lakes;

(E) Violation of Section 374.8 of the Penal Code relating to hazardous substances or Section 25189.5, 25189.6, or 25189.7 of the Health and Safety Code relating to hazardous waste;

(F) Violation of Section 2080 of the Fish and Game Code relating to endangered and threatened species or Section 3513 of the Fish and Game Code relating to the Migratory Bird Treaty Act; or

(G) Intentionally or with gross negligence causing substantial environmental harm to public lands or other public resources.

§ 11359

Every person who possesses for sale any marijuana, except as otherwise provided by law, shall be punished as follows:

(a) Every person under the age of 18 who possesses marijuana for sale shall be punished in the same manner provided in paragraph (1) of subdivision (b) of Section 11357.

(b) Every person 18 years of age or over who possesses marijuana for sale shall be punished by imprisonment in a county jail for a period of not more than six months or by a fine of not more than five hundred dollars ($500), or by both such fine and imprisonment.

(c) Notwithstanding subdivision (b), a person 18 years of age or over who possesses marijuana for sale may be punished by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code if:

~~(1) The person has one or more prior convictions for an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 of the Penal Code or for an offense requiring registration pursuant to subdivision (c) of Section 290 of the Penal Code;~~

~~(2) The person has two or more prior convictions under subdivision (b); or~~

(3) The offense occurred in connection with the knowing sale or attempted sale of marijuana to a person under the age of 18 years.

(d) Notwithstanding subdivision (b), a person 21 years of age or over who possesses marijuana for sale may be punished by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code if the offense involves knowingly hiring, employing, or using a person 20 years of age or younger in unlawfully cultivating, transporting, carrying, selling, offering to sell, giving away, preparing for sale, or peddling any marijuana.

§ 11360

(a) Except as otherwise provided by this section or as authorized by law, every person who transports, imports into this state, sells, furnishes, administers, or gives away, or offers to transport, import into this state, sell, furnish, administer, or give away, or attempts to import into this state or transport any marijuana shall be punished as follows:

(1) Persons under the age of 18 years shall be punished in the same manner as provided in paragraph (1) of subdivision (b) of Section 11357.

(2) Persons 18 years of age or over shall be punished by imprisonment in a county jail for a period of not more than six months or by a fine of not more than five hundred dollars ($500), or by both such fine and imprisonment.

(3) Notwithstanding paragraph (2), a person 18 years of age or over may be punished by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code for a period of two, three or four years if:

~~(A) The person has one or more prior convictions for an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 of the Penal Code or for an offense requiring registration pursuant to subdivision (c) of Section 290 of the Penal Code;~~

~~(B) The person has two or more prior convictions under paragraph (2);~~

(C) The offense involved the knowing sale, attempted sale, or the knowing offer to sell, furnish, administer or give away marijuana to a person under the age of 18 years; or

(D) The offense involved the import, offer to import, or attempted import into this state, or the transport for sale, offer to transport for sale, or attempted transport for sale out of this state, of more than 28.5 grams of marijuana or more than four grams of concentrated cannabis.

(b) Except as authorized by law, every person who gives away, offers to give away, transports, offers to transport, or attempts to transport not more than 28.5 grams of marijuana,

other than concentrated cannabis, is guilty of an infraction and shall be punished by a fine of not more than one hundred dollars ($100). In any case in which a person is arrested for a violation of this subdivision and does not demand to be taken before a magistrate, such person shall be released by the arresting officer upon presentation of satisfactory evidence of identity and giving his or her written promise to appear in court, as provided in Section 853.6 of the Penal Code, and shall not be subjected to booking.

(c) For purposes of this section, "transport" means to transport for sale.

(d) This section does not preclude or limit prosecution for any aiding and abetting or conspiracy offenses.

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

PROPONENT: Bay Area Lawyers for Individual Freedom

STATEMENT OF REASONS

The Problem: This law singles out individuals with prior convictions for increased punishment based solely on their status of being previously convicted. Certain populations that have been excessively impacted by the" war on drugs," as well as those communities that bore the brunt of the early medical marijuana fight will be unfairly and disproportionately affected by this law.

This law singles out those with prior felony convictions and treats them differently. Cannabis was only recently legalized and many of the legalization movement's most ardent advocates were convicted of felonies during the pursuit of legalization. The modern-day cannabis legalization movement is rooted in the AIDS epidemic, which decimated the LGBT community in the early 80s. One brave advocate during this time, Mary Jane Rathburn, popularly known as Brownie Mary, was a hospital volunteer at San Francisco General Hospital, known for illegally baking and distributing cannabis brownies to AIDS patients. Rathbun was arrested on three occasions. Her arrests generated interest in the medical community and motivated researchers to propose one of the first clinical trials to study the effects of cannabinoids in HIV-infected adults. This law punishes people like Brownie Mary, someone the LGBT community needed both to care for its sick and dying and to push the legalization of cannabis forward so that others may medicate without fear of arrest. This law overlooks the sacrifices of people like Brownie Mary and many others, many of whom are members of the LGBT community and punishes them for their early humanitarian efforts.

In addition to the excessive impact this law will have on the LGBT community, statistics show that minorities, most notably African Americans, have been unjustly affected by the war on drugs. These communities have suffered for years from disproportionate arrest rates, which take a toll on their families, community relations, and personal lives. This law furthers that inequity by allowing for increased penalties to be enforced against certain historically disproportionately impacted communities and only serves to further the United States' mass over-incarceration problem, despite the fact that the underlying harm for this victimless crime is no different, regardless of one's status as a prior felon or not.

The Solution: This resolution would allow for equal treatment for all individuals convicted under this law, regardless of the existence of any past felony conviction.

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

CURRENT OR PRIOR RELATED LEGISLATION
AB 64 (Cooley, Jones-Sawyer, Lackey, and Wood) 2016 - Cannabis: medical and nonmedical: regulation and advertising – Filed with Secretary of State on December 12, 2016.
AB 266 (Bonta) - 2015- Medical Marijuana - Filed by Secretary of State on October 9, 2015
AB 243 (Wood) - 2015 - Medical Marijuana - Filed with Secretary of State on October 09, 2015.
SB 243 (McGuire) - 2016 Medical Marijuana - Filed with Secretary of State on October 09, 2015

AUTHOR AND/OR PERMANENT CONTACT: Meaghan Zore, 391 Sutter Street, Suite 207 - San Francisco, CA 94108, voice: (415) 347-0004, email: mmzore@gmail.com

RESPONSIBLE FLOOR DELEGATE: Meaghan Zore

RESOLUTION 14-02-2017

DIGEST

Marijuana: Remove Penalties for Possession in Vehicles.

Amends Health and Safety Code section 11362.3 to remove penalties for possession of open marijuana containers while operating, or riding in, a vehicle in California.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

No similar resolutions found.

Reasons:

This resolution amends Health and Safety Code section 11362.3 to remove penalties for possession of open marijuana containers while operating, or riding in, a vehicle in California. This resolution should be approved in principle because, unlike alcohol, marijuana is not a time-sensitive consumable that would likely be consumed by the vehicle's operator merely because the container is open or the marijuana is loose from any packaging.

Proposition 64 passed in 2016, adding section 11362.3, among others, to the Health and Safety Code. Health and Safety Code section 11362.3, subdivision (a) states that none of the marijuana possession and usage rights granted in Health and Safety Code section 11362.1 "shall be construed to permit any person to" do any of the activities enumerated in subdivisions (1)-(8). Health and Safety Code section 11362.3, subdivision (a)(4) prohibits any person from possessing "an open container or open package of marijuana or marijuana products while driving, or operating, or riding in the passenger seat or compartment of a motor vehicle, boat, vessel, aircraft, or other vehicle used for transportation." (Original underline). This proposal's removal of subdivision (a)(4) from Health and Safety Code section 11362.3 corrects confusion made between marijuana and alcohol products, eliminates the potential for pretextual arrests by law enforcement officers, and solves for the redundancy of Health and Safety Code section 11362.3, subdivisions (a)(7) and (a)(8).

Health and Safety Code section 11362.3, subdivision (a)(4) emulates Vehicle Code section 23223, which prohibits open containers of alcohol in a motor vehicle. However, marijuana differs from alcohol in that alcohol is predominately found in liquid form, necessitating both a container and the need to be consumed quickly before it expires or evaporates. Furthermore, alcohol is a substance that is often manufactured commercially, and thus is placed within sealed and re-sealable containers. Marijuana, on the other hand, originates in plant form and it is generally consumed in a solid state, so the presence of an open container or packaging does not strongly infer that the party in control of the vehicle intends to consume the substance lest it quickly expire. Because of its solid-state form and its common lack of commercial packaging, unlike alcohol, Marijuana could also be loose in small quantities somewhere in a vehicle due to a spill for long periods of time, which would automatically cause those unknowing occupants of the vehicle to be in violation of subdivision (a)(4) of the Health and Safety Code, which is contrary to the spirit of Proposition 64 and Health and Safety Code section 11362.1.

Removal of Health and Safety Code section 11362.3, subdivision (a)(4) would not lessen law enforcement efforts meant to combat impaired driving due to the presence of subdivisions (a)(7) and (a)(8). Subdivision (a)(7) prohibits the smoking or ingestion of marijuana products while operating a vehicle, while subdivision (a)(8) applies the same restraints to passengers, and further limits the use of marijuana products in vehicles while persons under the age of 21 are present.

Recently, Senate Bill 96 was passed, which amended Health and Safety Code section 11362.3 in part, but it did not change subdivision (a)(4) or the relevant recommendations below.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Health and Safety Code section 11362.3to read as follows:

§ 11362.3

(a) Nothing in Section 11362.1 shall be construed to permit any person to:

(1) Smoke or ingest marijuana or marijuana products in any public place, except in accordance with Section 26200 of the Business and Professions Code.

(2) Smoke marijuana or marijuana products in a location where smoking tobacco is prohibited.

(3) Smoke marijuana or marijuana products within 1,000 feet of a school, day care center, or youth center while children are present at such a school, day care center, or youth center, except in or upon the grounds of a private residence or in accordance with Section 26200 of, or Chapter 3.5 (commencing with Section 19300) of Division 8 of, the Business and Professions Code and only if such smoking is not detectable by others on the grounds of such a school, day care center, or youth center while children are present.

~~(4) Possess an open container or open package of marijuana or marijuana products while driving,~~ or ~~operating, or riding in the passenger seat or compartment of a motor vehicle, boat, vessel, aircraft, or other vehicle used for transportation.~~

~~(5)~~ (4) Possess, smoke or ingest marijuana or marijuana products in or upon the grounds of a school, day care center, or youth center while children are present.

~~(6)~~ (5) Manufacture concentrated cannabis using a volatile solvent, unless done in accordance with a license under Chapter 3.5 (commencing with Section 19300) of Division 8 of, or Division 10 of, the Business and Professions Code.

~~(7)~~ (6) Smoke or ingest marijuana or marijuana products while driving, operating a motor vehicle, boat, vessel, aircraft, or other vehicle used for transportation.

