RESOLUTION 03-01-2018

DIGEST
Vandalism While Incarcerated: Making it a "Wobbler" Offense
Amends Penal Code section 4600 to make vandalism to property in a jail or prison, where damage exceeds $950, chargeable as either a felony or a misdemeanor.

RESOLUTIONS COMMITTEE RECOMMENDATION
APPROVE IN PRINCIPLE

History:
No similar resolutions found.

Reasons:
This resolution amends Penal Code section 4600 to make vandalism to property in a jail or prison, where damage exceeds $950, chargeable as either a felony or a misdemeanor. This resolution should be approved in principle because the court should be able to consider the individual circumstances of the case and decide whether justice is best served by punishing the offense as a misdemeanor or a felony, instead of being required to punish such occurrences as a felony.

Vandalism resulting in damage of over $400 to property outside of a jail or prison is treated as a wobbler, that is, it may be treated as a misdemeanor or felony. (Pen. Code, § 594, subd. (b).) Under Penal Code section 4600, vandalism to property in a jail or a prison is a felony, unless the damage is less than $950.

Property damage occurring in a county jail can occur for a number of reasons. For example, a mentally ill arrestee may break a window or cause other damage while off medication or not properly stabilized. Then there is the vengeful prisoner who willfully destroys prison property. In general, prisoners should be deterred from damaging property while in confinement, but as with other vandalism crimes, in cases of damage or injury to jail or prison property, the prosecution and the court should have discretion to charge and/or punish the act either as a felony or a misdemeanor based on the individual circumstances of the case, regardless of the value of the damage.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Penal Code section 4600 to read as follows:

§ 4600

(a) Every person who willfully and intentionally breaks down, pulls down, or otherwise destroys or injures any jail, prison, or any public property in any jail or prison, is punishable by a fine not exceeding ten thousand dollars ($10,000), and by imprisonment in a county jail not exceeding one year, or pursuant to subdivision (h) of Section 1170, except that where the damage or injury to any city, city and county, or county jail property or prison property is determined to be nine hundred fifty dollars ($950) or less, that person is guilty of a misdemeanor.

(b) In any case in which a person is convicted of violating this section, the court may order the defendant to make restitution to the public entity that owns the property damaged by the defendant. The court shall specify in the order that the public entity that owns the property damaged by the defendant shall not enforce the order until the defendant satisfies all outstanding fines, penalties, assessments, restitution fines, and restitution orders.

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

PROPONENT: Los Angeles County Bar Association

STATEMENT OF REASONS

The Problem: Under current law, vandalism over $400 occurring outside of county jail is a wobbler, meaning it can be charged as a misdemeanor or a felony. However, under current law vandalism in a county jail is always a felony, unless the damage is less than $950. Many vandalism offenses in county jail involve mentally ill defendants who break a window or other item while off their medications. Refusing to allow a court to consider the individual circumstances of the case for these defendants makes little sense, especially when such determinations are made as a matter of course for vandalism cases that occur on the street.

The Solution: This resolution would make vandalism in county jail chargeable as either a felony or a misdemeanor at the discretion of the prosecution or the court, after consideration of the nature of the offense and the defendant's criminal history.

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

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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RESPONSIBLE FLOOR DELEGATE: Nick Stewart-Oaten

RESOLUTION 03-02-2018

DIGEST
Statute of Limitations: Felony Computer Hacking
Adds Penal Code section 801.3 to commence running of the statute of limitations for felony computer hacking upon discovery of the crime.

RESOLUTIONS COMMITTEE RECOMMENDATION
APPROVE IN PRINCIPLE

History:
Similar to Resolution 06-08-2017, which was withdrawn.

Reasons:
This resolution adds Penal Code section 801.3 to commence running of the statute of limitations for felony computer hacking upon discovery of the crime. This resolution should be approved in principle because it is narrowly tailored to address the problem of inability to prosecute serious hacking crimes that remain hidden after commission.

Perpetrators of data breaches go to great lengths to conceal the effects of their crimes. As a result, by the time the crimes are discovered, it can be too late to prosecute them. The resolution addresses that problem by allowing prosecution within three years of discovery of the commission of the offense or completion of the offense, whichever is later. It addresses the overbreadth concerns raised with respect to Resolution 06-08-2017 (which would have applied the discovery rule to misdemeanors and even infractions) by limiting its application to felonies

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Association recommends that legislation be sponsored to add Penal Code section 801.3 to read as follows:

§ 801.3
Notwithstanding Section 801 or any other provision of law, prosecution for a felony violation of Section 502 shall be commenced within three years after discovery of the commission of the offense, or within three years after the completion of the offense, whichever is later.