~~(8)~~ (7) Smoke or ingest marijuana or marijuana products while riding in the passenger seat or compartment of a motor vehicle, boat, vessel, aircraft, or other vehicle used for transportation except as permitted on a motor vehicle, boat, vessel, aircraft, or other vehicle used for transportation that is operated in accordance with Section 26200 of the Business and Professions Code and while no persons under the age of 21 years are present.

(b) For purposes of this section, the following definitions apply:

(1) “Day care center” has the same meaning as in Section 1596.76.

(2) “Smoke” means to inhale, exhale, burn, or carry any lighted or heated device or pipe, or any other lighted or heated cannabis or cannabis product intended for inhalation, whether

natural or synthetic, in any manner or in any form. “Smoke” includes the use of an electronic smoking device that creates an aerosol or vapor, in any manner or in any form, or the use of any oral smoking device for the purpose of circumventing the prohibition of smoking in a place.

(3) “Volatile solvent” means a solvent that is or produces a flammable gas or vapor that, when present in the air in sufficient quantities, will create explosive or ignitable mixtures.

(4) “Youth center” has the same meaning as in Section 11353.1.

(c) Nothing in this section shall be construed or interpreted to amend, repeal, affect, restrict, or preempt laws pertaining to the Compassionate Use Act of 1996.

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

PROPONENT: Bay Area Lawyers for Individual Freedom

STATEMENT OF REASONS

The Problem: This law penalizes individuals for mere possession of a product that is lawful under California law.

There’s absolutely no harm caused by possessing an open package of marijuana while operating or riding in a motor vehicle, boat, vessel, aircraft, or other vehicle used for transportation. This is the equivalent of being cited for carrying a package of unlit cigarettes. Moreover, as currently written, persons of color will be disproportionately affected by this law.

A 2008 study conducted by the ACLU of Southern California found that for every 10,000 residents, about 3,400 more black people are stopped than whites, and 360 more Latinos are stopped than whites.

- Stopped blacks are 127% more likely to be frisked -- and stopped Latinos are 43% more likely to be frisked -- than stopped whites.
- Stopped blacks are 76% more likely to be searched, and stopped Latinos are 16% more likely to be searched than stopped whites.

The same holds true in Northern California, where a police report conducted in 2014 pursuant to requirements of the Oakland Police Department’s federal overseer, found African-Americans, who compose 28 percent of Oakland’s population, accounted for 62 percent of police stops from last April of the previous year to November of the previous year, the report found and that African-Americans were far more likely to be searched by police upon being stopped.

The Solution: This resolution repeals paragraph (4) of subsection (a) of Health and Safety Code section 11362.3, thereby removing penalties for mere possession of a substance otherwise lawfully possessed under California law, and which would disproportionately affect communities of color.

IMPACT STATEMENT

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

CURRENT OR PRIOR RELATED LEGISLATION

AB 64 (Cooley, Jones-Sawyer, Lackey, and Wood) 2016 - Cannabis: medical and nonmedical: regulation and advertising – Filed with Secretary of State on December 12, 2016.

AB 266 (Bonta) - 2015- Medical Marijuana - Filed by Secretary of State on October 9, 2015
AB 243 (Wood) - 2015 - Medical Marijuana - Filed with Secretary of State on October 09, 2015.
SB 243 (McGuire) - 2016 Medical Marijuana - Filed with Secretary of State on October 09, 2015

AUTHOR AND/OR PERMANENT CONTACT: Meaghan Zore, 391 Sutter Street, Suite 207, San Francisco, CA 94108, voice: (415) 347-0004, email: mmzore@gmail.com

RESPONSIBLE FLOOR DELEGATE: Meaghan Zore

RESOLUTION 14-03-2017

DIGEST
Communicable Diseases: Knowing Exposure/Transmission of HIV Reduced to Misdemeanor
Amends Health and Safety Code sections 1603.3 and 1644.5, and Penal Code sections 1001, 1001.1 and 1202.1; repeals Health and Safety Code sections 1621.5, 120290, 120291 and 120292, and Penal Code sections 647f, 1001.10, 1001.11, 1202.6 and 1463.23; and adds Health and Safety Code section 120290, and Penal Code sections 1170.21, 1170.22 and 1202.6, to make HIV laws consistent with other laws relating to criminal penalties for the knowing exposure and transmission to others of infectious and communicable diseases.

RESOLUTIONS COMMITTEE RECOMMENDATION
APPROVE IN PRINCIPLE

History:
No similar resolutions found.

Reasons:
This resolution amends Health and Safety Code sections 1603.3 and 1644.5, and Penal Code sections 1001, 1001.1 and 1202.1; repeals Health and Safety Code sections 1621.5, 120290, 120291 and 120292, and Penal Code sections 647f, 1001.10, 1001.11, 1202.6 and 1463.23; and adds Health and Safety Code section 120290, and Penal Code sections 1170.21, 1170.22 and 1202.6, to make HIV laws consistent with other laws relating to criminal penalties for the knowing exposure and transmission to others of infectious and communicable diseases. This resolution should be approved in principle because current law does discriminatorily single out the knowing exposure and transmission of HIV/AIDS, from other serious communicable and infectious diseases, for treatment as a felony rather than misdemeanor.

Since the discovery of AIDS and identification of those with HIV-positive status, tremendous medical strides have occurred in the early detection, treatment and control of many of the symptoms and high incidence of death associated with the disease. Yet there are other serious diseases which are communicable, and carry odious consequences, including Hepatitis C and potentially lethal airborne conditions. The resolution treats the nonconsensual wilful exposure and transmission of any communicable disease in a fair and level-headed way, with a more balanced approach to criminalization, by treating the act as a misdemeanor.

This resolution is similar to S.B. No. 239 (Wiener), now pending in the Legislature. As such, this resolution may prove to be Action Unnecessary at the Conference.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Health and Safety Code sections 1603.3 and 1644.5, repeal sections 1621.5, 120290, 120291 and 120292, and add section 120290 and amend Penal Code sections 1001, 1001.1 and 1202.1, repeal sections 647f, 1001.10, 1001.11, 1202.6 and 1463.23 and add sections 1170.21, 1170.22 and 1202.6 to read as follows:

§1603.3

(a) ~~Prior to a~~ Before donation of blood or blood components, ~~each~~ a donor shall be notified in writing of, and shall have signed a written statement confirming the notification of, all of the following:

(1) That the blood or blood components shall be tested for evidence of antibodies to HIV.

(2) That the donor shall be notified of the test results in accordance with the requirements described in subdivision (c).

(3) That the donor blood or blood component that is found to have the antibodies shall not be used for transfusion.

(4) That blood or blood components shall not be donated for transfusion purposes by a person if the person may have reason to believe that he or she has been exposed to HIV or AIDS.

(5) That the donor is required to complete a health screening questionnaire to assist in the determination as to whether he or she may have been exposed to HIV or AIDS.

(b) A blood bank or plasma center shall incorporate voluntary means of self-deferral for donors. The means of self-deferral may include, but are not limited to, a form with checkoff boxes specifying that the blood or blood components are for research or test purposes only and a telephone callback system for donors to use in order to inform the blood bank or plasma center that blood or blood components donated should not be used for transfusion. The blood bank or plasma center shall inform the donor, in a manner that is understandable to the donor, that the self-deferral process is available and should be used if the donor has reason to believe that he or she is infected with HIV. ~~The blood bank or plasma center shall also inform the donor that it is a felony pursuant to Section 1621.5 to donate blood if the donor knows that he or she has a diagnosis of AIDS or knows that he or she has tested reactive to HIV.~~

(c) Blood or blood components from any donor initially found to have serologic evidence of antibodies to HIV shall be retested for confirmation. Only if a further test confirms the conclusion of the earlier test shall the donor be notified of a reactive result by the blood bank or plasma center.

The department shall develop permissive guidelines for blood banks and plasma centers on the method to be used to notify a donor of a test result.

(d) Each blood bank or plasma center operating in California shall prominently display at each of its collection sites a notice that provides the addresses and telephone numbers of sites, within the proximate area of the blood bank or plasma center, where anonymous HIV antibody testing provided pursuant to Chapter 3 (commencing with Section 120885) of Part 4 of Division 105 may be administered without charge.

(e) The department may promulgate any additional regulations it deems necessary to enhance the safety of donated blood and blood components. The department may also promulgate regulations it deems necessary to safeguard the consistency and accuracy of HIV test results by requiring any confirmatory testing the department deems appropriate for the particular types of HIV tests that have yielded “reactive,” “positive,” “indeterminate,” or other similarly labeled results.

(f) Notwithstanding any other provision of law, no civil liability or criminal sanction shall not be imposed for disclosure of test results to a local health officer ~~when~~ if the disclosure is necessary to locate and notify a blood or blood components donor of a reactive result if reasonable efforts by the blood bank or plasma center to locate the donor have failed. Upon completion of the local health officer’s efforts to locate and notify a blood or blood components

donor of a reactive result, all records obtained from the blood bank or plasma center pursuant to this subdivision, or maintained pursuant to this subdivision, including, but not limited to, any individual identifying information or test results, shall be expunged by the local health officer.

~~§1621.5~~

~~(a) It is a felony punishable by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code for two, four, or six years, for any person to donate blood or tissue, semen to any medical center or semen bank that receives semen for purposes of artificial insemination, or breast milk to any medical center or breast milk bank that receives breast milk for purposes of distribution, whether he or she is a paid or a volunteer donor, who knows that he or she has acquired immunodeficiency syndrome (AIDS), as diagnosed by a physician and surgeon, or who knows that he or she has tested reactive to HIV. This section shall not apply to any person who is mentally incompetent or who self-defers his or her blood at a blood bank or plasma center pursuant to subdivision (b) of Section 1603.3 or who donates his or her blood for purposes of an autologous donation.~~

~~(b) In a criminal investigation for a violation of this section, no person shall disclose the results of a blood test to detect the etiologic agent of AIDS or antibodies to that agent to any officer, employee, or agent of a state or local agency or department unless the test results are disclosed as otherwise required by law pursuant to any one of the following:~~

~~(1) A search warrant issued pursuant to Section 1524 of the Penal Code.~~

~~(2) A judicial subpoena or subpoena duces tecum issued and served in compliance with Chapter 2 (commencing with Section 1985) of Title 3 of Part 4 of the Code of Civil Procedure.~~

~~(3) An order of a court.~~

~~(c) For purposes of this section, "blood" means "human whole blood" and "human whole blood derivatives," as defined for purposes of this chapter and includes "blood components," as defined in subdivision (k) of Section 1603.1.~~

~~(d)For purposes of this section, "tissue" shall have the same meaning as defined in paragraph (1) of subdivision (c) of Section 1635.~~

§1644.5

(a) Except as provided in subdivision (c) or (d), ~~no~~ tissues shall not be transferred into the body of another person by means of transplantation, unless the donor of the tissues has been screened and found nonreactive by laboratory tests for evidence of infection with human immunodeficiency virus (HIV), agents of viral hepatitis (HBV and HCV), and syphilis. For tissues that are rich in viable leukocytes, the tissue shall be tested for evidence of infection with human T lymphotropic virus (HTLV) and found nonreactive. The department may adopt regulations requiring additional screening tests of donors of tissues when, in the opinion of the department, the action is necessary for the protection of the public, donors, or recipients.

(b) Notwithstanding subdivision (a), infectious disease screening of blood and blood products shall be carried out solely in accordance with Article 2 (commencing with Section 1602.5) of Chapter 4.

(c) All donors of sperm shall be screened and found nonreactive as required under subdivision (a), except in the following instances:

(1) A recipient of sperm, from a sperm donor known to the recipient, may waive a second or other repeat testing of that donor if the recipient is informed of the requirements for testing donors under this section and signs a written waiver.

(2) A recipient of sperm may consent to therapeutic insemination of sperm or use of sperm in other assisted reproductive technologies even if the sperm donor is found reactive for hepatitis B, hepatitis C, syphilis, HIV, or HTLV if the sperm donor is the spouse of, partner of, or designated donor for that recipient. The physician providing insemination or assisted reproductive technology services shall advise the donor and recipient of the potential medical risks associated with receiving sperm from a reactive donor. The donor and the recipient shall sign a document affirming that each person comprehends the potential medical risks of using sperm from a reactive donor for the proposed procedure and that each consents to it. Copies of the document shall be placed in the medical records of the donor and the recipient.

(3) (A) Sperm whose donor has tested reactive for syphilis may be used for the purposes of insemination or assisted reproductive technology only after the donor has been treated for syphilis. Sperm whose donor has tested reactive for hepatitis B may be used for the purposes of insemination or assisted reproductive technology only after the recipient has been vaccinated against hepatitis B.

(B) (i) Sperm whose donor has tested reactive for HIV or HTLV may be used for the purposes of insemination or assisted reproductive technology for a recipient testing negative for HIV or HTLV only after the donor's sperm has been effectively processed to minimize the ~~infectiousness of~~ likelihood of transmission through the sperm for that specific donation and ~~where~~ if informed and mutual consent has occurred.

(ii) The department shall adopt regulations regulating facilities that perform sperm processing, pursuant to this subparagraph, that prescribe standards for the handling and storage of sperm samples of carriers of HIV, HTLV, or any other virus as deemed appropriate by the department. The department may propose to adopt, as initial regulations, the recommendations made within the "Guidelines for Reducing Risk of Viral Transmission During Fertility Treatment" as published by the American Society for Reproductive Medicine. Notice of the department's proposed adoption of the regulations shall be posted on the department's Internet Web site for at least 45 days. Public comment shall be accepted by the department for at least 30 days after the conclusion of the 45-day posting period. If a member of the public requests a public hearing during the 30-day comment period, the hearing shall be held prior to the adoption of the regulations. If no member of the public requests a public hearing, the regulations shall be deemed adopted at the conclusion of the 30-day comment period. Comments received shall be considered prior to the adoption of the final initial regulations. The department may modify any guidance published by the American Society for Reproductive Medicine. Adoption of initial regulations by the department pursuant to this subdivision shall not be subject to the rulemaking requirements of Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code and written responses to public comments shall not be required. Updates to the regulations shall be adopted pursuant to the same process. Until the department adopts these regulations, facilities that perform sperm processing pursuant to this section shall follow facility and sperm processing guidelines for the reduction of viral transmission developed by the American Society for Reproductive Medicine. ~~Nothing in this section shall~~ This section does not prevent the department from monitoring and inspecting facilities that process sperm to ensure adherence to the regulations, or, until regulations are adopted, to the guidelines set forth by the American Society for Reproductive Medicine.

(iii) ~~Prior to~~ Before insemination or other assisted reproductive technology ~~services,~~ services are performed, the physician providing the services shall inform the recipient of sperm from a spouse, partner, or designated donor who has tested reactive for HIV or HTLV of all of

the following:

(I) That sperm processing may not eliminate all of the risks of HIV or HTLV transmission.

(II) That the sperm may be tested to determine whether or not it is reactive for HIV or HTLV.

(III) That the recipient ~~must~~ shall provide documentation to the physician providing insemination or assisted reproductive technology services prior to treatment that she has established an ongoing relationship with another physician to provide for her medical care during and after completion of fertility services.

(IV) The recommendations made within the "Guidelines for Reducing the Risk of Viral Transmission During Fertility Treatment" published by the American Society for Reproductive Medicine regarding followup testing for HIV and HTLV after use of sperm from an HIV or HTLV reactive donor and have the recommendations regarding followup testing be documented in the recipient's medical record.

(iv) The physician providing insemination or assisted reproductive technology services shall also verify, and document in the recipient's medical record, that the donor of sperm who tests reactive for HIV or HTLV is under the care of a physician managing the HIV or HTLV.

(v) The physician providing insemination or assisted reproductive technology services shall recommend to the physician who will be providing ongoing care to the recipient recommended followup testing for HIV and HTLV according to the "Guidelines for Reducing the Risk of Viral Transmission During Fertility Treatment" published by the American Society for Reproductive Medicine, which shall be documented in the recipient's medical record.

(vi) If the recipient becomes HIV or HTLV positive, the physician assuming ongoing care of the recipient shall treat or provide information regarding referral to a physician who can provide ongoing treatment of the HIV or HTLV.

(4) A recipient of sperm donated by a sexually intimate partner of the recipient for reproductive use may waive a second or repeat testing of that donor if the recipient is informed of the donor testing requirements of this section and signs a written waiver. For purposes of this paragraph, "sexually intimate partner of the recipient" includes a known or designated donor to whose sperm the recipient has previously been exposed in a nonmedical setting in an attempt to conceive.

(d) Subdivision (a) ~~shall~~ does not apply to the transplantation of tissue from a donor who has not been tested or, with the exception of HTLV, has been found reactive for the infectious diseases listed in subdivision (a) or for which the department has, by regulation, required additional screening tests, if all of the following conditions are satisfied:

(1) The physician and surgeon performing the transplantation has determined any one or more of the following:

(A) Without the transplantation the intended recipient will most likely die during the period of time necessary to obtain other tissue or to conduct the required tests.

(B) The intended recipient already is diagnosed with the infectious disease for which the donor has tested positive.

(C) The symptoms from the infectious disease for which the donor has tested positive will most likely not appear during the intended recipient's likely lifespan after transplantation with the tissue or may be treated prophylactically if they do appear.

(2) The physician and surgeon performing the transplantation has ensured that an organ from an individual who has been found reactive for HIV may be transplanted only into an

individual who satisfies both of the following:

(A) The individual has been found reactive for HIV before receiving the organ.

(B) The individual is either participating in clinical research approved by an institutional review board under the criteria, standards, and regulations described in subsections (a) and (b) of Section 274f-5 of Title 42 of the United States Code, or, if the United States Secretary of Health and Human Services determines under subsection (c) of Section 274f-5 of Title 42 of the United States Code that participation in this clinical research is no longer warranted as a requirement for transplants, the individual is receiving the transplant under the standards and regulations under subsection (c) of Section 274f-5 of Title 42 of the United States Code.

(3) Consent for the use of the tissue has been obtained from the recipient, if possible, or if not possible, from a member of the recipient's family, or the recipient's legal guardian. For purposes of this section, "family" ~~shall mean~~ means spouse, adult son or daughter, either parent, adult brother or sister, or grandparent.

(e) The penalties prescribed in ~~Sections 1621.5 and~~ Section 120290 do not apply to a sperm donor covered under subdivision (c) or an organ or tissue donor who donates an organ or tissue for transplantation or research purposes.

(f) Human breast milk from donors who test reactive for agents of viral hepatitis (HBV and HCV), HTLV, HIV, or syphilis shall not be used for deposit into a milk bank for human ingestion in California.

~~§120290~~

~~(a)Except as provided in Section 120291 or in the case of the removal of an afflicted person in a manner the least dangerous to the public health, any person afflicted with any contagious, infectious, or communicable disease who willfully exposes himself or herself to another person, and any person who willfully exposes another person afflicted with the disease to someone else, is guilty of a misdemeanor.~~

~~(b)This section shall not apply to a person who donates an organ for transplantation or research purposes.~~

§120290

(a) The intentional transmission of an infectious or communicable disease is a misdemeanor. A defendant is guilty of intentional transmission of an infectious or communicable disease if all of the following apply:

(1) The defendant knows that he or she is afflicted with an infectious or communicable disease.

(2) The defendant acts with the specific intent to transmit that disease to another person.

(3) The defendant engages in conduct that poses a substantial risk of transmission to that person.

(4) The defendant transmits that infectious or communicable disease to the other person.

(b) The defendant does not act with the intent required pursuant to paragraph (2) of subdivision (a) if the defendant takes, or attempts to take, practical means to prevent transmission.

(c) Failure to take practical means to prevent transmission alone is insufficient to prove the intent required pursuant to paragraph (2) of subdivision (a).

(d) Becoming pregnant while infected with an infectious or communicable disease, continuing a pregnancy while infected with an infectious or communicable disease, or declining

treatment for an infectious or communicable disease during pregnancy does not constitute a crime for purposes of this section.

(e) For purposes of this section, the following definitions shall apply:

(1) "Conduct that poses a substantial risk of transmission" means an act that has a reasonable probability of disesae transmission as proven by competent medical or epidemiological evidence. Conduct posing a low or negligible risk of transmission as proven by competent medical or epidemiological evidence does not meet the definition of conduct posing a substantial risk of transmission.

(2) "Infectious or communicable disease" means a disease that spreads from human to human and that is determined to have significant, long-term consequences on the physical health or life activities of the person infected.

(3) "Practical means to prevent transmission" means a method, device, behavior, or activity demonstrated scientifically to measurably limit or reduce the risk of transmission of an infectious or communicable disease, including, but not limited to, the use of a condom, barrier protection or prophylactic device, or good faith compliance with a medical treatment regimen prescribed by a physician for the infectious or communicable disease.

(f) This section does not preclude a defendant from asserting any common law defense, including the complainant's consent to the defendant's conduct.

(g) It is an affirmative defense to a charge under this section if both of the following apply:

(1) The complainant knew that the defendant was infected with the infectious or communicable disease before the exposure.

(2) The complainant willingly engaged in conduct that poses a substantial risk of transmission of the infectious or communicable disease.

(h) (1) When alleging a violation of subdivision (a), the prosecuting attorney or the grand jury shall substitute a pseudonym for the true name of a complainant. The actual name and other identifying characteristics of a complainant shall be revealed to the court only in camera, unless the complainant requests otherwise, and the court shall seal the information from further disclosure, except by counsel as part of discovery.

(2) Unless the complainant requests otherwise, all court decisions, orders, petitions, and other documents, including motions and papers filed by the parties, shall be worded so as to protect the name or other identifying characteristics of the complainant from public disclosure.

(3) Unless the complainant requests otherwise, a court in which a violation of this section is filed shall, at the first opportunity, issue an order that prohibits counsel, their agents, law enforcement personnel, and court staff from making a public disclosure of the name or any other identifying characteristic of the complainant.