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

PROPONENT: Los Angeles County Bar Association

STATEMENT OF REASONS

The Problem: Under existing law, the statute of limitations for 'white-collar' crimes that involve a breach of trust (e.g., grand theft, identity theft, fraud, forgery, perjury, etc.) is four years after discovery of the offense, or four years after its completion, whichever is later. (Pen. Code

§§801.5, 803(c).) Similarly, the statute of limitations for computer hacking is three years after discovery, if prosecuted civilly. (Pen. Code, §502(e)(5).) But, the statute of limitations for computer hacking prosecuted as a felony commences from the date of the offense, not the date of discovery, which is inconsistent and counterintuitive. (See Pen. Code, §§502(d)(1), 801.) Unlike victims of physical crimes, victims of computer hacking are often unaware of its occurrence. For example, in December 2016, Yahoo reported that over 1 billion user accounts were compromised back in August 2013, or beyond the statute of limitations for criminal prosecution. (Goel and Perlroth, Yahoo Says 1 Billion User Accounts Were Hacked (Dec. 14, 2016) New York Times www.nytimes.com/2016/12/14/technology/yahoo-hack.html.) Moreover, due to the anonymous nature of many computer intrusions, an investigation to identify the perpetrator often requires a significant amount of time and technical resources.

The Solution: This resolution adds Penal Code section 801.3 to adopt the same statute of limitations for a felony violation of Penal Code section 502 as a civil prosecution for the same act, i.e. three years after the date of discovery.

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

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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RESPONSIBLE FLOOR DELEGATE: Michael Fern

RESOLUTION 03-03-2018

DIGEST

Revocation of Supervision: Exception for Specified Infraction Violations

Amends Penal Code section 19.8 to specify that infraction violations, except as specified, shall not be grounds for revocation of supervision.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

No similar resolutions found.

Reasons:

This resolution amends Penal Code section 19.8 to specify that infraction violations, except as specified, shall not be grounds for revocation of supervision. This resolution should be approved in principle because it is consistent with the goals of criminal justice realignment, the expansion of community-based supervision, and the national movement to lessen the criminal implications of infraction violations.

Current law states that, except for violations related to driving under the influence of controlled substances or alcohol, or failing to submit to field and alcohol tests, or testing at or above legal limits for controlled substances and alcohol, a conviction for an offense that was reduced to an infraction as defined shall not be grounds for the revocation of probation or parole. The resolution seeks to do two important things. First, it seeks to expand the class of infraction violations for which an individual would not suffer a revocation of probation and parole. Current law refers only to those offenses that were reduced to infractions. The resolution would expand this provision to state that no infraction shall result in the revocation of supervision, except those enumerated and related to driving under the influence, refusal to take field sobriety tests, and failing field sobriety tests. This makes sense given that (a) most of the DUI and related provisions are not infractions in the first instance; (b) there is a valid distinction to be made between the vast majority of infraction violations which are punishable by fines and penalties only, and those that result in mandatory suspension of driver's licenses for drug and alcohol-related motor vehicle offenses; and (c) there is a significant nation-wide movement away from the over-criminalization of infraction violations because of the disparate impact of over-criminalization on low-income people and people of color that perpetuates the cycle of injustice and poverty.

The second change the resolution addresses is to expand the kinds of community supervision that would not be violated for an infraction violation. As a result of criminal justice realignment (Assm. Bill No. 109, Chapter 15, Statutes of 2011), community-based supervision was expanded to include post-release community supervision and mandatory supervision. The resolution would include post-release community supervision and mandatory supervision as kinds of supervision that would not be violated for an infraction violation in addition to probation and parole. This provision makes sense because of the changed definition of community supervision

post-realignment. Failure to make the change would lead to irregularities and inconsistencies in the law that would have no justification.

TEXT OF RESOLTUION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Penal Code section 19.8 to read as follows:

§ 19.8

(a) The following offenses are subject to subdivision (d) of Section 17: Sections 193.8, 330, 415, 485, 490.7, 555, 602.13, and 853.7 of this code; subdivision (c) of Section 532b, and subdivision (o) of Section 602 of this code; subdivision (b) of Section 25658 and Sections 21672, 25661, and 25662 of the Business and Professions Code; Section 27204 of the Government Code; subdivision (c) of Section 23109 and Sections 5201.1, 12500, 14601.1, 27150.1, 40508, and 42005 of the Vehicle Code, and any other offense that the Legislature makes subject to subdivision (d) of Section 17. Except where a lesser maximum fine is expressly provided for a violation of those sections, a violation that is an infraction is punishable by a fine not exceeding two hundred fifty dollars ($250).