(4) Unless the defendant requests otherwise, a court in which a violation of this section is filed, at the earliest opportunity, shall issue an order that counsel and their agents, law enforcement personnel, and court staff, before a finding of guilt, not publicly disclose the names or other identifying characteristics of the defendant, except by counsel as part of discovery or to a limited number of relevant individuals in its investigation of the specific charges under this section.

(5) For purposes of this subdivision, "identifying characteristics" includes, but is not limited to, the name or any part of the name, address or any part of the address, city or unincorporated area of residence, age, marital status, relationship of the defendant and complainant, place of employment, or race or ethnic background.

(i) (1) A court, upon a finding of reasonable suspicion that an individual has violated this section, shall order the production of the individual's medical records or the attendance of a person with relevant knowledge thereof, so long as the return of the medical records or attendance of the person pursuant to the subpoena is submitted initially to the court for an in camera inspection. Only upon a finding by the court that the medical records or proffered testimony are relevant to the pleading offense, the information produced pursuant to the court's order shall be disclosed to the prosecuting entity and admissible if otherwise permitted by law.

(2) The medical records, medications, prescriptions, or medical devices of the defendant are not admissible as evidence or considered probative as to the specific intent required under this section in the absence of the defendant's stated intent required under this section within the medical record to do specific harm to the complainant.

(3) Surveillance reports and records maintained by state and local health officials shall not be subpoenaed or released for the purpose of establishing the specific intent required pursuant to subdivision (a).

(4) A court shall take judicial notice of any fact establishing an element of the offense upon the defendant's motion or stipulation.

(5) Paragraph (2) does not limit the defendant's right to submit medical evidence to show the absence of the stated intent required pursuant to subdivision (a).

(j) Before sentencing, a defendant shall be assessed for placement in one or more community-based programs that provide counseling, supervision, education, and reasonable redress to the victim or victims.

(k) This section does not apply to a person who donates an organ or tissue for transplantation or research purposes.

~~§120291~~

~~(a) Any person who exposes another to the human immunodeficiency virus (HIV) by engaging in unprotected sexual activity when the infected person knows at the time of the unprotected sex that he or she is infected with HIV, has not disclosed his or her HIV-positive status, and acts with the specific intent to infect the other person with HIV, is guilty of a felony punishable by imprisonment in the state prison for three, five, or eight years. Evidence that the person had knowledge of his or her HIV-positive status, without additional evidence, shall not be sufficient to prove specific intent.~~

~~(b) As used in this section, the following definitions shall apply:~~

~~(1) "Sexual activity" means insertive vaginal or anal intercourse on the part of an infected male, receptive consensual vaginal intercourse on the part of an infected woman with a male partner, or receptive consensual anal intercourse on the part of an infected man or woman with a male partner.~~

~~(2) "Unprotected sexual activity" means sexual activity without the use of a condom.~~

~~(c) (1) When alleging a violation of subdivision (a), the prosecuting attorney or grand jury shall substitute a pseudonym for the true name of the victim involved. The actual name and other identifying characteristics of the victim shall be revealed to the court only in camera, and the court shall seal that information from further revelation, except to defense counsel as part of discovery.~~

~~(2) All court decisions, orders, petitions, and other documents, including motions and papers filed by the parties, shall be worded so as to protect the name or other identifying characteristics of the victim from public revelation.~~

~~(3) Unless the victim requests otherwise, a court in which a violation of this section is filed shall, at the first opportunity, issue an order that the parties, their counsel and other agents, court staff, and all other persons subject to the jurisdiction of the court shall make no public revelation of the name or any other identifying characteristics of the victim.~~

~~(4) As used in this subdivision, "identifying characteristics" includes, but is not limited to, name or any part thereof, address or any part thereof, city or unincorporated area of residence, age, marital status, relationship to defendant, and race or ethnic background.~~

~~§120292~~

~~(a) Notwithstanding Chapter 7 (commencing with Section 120975) and Chapter 8 (commencing with Section 121025) of Part 4, identifying information and other records of the diagnosis, prognosis, testing, or treatment of any person relating to the human immunodeficiency virus (HIV) shall be disclosed in a criminal investigation for a violation of Section 120291 if authorized by an order of a court of competent jurisdiction granted after application showing good cause therefor. Any order of the court shall be issued in accordance with the following conditions:~~

~~(1) An order shall not be based on the sexual orientation of the defendant.~~

~~(2) In deciding whether to issue an order, the court shall weigh the public interest and the need for disclosure against any potential harm to the defendant, including, but not limited to, damage to the physician-patient relationship and to treatment services. Upon the issuance of an order of this nature, the court, in determining the extent to which any disclosure of all or any part of any record is necessary, shall impose safeguards determined appropriate by the court against unauthorized disclosure. However, the court shall not order disclosure under this paragraph for any purpose other than a proceeding under this section. Any order for disclosure under this subdivision shall limit disclosure to those who need the information for the proceeding, and shall direct those to whom disclosure is made to make no further disclosure without permission of the court. The court shall grant permission for further disclosure when necessary for a proceeding under this section. Any disclosure in violation of an order issued under this section shall be remedied or punished as provided in Section 120980.~~

~~(b) Nothing in this section is intended to compel the testing to determine the HIV status of any victim of an alleged crime or crimes.~~

~~(c) Nothing in this section is intended to restrict or eliminate the anonymous AIDS testing programs provided for in Sections 120885 to 120895, inclusive. Identifying characteristics of persons who submit to that testing shall not be ordered disclosed pursuant to this section, nor shall an order be issued authorizing the search of the records of a testing program of that nature.~~

~~§647f~~

~~In any accusatory pleading charging a violation of subdivision (b) of Section 647, if the defendant has been previously convicted one or more times of a violation of that subdivision or of any other offense listed in subdivision (d) of Section 1202.1, and in connection with one or more of those convictions a blood test was administered pursuant to Section 1202.1 or 1202.6 with positive test results, of which the defendant was informed, the previous conviction and positive blood test results, of which the defendant was informed, shall be charged in the accusatory pleading. If the previous conviction and informed test results are found to be true by the trier of fact or are admitted by the defendant, the defendant is guilty of a felony.~~

§1001

It is the intent of the Legislature that ~~neither~~ this chapter, Chapter 2.5 (commencing with Section 1000) of this title, ~~nor~~ or any other provision of law not be construed to preempt other current or future pretrial or precomplaint diversion programs. It is also the intent of the Legislature that current or future posttrial diversion programs not be preempted, except as provided in Section 13201 or 13352.5 of the Vehicle Code. Sections 1001.2 to ~~1001.11,~~ 1001.9, inclusive, of this chapter ~~shall~~ apply only to pretrial diversion programs as defined in Section 1001.1.

§1001.1

As used in Sections 1001.2 to ~~1001.11,~~ 1001.9, inclusive, of this chapter, pretrial diversion refers to the procedure of postponing prosecution of an offense filed as a misdemeanor either temporarily or permanently at any point in the judicial process from the point at which the accused is charged until adjudication.

~~§1001.10~~

~~(a)The judge shall require any person described in subdivision (b), as a condition of either placing the person on probation or of permitting the person to participate in a drug diversion program to agree to participate in an AIDS education program. Testing for AIDS antibodies shall be offered but no person described in subdivision (b) shall be required to be tested.~~

~~(b)This section shall apply to any person who has either been placed on probation or granted diversion for, any of the following:~~

~~(1)A violation of subdivision (a) of Section 11350 of the Health and Safety Code, subdivision (a) of Section 11377 of the Health and Safety Code, Section 11550 of the Health and Safety Code, Section 4143 or 4149 of the Business and Professions Code, or of subdivision (f) of Section 647 if the offense involves intravenous use of a controlled substance.~~

~~(2)A violation of subdivision (a) or (b) of Section 647.~~

~~§1001.11~~

~~(a)The health department in each county shall select an agency, or agencies, in the county that shall provide AIDS prevention education to those persons sentenced to probation or a drug diversion program in accordance with Section 1001.10. The health department shall endeavor to select an agency, or agencies, that currently provide AIDS prevention education programs to substance abusers or prostitutes. If no agency is currently providing this education, the county agency responsible for substance abuse shall develop an AIDS prevention education program either within the agency or under contract with a community-based, nonprofit organization in the county. The health department shall forward to the courts a list of agencies selected for purposes of referral in accordance with Section 1001.10. Reimbursement for the costs of implementing this section shall be made out of moneys deposited with the county treasurer in accordance with Section 1463.23.~~

~~(b)An AIDS prevention education program providing services pursuant to subdivision (a) shall, at a minimum, include details about the transmission of human immunodeficiency virus (HIV), the etiologic agent for AIDS, symptoms of AIDS or AIDS-related conditions, prevention through avoidance or cleaning of needles, sexual practices which constitute high risk, low risk, and no risk (including abstinence), and resources for assistance if the person decides to take a~~

~~test for the etiologic agent for AIDS and receives a positive test result. The program shall also include other relevant medical and prevention information as it becomes available.~~

~~(c)A person sentenced to a drug diversion program pursuant to Section 1001.10 shall not be required to participate in an AIDS prevention education program, provided that the drug diversion program includes an AIDS prevention education component that meets the requirements of subdivision (b).~~

§1170.21

(a) A conviction for a violation of Section 647f as it read on December 31, 2017, is invalid and vacated. All charges alleging violation of Section 647f are dismissed and all arrests for violation of Section 647f are deemed to have never occurred. An individual who was arrested, charged, or convicted for a violation of Section 647f may indicate in response to any question concerning his or her prior arrest, charge, or conviction under Section 647f that he or she was not arrested, charged, or convicted for a violation of Section 647f. Notwithstanding any other law, information pertaining to an individual's arrest, charge, or conviction for violation of Section 647f shall not, without the individual's consent, be used in any way adverse to his or her interests, including, but not limited to, denial of any employment, benefit, license, or certificate.

(b) Any court or agency having custody or control of records pertaining to the arrest, charge, or conviction of a person for a violation of Section 647f as it read on December 31, 2017, shall destroy those records by June 30, 2018. The court or agency shall purge those records from any local or statewide criminal database and shall destroy the records in accordance with subdivision (c). As used in this section, "records pertaining to the arrest, charge, or conviction" includes blood test results, records of arrests, and records relating to other offenses charged in the accusatory pleading, as well as whether the defendant was acquitted or the charges were dismissed.

(c) The court or agency shall destroy records pertaining to the arrest, charge, or conviction of a person for a violation of Section 647f as it read on December 31, 2017, by permanently obliterating all entries or notations upon the record, and the record shall be prepared again so that it appears that the arrest, charge, or conviction never occurred. However, the court or agency shall physically destroy the document constituting the record if the only entry upon the record pertains to the arrest, charge, or conviction, and the record can be destroyed without necessarily destroying other records.

(d) The court shall send an order to the Federal Bureau of Investigation directing it to seal and destroy its records relating to the defendant's arrest, charge, and conviction for a violation of Section 647f as it read on December 31, 2017, within six months of receiving the order.

(e) Notwithstanding subdivision (b) or (c), written transcriptions of oral testimony in court proceedings and published judicial appellate reports are not subject to this section. Additionally, a record shall not be destroyed if the defendant or a codefendant has filed a civil action against the peace officer or law enforcement agency that instituted the prosecution and if the agency that is the custody of those records has received a certified copy of the complaint in the civil action, until the civil action has finally been resolved. Immediately following the final resolution of the civil action, a record subject to subdivision (b) shall be destroyed pursuant to subdivision (c) if more than six months have elapsed from the date of the conviction or arrest without conviction.

§1170.22

(a) A person who is serving a sentence as a result of a violation of Section 647f as it read on December 31, 2017, whether by trial or by open or negotiated plea, may petition for a recall or dismissal of sentence before the trial court that entered the judgment of conviction in his or her case.

(b) If the court's records show that the petitioner was convicted for a violation of Section 647f as it read on December 31, 2017, the court shall vacate the conviction and resentence the person for any remaining counts.

(c) A person who is serving a sentence and resentenced pursuant to subdivision (b) shall be given credit for any time already served and shall be subject to whatever supervision time they would have otherwise been subject to after release, whichever is shorter, unless the court, in its discretion, as part of its resentencing order, releases the person from supervision.

(d) Under no circumstances may resentencing under this section result in the imposition of a term longer than the original sentence, or the reinstatement of charges dismissed pursuant to a negotiated plea agreement.

(e) Upon completion of sentence for a conviction under Section 647f as it read on December 31, 2017, the provisions of Section 1170.21 shall apply.

(f) Nothing in this and related sections is intended to diminish or abrogate the finality of judgments in any case not falling within the purview of this section.

(g) A resentencing hearing ordered under this section shall constitute a "post-conviction release proceeding" under paragraph (7) of subdivision (b) of Article I of the California Constitution.

(h) The provisions of this section apply to juvenile delinquency adjudications and dispositions under Section 602 of the Welfare and Institutions Code if the juvenile would not have been guilty of an offense or would not have been guilty of an offense governed by this section.

(i) The Judicial Council shall promulgate and make available all necessary forms to enable the filing of petitions and applications provided in this section.

§1202.1

(a) Notwithstanding Sections 120975 and 120990 of the Health and Safety Code, the court shall order every person who is convicted of, or adjudged by the court to be a person described by Section 601 or 602 of the Welfare and Institutions Code as provided in Section 725 of the Welfare and Institutions Code by reason of a violation of, a sexual offense listed in subdivision (e), whether or not a sentence or fine is imposed or probation is granted, to submit to a blood or oral mucosal transudate saliva test for evidence of antibodies to the probable causative agent of acquired immune deficiency syndrome (AIDS) within 180 days of the date of conviction. Each person tested under this section shall be informed of the results of the blood or oral mucosal transudate saliva test.

(b) Notwithstanding Section 120980 of the Health and Safety Code, the results of the blood or oral mucosal transudate saliva test to detect antibodies to the probable causative agent of AIDS shall be transmitted by the clerk of the court to the Department of Justice and the local health officer.

(c) Notwithstanding Section 120980 of the Health and Safety Code, the Department of Justice shall provide the results of a test or tests as to persons under investigation or being prosecuted under Section ~~647f or~~ 12022.85, if the results are on file with the department, to the defense attorney upon request and the results also shall be available to the prosecuting attorney

upon request for the purpose of either preparing counts for a ~~subsequent offense under Section 647f or~~ sentence enhancement under Section 12022.85 or complying with subdivision (d).

(d) (1) In every case in which a person is convicted of a sexual offense listed in subdivision (e) or adjudged by the court to be a person described by Section 601 or 602 of the Welfare and Institutions Code as provided in Section 725 of the Welfare and Institutions Code by reason of the commission of a sexual offense listed in subdivision (e), the prosecutor or the prosecutor's victim-witness assistance bureau shall advise the victim of his or her right to receive the results of the blood or oral mucosal transudate saliva test performed pursuant to subdivision (a). The prosecutor or the prosecutor's victim-witness assistance bureau shall refer the victim to the local health officer for counseling to assist him or her in understanding the extent to which the particular circumstances of the crime may or may not have placed the victim at risk of transmission of the human immunodeficiency virus (HIV) from the accused, to ensure that the victim understands the limitations and benefits of current tests for HIV, and to assist the victim in determining whether he or she should make the request.

(2) Notwithstanding any other law, upon the victim's request, the local health officer shall be responsible for disclosing test results to the victim who requested the test and the person who was tested. However, as specified in subdivision (g), positive test results shall not be disclosed to the victim or the person who was tested without offering or providing professional counseling appropriate to the circumstances as follows:

(A) To help the victim understand the extent to which the particular circumstances of the crime may or may not have put the victim at risk of transmission of HIV from the perpetrator.

(B) To ensure that the victim understands both the benefits and limitations of the current tests for HIV.

(C) To obtain referrals to appropriate health care and support services.

(e) For purposes of this section, "sexual offense" includes any of the following:

(1) Rape in violation of Section 261 or 264.1.

(2) Unlawful intercourse with a person under 18 years of age in violation of Section 261.5 or 266c.

(3) Rape of a spouse in violation of Section 262 or 264.1.

(4) Sodomy in violation of Section 266c or 286.

(5) Oral copulation in violation of Section 266c or 288a.

(6) (A) Any of the following offenses if the court finds that there is probable cause to believe that blood, semen, or any other bodily fluid capable of transmitting HIV has been transferred from the defendant to the victim:

(i) Sexual penetration in violation of Section 264.1, 266c, or 289.

(ii) Aggravated sexual assault of a child in violation of Section 269.

(iii) Lewd or lascivious conduct with a child in violation of Section 288.

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

(v) The attempt to commit any offense described in clauses (i) to (iv), inclusive.

(B) For purposes of this paragraph, the court shall note its finding on the court docket and minute order if one is prepared.

(f) Any blood or oral mucosal transudate saliva tested pursuant to subdivision (a) shall be subjected to appropriate confirmatory tests to ensure accuracy of the first test results, and under no circumstances shall test results be transmitted to the victim or the person who is tested unless any initially reactive test result has been confirmed by appropriate confirmatory tests for positive reactors.

(g) The local health officer shall be responsible for disclosing test results to the victim who requested the test and the person who was tested. However, positive test results shall not be disclosed to the victim or the person who was tested without offering or providing professional counseling appropriate to the circumstances.

(h) The local health officer and the victim shall comply with all laws and policies relating to medical confidentiality, subject to the disclosure authorized by subdivisions (g) and (i).

(i) Any victim who receives information from the local health officer pursuant to subdivision (g) may disclose the information as he or she deems necessary to protect his or her health and safety or the health and safety of his or her family or sexual partner.

(j) Any person who transmits test results or discloses information pursuant to this section shall be immune from civil liability for any action taken in compliance with this section.

~~§1202.6~~

~~(a)Notwithstanding Sections 120975, 120980, and 120990 of the Health and Safety Code, upon the first conviction of any person for a violation of subdivision (b) of Section 647, the court shall, before sentencing or as a condition of probation, order the defendant to complete instruction in the causes and consequences of acquired immune deficiency syndrome (AIDS) pursuant to subdivision (d) and shall order the defendant to submit to testing for AIDS in accordance with subdivision (e). In addition, the court shall refer a defendant, where appropriate, to a program under Article 3.2 (commencing with Section 11320) of Chapter 2 of Part 3 of Division 9 of the Welfare and Institutions Code or to any drug diversion program, or both.~~

~~(b)Upon a second or subsequent conviction of a violation of subdivision (b) of Section 647, the court shall, before sentencing, order the defendant to submit to testing for AIDS in accordance with subdivision (e).~~

~~(c)At the sentencing hearing of a defendant ordered to submit to testing for AIDS pursuant to subdivision (a) or (b), the court shall furnish the defendant with a copy of the report submitted pursuant to subdivision (e) and shall direct the clerk to note the receipt of the report by the defendant in the records of the case.~~

~~If the results of the test described in the report are positive, the court shall make certain that the defendant understands the nature and meaning of the contents of the report and shall further advise the defendant of the penalty established in Section 647f for a subsequent violation of subdivision (b) of Section 647.~~

~~(d)The county health officer in each county shall select an agency, or agencies, in the county that shall provide AIDS prevention education. The county health officer shall endeavor to select an agency, or agencies, that currently provide AIDS prevention education programs to substance abusers or prostitutes. If no agency is currently providing this education, the county agency responsible for substance abuse shall develop an AIDS prevention education program either within the agency or under contract with a community-based, nonprofit organization in the county. The county health officer shall forward to the courts a list of agencies selected for purposes of referral.~~

~~An AIDS prevention education program providing services, at a minimum, shall include details about the transmission of human immunodeficiency virus (HIV), the etiologic agent for AIDS, symptoms of AIDS or AIDS-related conditions, prevention through avoidance or cleaning of needles, sexual practices that constitute high risk, low risk, and no risk (including abstinence), and resources for assistance if the person decides to take a test for the etiologic agent for AIDS and receives a positive test result. The program also shall include other relevant medical and~~

~~prevention information as it becomes available.~~

~~(e)The court shall order testing of every defendant as ordered pursuant to subdivision (a) or (b) for evidence of antibodies to the probable causative agent of acquired immune deficiency syndrome. Notwithstanding Section 120980 of the Health and Safety Code, written copies of the report on the test shall be furnished to both of the following:~~

~~(1)The court in which the defendant is to be sentenced.~~

~~(2)The State Department of Health Services.~~

~~(f)Except as provided in subdivisions (c) and (g), the reports required by subdivision (e) shall be confidential.~~

~~(g)The State Department of Health Services shall maintain the confidentiality of the reports received pursuant to subdivision (e), except that the department shall furnish copies of any report to a district attorney upon request.~~

§1202.6

Notwithstanding Sections 120975, 120980, and 120990 of the Health and Safety Code, upon the first conviction of a person for a violation of subdivision (b) of Section 647, the court shall refer the defendant, where appropriate, to a program under Article 3.2 (commencing with Section 11320) of Chapter 2 of Part 3 of Division 9 of the Welfare and Institutions Code or to a drug diversion program, or to both.

~~§1463.23~~

~~Notwithstanding Section 1463, out of the moneys deposited with the county treasurer pursuant to Section 1463, fifty dollars ($50) of each fine imposed pursuant to Section 4338 of the Business and Professions Code; subdivision (c) of Section 11350, subdivision (c) of Section 11377, or subdivision (d) of Section 11550 of the Health and Safety Code; or subdivision (b) of Section 264, subdivision (m) of Section 286, subdivision (m) of Section 288a, or Section 647.1 of this code, shall be deposited in a special account in the county treasury which shall be used exclusively to pay for the reasonable costs of establishing and providing for the county, or any city within the county, an AIDS (acquired immune deficiency syndrome) education program under the direction of the county health department, in accordance with Chapter 2.71 (commencing with Section 1001.10) of Title 6, and for the costs of collecting and administering funds received for purposes of this section.~~

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

PROPONENT: Bay Area Lawyers for Individual Freedom

STATEMENT OF REASONS

The Problem: Makes it a felony punishable by imprisonment for 3 to 8 years to expose another person to HIV by engaging in unprotected sexual activity when the infected person knows at the time they are infected with HIV, has not disclosed their HIV-positive status, and acts with the specific intent to infect the other person with HIV. It is also a felony punishable by imprisonment for 2 to 6 years for any person to donate blood, body organs or other tissue if the person knows they have HIV. Existing law provides that a person who is afflicted with a contagious, infectious, or communicable disease who willfully exposes them self to another person, or any person who

willfully exposes another person afflicted with the disease to someone else, is guilty of a misdemeanor.