(b) Except in cases where a different punishment is prescribed, every offense declared to be an infraction is punishable by a fine not exceeding two hundred fifty dollars ($250).

(c) Except for the violations enumerated in subdivision (d) of Section 13202.5 of the Vehicle Code, and Section 14601.1 of the Vehicle Code based upon failure to appear, a conviction for an ~~offense made an~~ infraction ~~under subdivision (d) of Section 17~~ is not grounds for the suspension, revocation, or denial of a license, or for the revocation of probation, ~~or~~ parole, post release community supervision or mandatory supervision of the person convicted.

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

PROPONENT: Los Angeles County Bar Association

STATEMENT OF REASONS

The Problem: When it comes to how a conviction for an infraction may be used against a person, the Penal Code is very odd. Penal Code section 19.8 prohibits using enumerated crimes (misdemeanors that have been reduced to infractions) to violate a person's parole or probation. But it says nothing about whether a straight infraction (for example, expired registration, jaywalking, or speeding) may be used to violate a person's parole or probation. It makes no sense for a crime that could have been a misdemeanor to be unusable to violate probation or parole but at the same time a crime that is only an infraction might be so used. In addition, there are two new levels of supervision that are not mentioned in the statute: Post Release Community Supervision (PRCS) and mandatory supervision.

The Solution: The solution is to clarify the law so that no infraction may be used to violate a person's parole, probation, PRCS, or mandatory supervision. It really doesn't make any sense that a person can be sent to prison, or returned to county jail, because of a fix-it ticket or a speeding ticket.

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

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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RESPONSIBLE FLOOR DELEGATE: Mark Harvis

RESOLUTION 03-04-2018

DIGEST
Insurance Fraud: Make Non-Health Care Insurance Fraud a "Wobbler"
Amends Penal Code section 550 to make non-health care insurance and other fraudulent claims chargeable as either a felony or a misdemeanor.

RESOLUTIONS COMMITTEE RECOMMENDATION
APPROVE IN PRINCIPLE

History:
No similar resolutions found.

Reasons:
This resolution amends Penal Code section 550 to make non-health care insurance and other fraudulent claims chargeable as either a felony or a misdemeanor. This resolution should be approved in principle because the prosecutor should have the discretion to prosecute a fraudulent non-health insurance claim as a felony or misdemeanor.

Since the law's enactment in 1992, what is now subdivision (c)(2) of section 550 has allowed discretionary felony or misdemeanor prosecution of fraudulent health care insurance claims and related activity, regardless of the amount involved in the false claim. (Ins. Code, § 550, subds. (a)(6)-(9) & (b)(1)-(4).) No similar discretion is authorized for false or fraudulent conduct concerning a non-health care insurance policy, which must be treated as a felony. (Ins. Code, § 550, subds. (a)(1)-(5).) As is the case when dealing with false and fraudulent claims regarding health care insurance, the prosecutor and court should have similar discretion to make a good faith determination, based on the individual circumstances of the case, whether to treat a fraudulent claim not associated with health care insurance as a felony or a misdemeanor. There does not appear to be any universally discernable distinction between health care insurance fraud and fraud related to a non-health care insurance claim to justify the restriction on prosecutorial authority that currently exists.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Penal Code section 550 to read as follows:

§ 550

(a) It is unlawful to do any of the following, or to aid, abet, solicit, or conspire with any person to do any of the following:

(1) Knowingly present or cause to be presented any false or fraudulent claim for the payment of a loss or injury, including payment of a loss or injury under a contract of insurance.

(2) Knowingly present multiple claims for the same loss or injury, including presentation of multiple claims to more than one insurer, with an intent to defraud.

(3) Knowingly cause or participate in a vehicular collision, or any other vehicular accident, for the purpose of presenting any false or fraudulent claim.

(4) Knowingly present a false or fraudulent claim for the payments of a loss for theft, destruction, damage, or conversion of a motor vehicle, a motor vehicle part, or contents of a motor vehicle.

(5) Knowingly prepare, make, or subscribe any writing, with the intent to present or use it, or to allow it to be presented, in support of any false or fraudulent claim.

(6) Knowingly make or cause to be made any false or fraudulent claim for payment of a health care benefit.

(7) Knowingly submit a claim for a health care benefit that was not used by, or on behalf of, the claimant.

(8) Knowingly present multiple claims for payment of the same health care benefit with an intent to defraud.

(9) Knowingly present for payment any undercharges for health care benefits on behalf of a specific claimant unless any known overcharges for health care benefits for that claimant are presented for reconciliation at that same time.

(10) For purposes of paragraphs (6) to (9), inclusive, a claim or a claim for payment of a health care benefit also means a claim or claim for payment submitted by or on the behalf of a provider of any workers' compensation health benefits under the Labor Code.