If a defendant has been previously convicted of prostitution or of another specified sexual offense, and in connection with the conviction a blood test was administered with positive results for AIDS, the previous conviction and positive test results are to be charged in any subsequent charge of prostitution. Defendant is guilty of a felony if the previous conviction and informed test results are found to be true or are admitted by the defendant. Lastly, courts are required to order a defendant convicted for a violation of soliciting or engaging in prostitution for the first time to submit to HIV testing and education.

During the 1980's and 90's, California passed these discriminatory laws and singled out people with HIV for harsher punishment than people with other communicable diseases. According to a 2015 report by the Williams Institute, HIV criminalization disproportionately affects women and people of color. Forty-three percent of those criminalized under these laws are women, despite comprising only 13 percent of people living with HIV in California. Blacks and Latinos made up two-thirds of the people who encountered the criminal justice system based on their HIV status, despite comprising only about half of people living with HIV in California.

Today's HIV treatments are highly effective in preventing the transmission of HIV, essentially reducing the chances of transmission to virtually nil. This has led to a treatment as prevention strategy - increasing testing and treatment coverage to decrease community viral load and reduce the rate of new HIV infections. However, California law discourages people from getting tested because mere knowledge of a positive HIV status could subject a person to felony criminal liability. Without the knowledge of one's status through testing, people do not seek treatment, thereby placing their and others' health at greater risk.

The Solution: Would repeal the felony provisions under existing law. It would instead make the intentional transmission of an infectious or communicable disease a misdemeanor, if certain circumstances apply. It would also delete the provision related to enhancements for those convicted of prostitution or another specified sex offense who subsequently test positive for HIV under existing law mandating HIV testing. It would vacate any conviction, dismiss any charge, and legally deem that an arrest under the deleted provision never occurred. It would require any court or agency having custody or control of records pertaining to the arrest, charge, or conviction of a person for a violation of the deleted provision to destroy, as specified, those records. It would also authorize a person serving a sentence due to a violation of the deleted provision to petition for a recall or dismissal of sentence. It would require a court to vacate the conviction and resentence the person to any remaining counts while giving credit for any time already served. Lastly, it would impose various requirements upon the court to prevent the public disclosure of identifying characteristics and delete the provisions requiring mandatory HIV testing and education for those convicted of a first-time violation of soliciting or engaging in prostitution.

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

CURRENT OR PRIOR RELATED LEGISLATION
This resolution tracks the language of SB 239 Infectious and communicable diseases: HIV and AIDS: criminal penalties, as introduced by Wiener Feb. 2017.

AUTHOR AND/OR PERMANENT CONTACT: Jennifer Orthwein, 2532 Santa Clara Ave, #227, Alameda, CA 94501-4634, voice: (415) 786-3855, email: jennifer.orthwein@gmail.com

RESPONSIBLE FLOOR DELEGATE: Jennifer Orthwein

COUNTERARGUMENTS AND STATE BAR SECTION COMMENTS

SAN DIEGO COUNTY BAR ASSOCIATION

The SDCBA Delegation urges Disapproval of Resolution 14-03-2017. While drug cocktails and improved medical treatments have rendered HIV and AIDS treatable to the point of achieving HIV positive nondetectable status, the consequences of intentional infection of others are still profound and warrant felony-level punishment. No one should have to suffer a lifetime requirement of buying expensive drug treatments to maintain their health because someone intentionally or recklessly infected them with a lifelong disease that can lead to death if not consistently treated.

RESOLUTION 14-04-2017

DIGEST

Incarceration: Gender Transition -Related Surgery Permitted

Amends 15 California Code of Regulations section 3350.1 to remove castration, vaginoplasty, and cosmetic breast reduction or enlargement from the list of treatments that may not be performed during incarceration.

RESOLUTIONS COMMITTEE RECOMMENDATION

DISAPPROVE

History:

Similar to Resolutions 02-23-2008 and 11-03-2011, which were approved in principle, and Resolutions 06-11-2009 and 01-08-2010, which were approved as amended.

Reasons:

This resolution amends 15 California Code of Regulations section 3350.1 to remove castration, vaginoplasty, and cosmetic breast reduction or enlargement from the list of treatments that may not be performed during incarceration. This resolution should be disapproved because it is overbroad.

While this resolution addresses legitimate issues faced by individuals with gender dysphoria, who require sex reassignment surgery as treatment, it would not only establish the right to obtain appropriate medical treatment for gender dysphoria while incarcerated, because the surgeries were expressly listed, then removed, this resolution could be interpreted as permitting castration, vaginoplasty, and cosmetic breast reduction or enlargement for any person. While well intentioned, this resolution goes too far. A more targeted approach, such as specifically excluding all surgery required for gender dysphoria treatment from the list of prohibited treatments, or including a parenthetical comment such as "(except for treatment of gender dysphoria)" after each of the surgeries, would alleviate the identified problem without the overbreadth.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Code of Regulations section 3350.1 to read as follows:

§ 3350.1

(a) Treatment refers to attempted curative treatment and does not preclude palliative therapies to alleviate serious debilitating conditions such as pain management and nutritional support. Treatment shall not be provided for the following conditions:

(1) Conditions that improve on their own without treatment. Examples include, but are not limited to:

(A) Common cold.

(B) Mononucleosis.

(C) Viral hepatitis A.

(D) Viral pharyngitis.
(E) Mild sprains.
(F) Benign oral lesions.
(G) Traumatic oral ulcers.
(H) Recurrent aphthous ulcer.
(2) Conditions that are not readily amenable to treatment, including, but not limited to, those which may be made worse by treatment with conventional medication or surgery, and those that are so advanced in the disease process that the outcome would not change with existing conventional or heroic treatment regimens. Examples include, but are not limited to:
(A) Multiple organ transplants.
(B) Temporomandibular joint dysfunction.
(C) Grossly metastatic cancer.
(D) Shrinkage and atrophy of the bony ridges of the jaws.
(E) Benign root fragments whose removal would cause greater damage or trauma than if retained for observation.
(3) Conditions that are cosmetic. Examples include, but are not limited to:
(A) Removal of tattoos.
(B) Removal of nontoxic goiter.
~~(C) Breast reduction or enlargement.~~
(~~D~~C) Penile implants.
(~~E~~D) Removal of existing body piercing metal or plastic rings or similar devices within the oral cavity, except for security reasons.
(~~F~~E) Restoration or replacement of teeth for esthetic reasons.
(~~G~~F) Restoration of any natural or arti cial teeth with unauthorized biomaterials.
(b) Surgery not medically necessary shall not be provided. Examples include, but are not limited to:
~~(1) Castration.~~
~~(2) Vaginoplasty (except for Cystocele or Rectocele).~~
~~(3)~~ (1) Vasectomy.
~~(4)~~ (2) Tubal ligation.
~~(5)~~ (3) Extractions of asymptomatic teeth or root fragments unless required for a dental prosthesis, or for the general health of the patient's mouth.
~~(6)~~ (4) Removal of a benign bony enlargement (torus) unless required for a dental prosthesis.
~~(7)~~ (5) Surgical extraction of asymptomatic unerupted teeth.
(c) Services that have no established outcome on morbidity or improved mortality for acute health conditions shall not be provided. Examples include, but are not limited to:
(1) Acupuncture.
(2) Orthoptics.
(3) Pleoptics.
(4) Root canals on posterior teeth (bicuspids and molars).
(5) Dental Implants.
(6) Fixed prosthodontics (dental bridges).
(7) Laboratory processed crowns.
(8) Orthodontics.

(d) Treatment for those conditions that are excluded within these regulations may be provided in cases where all of the following criteria are met:

(1) The inmate's attending physician or dentist prescribes the treatment as clinically necessary.

(2) The service is approved by the Dental Authorization Review committee and the Dental Program Health Care Review Committee for dental treatment, or the Institutional Utilization Management committee and the Headquarters Utilization Management committee for medical treatment. The decision of the review committee, as applicable, to approve an otherwise excluded service shall be based on:

(A) Available health and dental care outcome data supporting the effectiveness of the services as medical or dental treatment.

(B) Other factors, such as:

1. Coexisting medical or dental problems.
2. Acuity.
3. Length of the inmate's sentence.
4. Availability of the service.
5. Cost.

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

PROPONENT: Bay Area Lawyers for Individual Freedom

STATEMENT OF REASONS

The Problem: The California Department of Corrections and Rehabilitation (CDCR) explicitly excludes gender transition related surgeries under Title 15 section 3350.1. In response to constitutional challenges to this section, CDCR has created a multi-tiered and multi-person process to determine if sex reassignment surgery (SRS) is medically necessary. The process removes the medical determination as to whether SRS is medically necessary from the treating provider and places it in the hands of administrative personnel who have had no contact with the patient and have little-to-no experience or training treating individuals with gender dysphoria. The administrative process also considers the patient's correctional and criminal history, which are not considered in any other determination related to access to medical treatment.

Blanket bars and unequal access to medically necessary treatment based on gender are recognized as unacceptable under California law, but are acceptable when it comes to the treatment provided prisoners. Decades of careful and methodologically sound scientific research has demonstrated that SRS is a safe and effective treatment for severe gender dysphoria and, for many people, it is the only effective treatment.

In, *Norsworthy v. Beard*, Ms. Norsworthy alleged Defendants discriminated against her on the basis of her transgender status, specifically citing 15 C.C.R. § 3350.1 as facially discriminatory because it explicitly distinguishes between treatment for transsexual women that is designated as presumptively "not medically necessary" (i.e. castration and vaginoplasty for treatment of gender dysphoria) and the same treatments for non-transgender women (i.e. vaginoplasty for treatment of cystocele or rectocele), which are explicitly exempt from this bar (2014 WL 6842935

(N.D.Cal)). The Court agreed with Ms. Norsworthy holding she had adequately stated a claim under 42 U.S.C. § 1983 for a violation of the Equal Protection Clause of the Fourteenth Amendment. In April 2015, she was grated her motion for preliminary injunction ordering the defendants to provide her with access to adequate medical care, including SRS. She demonstrated the surgery was medically necessary and failure to treat her could result in further injury.

Nearly 2 years since *Norsworthy*, 64 referrals have been made by CDCR employed treating providers who found SRS to be medically necessary for their patients. Of those, CDCR Headquarters has approved 4, denied 51, and 13 remain pending. Only one individual has received SRS due to a settlement agreement, not this procedure.

The Solution: Would remove all SRS exclusions from Title 15 and bring it into compliance with case law indicating such exclusions are unconstitutional on Fourteenth and Eighth Amendment grounds. Removing the Title 15 requirements that excluded surgeries must be approved through an administrative process would make the administrative procedure (a supplement to the GD Care Guide) unnecessary and would enable access to SRS for individuals' whose treating provider has determined it to be medically necessary. Furthermore, the removal of the procedures would make the GD Care Guide consistent with the Inmate Medical Services Policies & Procedures, which states the GD Care Guide, "is not a substitute for the clinical judgment of the primary care provider or mental health professional".

IMPACT STATEMENT
This resolution should invalidate the California Correctional Health Care Services Supplement to the Gender Care Guide, which outlines the administrative process for obtaining gender confirming surgeries.

The supplement to the GD Care Guide currently creates a procedure that explicitly substitutes the clinical judgment of the treating primary care provider or mental health professional with an administrative committee. Removing the express exclusions from Title 15 would make the supplement to the GD Care Guide, and the procedure it creates, unnecessary, thereby making all relevant rules, policies and procedures in line with the Inmate Medical Services Policies & Procedures that indicate treatment for gender dysphoria should be based on the clinical judgement of the provider.

CURRENT OR PRIOR RELATED LEGISLATION
None known

AUTHOR AND/OR PERMANENT CONTACT: Jennifer Orthwein, 2532 Santa Clara Ave, #227, Alameda, CA 94501-4634, voice: (415) 786-3855, email: jennifer.orthwein@gmail.com

RESPONSIBLE FLOOR DELEGATE: Jennifer Orthwein

RESOLUTION 14-05-2017

DIGEST
Medical Marijuana: Increase Amount a Qualified Patient Can Possess
Amends Health and Safety Code sections 11362.7 and 11462.77 to allow a qualified patient to possess an amount of marijuana consistent with their needs and expand the eligibility of a primary caregiver.

RESOLUTIONS COMMITTEE RECOMMENDATION
APPROVE IN PRINCIPLE

History:
No similar resolution found.

Reasons:
This resolution amends Health and Safety Code sections 11362.7 and 11462.77 to allow a qualified patient to possess an amount of marijuana consistent with their needs and expand the eligibility of a primary caregiver. This resolution should be approved in principle because it will allow a patient to possess an amount of marijuana consistent with their needs, and align the statute to the Compassionate Use Act and current case law.

Prior to the ruling in *People v. Kelly* (2010) 47 Cal.4th 1008, a qualified patient or primary caregiver could possess no more than eight ounces of dried marijuana per qualified patient, and no more than six mature or twelve immature marijuana plants per qualified patient. The court in *Kelly* invalidated these limitations and held that a patient may possess an amount of marijuana reasonably related to the patient's current medical needs. Accordingly, this resolution would reconcile the statutes with this ruling.

Additionally, the resolution eliminates the requirement that a designated caregiver must live in the same city or county as the patient, which is ambiguous, and provides instead that the primary caregiver must live within 25 miles of the patient. Given the size of counties in California, it makes more sense to limit the distance based on a defined twenty-five mile radius, and not to a county or city.

The Resolutions Committee notes that after submission of this resolution, legislation was enacted that made changes to the language of Health & Safety Code section 11362.77, effective June 27, 2017. (Stats. 2017, Ch. 27, Sec. 139. eff. June 27, 2017 (Sen. Bill 94).) The changes to the section do not impact the goal of the resolution.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Health and Safety Code sections 11362.7 and 11362.77 to read as follows:

§ 11362.7

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

(a) "Attending physician" means an individual who possesses a license in good standing to practice medicine or osteopathy issued by the Medical Board of California or the Osteopathic Medical Board of California and who has taken responsibility for an aspect of the medical care, treatment, diagnosis, counseling, or referral of a patient and who has conducted a medical examination of that patient before recording in the patient's medical record the physician's assessment of whether the patient has a serious medical condition and whether the medical use of marijuana is appropriate.

(b) "Department" means the State Department of Health Services.

(c) "Person with an identification card" means an individual who is a qualified patient who has applied for and received a valid identification card pursuant to this article.

(d) "Primary caregiver" means the individual, designated by a qualified patient or by a person with an identification card, who has consistently assumed responsibility for the housing, health, or safety of that patient or person, and may include any of the following:

(1) In any case in which a qualified patient or person with an identification card receives medical care or supportive services, or both, from a clinic licensed pursuant to Chapter 1 (commencing with Section 1200) of Division 2, a health care facility licensed pursuant to Chapter 2 (commencing with Section 1250) of Division 2, a residential care facility for persons with chronic life-threatening illness licensed pursuant to Chapter 3.01 (commencing with Section 1568.01) of Division 2, a residential care facility for the elderly licensed pursuant to Chapter 3.2 (commencing with Section 1569) of Division 2, a hospice, or a home health agency licensed pursuant to Chapter 8 (commencing with Section 1725) of Division 2, the owner or operator, or no more than three employees who are designated by the owner or operator, of the clinic, facility, hospice, or home health agency, if designated as a primary caregiver by that qualified patient or person with an identification card.

(2) An individual who has been designated as a primary caregiver by more than one qualified patient or person with an identification card, if every qualified patient or person with an identification card who has designated that individual as a primary caregiver resides in the same ~~city or~~ county as ~~the primary caregiver~~ or up to 25 miles from the primary caregiver.

(3) An individual who has been designated as a primary caregiver by a qualified patient or person with an identification card who resides in a ~~city or~~ county other than that of the primary caregiver or greater than 25 miles from the primary caregiver, if the individual has not been designated as a primary caregiver by any other qualified patient or person with an identification card.

(e) A primary caregiver shall be at least 18 years of age, unless the primary caregiver is the parent of a minor child who is a qualified patient or a person with an identification card or the primary caregiver is a person otherwise entitled to make medical decisions under state law pursuant to Sections 6922, 7002, 7050, or 7120 of the Family Code.

(f) "Qualified patient" means a person who is entitled to the protections of Section 11362.5, but who does not have an identification card issued pursuant to this article.

(g) "Identification card" means a document issued by the State Department of Health Services that ~~document~~ identifies a person authorized to engage in the medical use of marijuana and the person's designated primary caregiver, if any.

(h) "Serious medical condition" means all of the following medical conditions:

(1) Acquired immune deficiency syndrome (AIDS).

(2) Anorexia.

(3) Arthritis.

(4) Cachexia.
(5) Cancer.
(6) Chronic pain.
(7) Glaucoma.
(8) Migraine.
(9) Persistent muscle spasms, including, but not limited to, spasms associated with multiple sclerosis.
(10) Seizures, including, but not limited to, seizures associated with epilepsy.
(11) Severe nausea.
(12) Any other chronic or persistent medical symptom that does either of the following:
(A) Substantially limits the ability of the person to conduct one or more major life activities as defined in the Americans with Disabilities Act of 1990 (Public Law 101-336).
(B) If not alleviated, may cause serious harm to the patient's safety or physical or mental health.
(i) "Written documentation" means accurate reproductions of those portions of a patient's medical records that have been created by the attending physician, that contain the information required by paragraph (2) of subdivision (a) of Section 11362.715, and that the patient may submit to a county health department or the county's designee as part of an application for an identification card.

§ 11362.77
(a) A qualified patient, a person with an identification card, or any designated primary caregiver may possess ~~no more than eight ounces of dried marijuana per qualified patient~~ any amount of marijuana consistent with the medical needs of that qualified patient or person with an identification card. ~~In addition, a qualified patient or primary caregiver may also maintain no more than~~.
(b) (1) A person with an identification card or a primary caregiver with an identification card shall not be subject to arrest for possessing eight ounces or fewer of dried marijuana per person with an identification card, and maintaining six or fewer mature or 12 or fewer immature marijuana plants per ~~qualified patient~~ person with an identification card.
(2) Nothing in this section is intended to affect any city or county guidelines insofar as the amounts contained in those guidelines exceed the quantities set forth in paragraph (1).
~~(b)~~(c) If a ~~qualified patient or primary caregiver has a doctor's recommendation that this quantity does~~ physician determines that the quantities in subdivision (b) do not meet the ~~qualified patient's~~ medical needs~~, the qualified patient~~ of the person with an identification card, that person or that person's or primary caregiver with an identification card may possess an amount of marijuana consistent with ~~the patient's~~ those medical needs and shall not be subject to arrest for possessing that amount.
~~(c) Counties and cities may retain or enact medical marijuana guidelines allowing qualified patients or primary caregivers to exceed the state limits set forth in subdivision (a).~~
(d) Only the dried mature processed flowers of female cannabis plant or the plant conversion shall be considered when determining allowable quantities of marijuana under this section.
(e) The Attorney General may recommend modifications to the possession or cultivation limits set forth in this section. These recommendations, if any, shall be made to the Legislature no later than December 1, 2005, and may be made only after public comment and consultation

with interested organizations, including, but not limited to, patients, health care professionals, researchers, law enforcement, and local governments. Any recommended modification shall be consistent with the intent of this article and shall be based on currently available scientific research.

~~(f) A qualified patient or a person holding a valid identification card, or the designated primary caregiver of that qualified patient or person, may possess amounts of marijuana consistent with this article.~~

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

PROPONENT: San Diego County Bar Association

STATEMENT OF REASONS

The Problem: In the 90's, Californians passed the Compassionate Use Act, which allows (as an affirmative defense) patients to have any amount of medical marijuana consistent with their medical needs. In the early 2000's, the legislature passed a law to provide for a medical marijuana ID card, where if someone possesses less than a certain amount of marijuana and has the ID card, he or she will not be arrested. A drafting error, however, ended up incorporating those limits on amount also for the affirmative defense, in violation of the Compassionate Use Act. That part was invalidated by the ruling in *People v. Kelly*, 146 P.3d 547 (Cal. 2006). Another part of existing law limits primary caregivers to living in the same county as the patient. Someone may live on the outskirts of a county and know someone who lives close by in an adjacent county, but such person is ineligible to be the person's primary caregiver.

Additionally, Proposition 64, which legalized possessing a small amount of marijuana for recreational purposes, did not change these provisions.

The Solution: This resolution implements the California Supreme Court's ruling in *Kelly*, by ensuring medical marijuana patients can have any amount consistent with their medical needs. It also expands the eligibility of primary caregivers by permitting them to live within 25 miles of the patient, rather than just the same county.

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

CURRENT OR PRIOR RELATED LEGISLATION
SB 1494 (2004).

AUTHOR AND/OR PERMANENT CONTACT: Ben Rudin, 3830 Valley Centre Dr., Ste. 705 #231, San Diego, CA 92130, (858) 256-4429, ben_rudin@hotmail.com.

RESPONSIBLE FLOOR DELEGATE: Ben Rudin

RESOLUTION 14-06-2017

DIGEST
Taxation: Exempt Medicines and Nutritional Supplements from Sales Tax
Amends Revenue and Taxation Code section 6359 to provide that over-the-counter medicines and nutritional supplements are not subject to the sales tax.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution amends Revenue and Taxation Code section 6359 to provide that over-the-counter medicines and nutritional supplements are not subject to the sales tax. This resolution should be disapproved because nutritional supplements, unlike food and prescription medicines, are not consumable necessities of life for many people and, thus, they should not be exempted from the sales tax.

Under current law, dietary supplements are, in limited circumstances, considered "medicines" not subject to sales tax. For example, supplements provided by a physician to his or her own patient as part of a medically supervised weight loss program to treat obesity and are not subject to sales tax. (18 Cal. Code Regs., §§ 1602 and 1591.) However, this resolution would give numerous additional supplements, which are not reasonably considered necessities of life, the sales tax exemption, and is thus overbroad. Supplements are not generally unregulated, and therefore could include items that may be similar in composition to candy (which is taxed), which is not taxed. This resolution would allow even such supplements to be except from taxation.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to add Revenue and Taxation Code section 6359 to read as follows:

§ 6359

(a) There are exempted from the taxes imposed by this part the gross receipts from the sale of, and the storage, use, or other consumption in this state of, food products for human consumption.

(b) For the purposes of this section, "food products" include all of the following:

(1) Cereals and cereal products, oleomargarine, meat and meat products, fish and fish products, eggs and egg products, vegetables and vegetable products, fruit and fruit products, spices and salt, sugar and sugar products, candy, gum, confectionery, coffee and coffee substitutes, tea, and cocoa and cocoa products.

(2) Milk and milk products, milkshakes, malted milks, and any other similar type beverages that are composed at least in part of milk or a milk product and that require the use of milk or a milk product in their preparation.

(3) All fruit juices, vegetable juices, and other beverages, whether liquid or frozen, including bottled water, but excluding spirituous, malt, or vinous liquors or carbonated beverages.

(~~c~~4) ~~For purposes of this section, "food products" do not include~~ ~~m~~Medicines, and preparations in liquid, powdered, granular, tablet, capsule, lozenge, and pill form sold as dietary supplements or adjuncts.

(~~d~~c) None of the exemptions in this section apply to any of the following:

(1) When the food products are served as meals on or off the premises of the retailer.

(2) When the food products are furnished, prepared, or served for consumption at tables, chairs, or counters or from trays, glasses, dishes, or other tableware whether provided by the retailer or by a person with whom the retailer contracts to furnish, prepare, or serve food products to others.

(3) When the food products are ordinarily sold for immediate consumption on or near a location at which parking facilities are provided primarily for the use of patrons in consuming the products purchased at the location, even though those products are sold on a "take out" or "to go" order and are actually packaged or wrapped and taken from the premises of the retailer.

(4) When the food products are sold for consumption within a place, the entrance to which is subject to an admission charge, except for national and state parks and monuments, marinas, campgrounds, and recreational vehicle parks.

(5) When the food products are sold through a vending machine.

(6) When the food products sold are furnished in a form suitable for consumption on the seller's premises, and both of the following apply:

(A) Over 80 percent of the seller's gross receipts are from the sale of food products.

(B) Over 80 percent of the seller's retail sales of food products are sales subject to tax pursuant to paragraph (1), (2), (3), or (7).

(7) When the food products are sold as hot prepared food products.

(~~e~~d) "Hot prepared food products," for the purposes of paragraph (7) of subdivision (d), include a combination of hot and cold food items or components where a single price has been established for the combination and the food products are sold in combination, such as a hot meal, a hot specialty dish or serving, a hot sandwich, or a hot pizza, including any cold components or side items. Paragraph (7) of subdivision (d) does not apply to a sale for a separate price of bakery goods or beverages (other than bouillon, consommé, or soup), or where the food product is purchased cold or frozen; "hot prepared food products" means those products, items, or components that have been prepared for sale in a heated condition and that are sold at any temperature that is higher than the air temperature of the room or place where they are sold.

(~~f~~e) Notwithstanding paragraph (6) of subdivision (d), if the seller elects to separately account for sales of food products specified in subdivision (b), then the gross receipts from the sale of those food products shall be exempt under subdivision (a), provided that the separate accounting is fully documented in the seller's records. However, if the seller's records do not reflect the separate accounting of the gross receipts from sales of nontaxable food products, the seller's election under this subdivision shall be revoked.

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

PROPONENT: San Diego County Bar Association

STATEMENT OF REASONS

The Problem: Medicines and nutritional supplements are consumable necessities of life for many people, but unlike food, they are subject to the sales tax. Sales taxes hit people in greater proportions the poorer they are; while we recognize that in our exemption of food and prescription drugs, we fail to do so with over-the-counter medicines and supplements.

The Solution: By exempting over-the-counter medicines and nutritional supplements from the sales tax, we ease the burden on buying them and enable more people to consume these necessities.

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.

AUTHOR AND/OR PERMANENT CONTACT: Ben Rudin, 3830 Valley Centre Dr., Ste. 705 #231, San Diego, CA 92130, (858) 256-4429, ben_rudin@hotmail.com.

RESPONSIBLE FLOOR DELEGATE: Ben Rudin

RESOLUTION 14-07-2017

DIGEST
Health: Prohibiting Sale of Tobacco and Vaping Products
Adds Health and Safety Code section 118951 to prohibit the sale of tobacco products on the premises of stores having operating pharmacies.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution adds Health and Safety Code section 118951 to prohibit the sale of tobacco products on the premises of stores having operating pharmacies. This resolution should be disapproved because tobacco products remain a legal commodity and the State should not interfere in a store's decision to either sell or not sell a legal product line.

Both state and federal governments have established programs to educate children and adults on the health dangers associated with tobacco use. Their mission is to discourage people from smoking in the first instance, and to get smokers to end the habit and cease smoking. California's Department of Public Health has a dedicated division for that purpose. (See http://www.cdph.ca.gov/programs/tobacco/Pages/Welcome.aspx.) State law strictly licenses, regulates and taxes the sale of tobacco products. The method and content of tobacco advertisement and promotion are likewise restricted. Through these efforts and clear warnings on labels for tobacco products, consumers are well aware of the risks associated with smoking.

Nevertheless, tobacco products remain legal for sale and consumption. It is a product that does not require a prescription or license for purchase or use, only that the purchaser be an adult. If a consumer chooses to exercise his or her personal right to smoke, and a store decides to carry and offer this product to its customers, the State has no reasonable basis to prevent a private, non-governmental retail store from carrying and selling tobacco products, irrespective of whether a pharmacy is operated on the premises. The presence of an operating pharmacy within a retail store is irrelevant to whether tobacco products - or for that matter any other product, healthy or not - should or should not be offered by a retail merchant to a customer interested in purchasing a particular product from the retail store. Tobacco is not the only unhealthy product offered for sale, be it alcohol, carbonated soda, candy and other high sugar, high salt or high caloric products … even bacon. A merchant is always free to choose not to offer tobacco products, as many retailers have. There is no need for enforced regulation. Education and the public marketplace is adequate enough regulation.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to add Health and Safety Code section 118951 to read as follows:

§ 118951

(a) It shall be unlawful for any merchant engaged in the sale of merchandise, goods or services to the public that has on its premises and open to the public an operating pharmacy licensed by this state, whether such pharmacy is operated by the merchant, or is independently owed and operated, or is a tenant or subtenant of the merchant or the owner of the property of the merchant, to sell, engage in the sale of, or offer for sale any tobacco products on the merchant's premises where the pharmacy is located, whether or not such operating pharmacy is actually open for business.

(b) Except as provided in subdivision (f) of this Section it shall be unlawful for any pharmacy licensed by this state to sell or offer for sale any tobacco products.

(c) Except as provided in subdivision (f) of this Section it shall be unlawful for any pharmacy licensed by this state to operate or dispense any prescription medication on the premises of any business that sells or offers for sale any tobacco products.

(d) A violation of subdivision (a) of this Section shall be enforced by any city or county attorney, district attorney or the attorney general who shall apply to the superior court of the county in which the violation is alleged to be occurring for injunctive relief

(e) A violation of subdivision (b) or (c) of this Section shall be enforced by the State Board of Pharmacy and shall constitute grounds for administrative action, including the suspension or revocation of all licenses issued to the pharmacy and its pharmacists, by the State Board of Pharmacy.

(f) As used in this section the term "tobacco products" includes any product that includes in its ingredients any part of the tobacco plant, even if the primary ingredient of such product is not itself a product of the tobacco plant. This shall also include any instrument or device that provides a delivery system for the inhalation or ingestion of nicotine, including vaping devices and e-cigarettes. Any product designed and used for the purpose of assisting in smoking cessation that contains a tobacco product as one or more of its ingredients shall not be subject to this section.

(g) This Section shall preempt all city, county, city and county, special district, and local ordinances and resolutions relating to the sale of tobacco products on premises upon which an operating pharmacy is located.

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

PROPONENT: San Mateo County Bar Association

STATEMENT OF REASONS

The Problem: The state has determined that the use of tobacco products is harmful to the health of the user and is a significant factor in a variety of insidious diseases including cancer, pulmonary disease, cardiovascular disease and other diseases. Second hand smoke is also

harmful to those who are forced to inhale the second hand smoke and by-products of those whom smoke tobacco products. Smokeless tobacco also presents a significant health risk to users, including a variety of cancers, particularly to younger people who get addicted to it early in life. Pharmacies are licensed by the state and are in the business of dispensing the very kinds of medicines patients use to treat the very diseases they acquire from the use of tobacco products. Likewise, scientific and medical studies have shown that the ingestion of nicotine through such devices such as e-cigarettes and vaping instruments presents significant and detrimental health risks. It is therefore inconsistent with the purpose of a pharmacy that sells wellness products to sell products that cause the very diseases for which patients seek medicinal treatment.

The Solution: Prohibiting the sale of tobacco products, and devices designed for the delivery of nicotine as well, on the premises of stores that have operating pharmacies would further the state's goal of reducing the use of such carcinogenic products. Furthermore, such statewide prohibition would be consistent with the laws of several cities and counties that already have adopted local legislation that prohibits the sale of tobacco products on the premises of stores that have operating pharmacies in their jurisdictions.

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.

AUTHOR AND/OR PERMANENT CONTACT: Paul M. Davis, LAW OFFICES OF PAUL M. DAVIS, 448 Ignacio Blvd. #201, Novato, California 94949-6085 (650) 345-7700
pmd@davislawoffice.com

RESPONSIBLE FLOOR DELEGATE: Paul M. Davis

COUNTERARGUMENT AND STATE BAR SECTION COMMENTS

SAN DIEGO COUNTY BAR ASSOCIATION

The SDCBA Delegation urges Disapproval of Resolution 14-07-2017. Smoking and other uses of tobacco and vaping products are personal choices, and the decision to sell tobacco and vaping is none of the government's business unless it presents a clear and immediate harm to the user. While true that second-hand smoke imposes a risk on others, this Resolution misses the mark if that is the goal; second-hand smoke concerns where smoking occurs, not where such products are bought and sold. To think that anyone is going to decide, "Oh, I cannot get tobacco at my drug store anymore, so rather than buying it elsewhere, I am just going to quit," is naive. Regardless whether selling it is hypocritical, hypocrisy is not a reason for legislation. Even if it

were, that would justify prohibiting drug stores from selling candy, alcohol, or anything else that contributes to a problem that prescription drugs can mitigate. Hypocrisy is many things; it is not worth banning.