(b) It is unlawful to do, or to knowingly assist or conspire with any person to do, any of the following:

(1) Present or cause to be presented any written or oral statement as part of, or in support of or opposition to, a claim for payment or other benefit pursuant to an insurance policy, knowing that the statement contains any false or misleading information concerning any material fact.

(2) Prepare or make any written or oral statement that is intended to be presented to any insurer or any insurance claimant in connection with, or in support of or opposition to, any claim or payment or other benefit pursuant to an insurance policy, knowing that the statement contains any false or misleading information concerning any material fact.

(3) Conceal, or knowingly fail to disclose the occurrence of, an event that affects any person's initial or continued right or entitlement to any insurance benefit or payment, or the amount of any benefit or payment to which the person is entitled.

(4) Prepare or make any written or oral statement, intended to be presented to any insurer or producer for the purpose of obtaining a motor vehicle insurance policy, that the person to be the insured resides or is domiciled in this state when, in fact, that person resides or is domiciled in a state other than this state.

(c)(1) Every person who violates paragraph (1), (2), (3), (4), or (5) of subdivision (a) is guilty of a felony punishable by imprisonment pursuant to subdivision (h) of Section 1170 for two, three, or five years, and by a fine not exceeding fifty thousand dollars ($50,000), or double the amount of the fraud, whichever is greater; or by imprisonment in a county jail not to exceed one year, by a fine of not more than fifty thousand dollars ($50,000), or double the amount of the fraud, whichever is greater, or by both that imprisonment and fine.

(2) Every person who violates paragraph (6), (7), (8), or (9) of subdivision (a) is guilty of a public offense.

(A) When the claim or amount at issue exceeds nine hundred fifty dollars ($950), the offense is punishable by imprisonment pursuant to subdivision (h) of Section 1170 for two, three, or five years, or by a fine not exceeding fifty thousand dollars ($50,000) or double the amount of the fraud, whichever is greater, or by both that imprisonment and fine, or by imprisonment in a

county jail not to exceed one year, by a fine of not more than ten thousand dollars ($10,000), or by both that imprisonment and fine.

(B) When the claim or amount at issue is nine hundred fifty dollars ($950) or less, the offense is punishable by imprisonment in a county jail not to exceed six months, or by a fine of not more than one thousand dollars ($1,000), or by both that imprisonment and fine, unless the aggregate amount of the claims or amount at issue exceeds nine hundred fifty dollars ($950) in any 12-consecutive-month period, in which case the claims or amounts may be charged as in subparagraph (A).

(3) Every person who violates paragraph (1), (2), (3), or (4) of subdivision (b) shall be punished by imprisonment pursuant to subdivision (h) of Section 1170 for two, three, or five years, or by a fine not exceeding fifty thousand dollars ($50,000) or double the amount of the fraud, whichever is greater, or by both that imprisonment and fine, or by imprisonment in a county jail not to exceed one year, or by a fine of not more than ten thousand dollars ($10,000), or by both that imprisonment and fine.

(4) Restitution shall be ordered for a person convicted of violating this section, including restitution for any medical evaluation or treatment services obtained or provided. The court shall determine the amount of restitution and the person or persons to whom the restitution shall be paid.

(d) Notwithstanding any other provision of law, probation shall not be granted to, nor shall the execution or imposition of a sentence be suspended for, any adult person convicted of felony violations of this section who previously has been convicted of felony violations of this section or Section 548, or of Section 1871.4 of the Insurance Code, or former Section 556 of the Insurance Code, or former Section 1871.1 of the Insurance Code as an adult under charges separately brought and tried two or more times. The existence of any fact that would make a person ineligible for probation under this subdivision shall be alleged in the information or indictment, and either admitted by the defendant in an open court, or found to be true by the jury trying the issue of guilt or by the court where guilt is established by plea of guilty or nolo contendere or by trial by the court sitting without a jury.

Except when the existence of the fact was not admitted or found to be true or the court finds that a prior felony conviction was invalid, the court shall not strike or dismiss any prior felony convictions alleged in the information or indictment.

This subdivision does not prohibit the adjournment of criminal proceedings pursuant to Division 3 (commencing with Section 3000) or Division 6 (commencing with Section 6000) of the Welfare and Institutions Code.

(e) Except as otherwise provided in subdivision (f), any person who violates subdivision (a) or (b) and who has a prior felony conviction of an offense set forth in either subdivision (a) or (b), in Section 548, in Section 1871.4 of the Insurance Code, in former Section 556 of the Insurance Code, or in former Section 1871.1 of the Insurance Code shall receive a two-year enhancement for each prior felony conviction in addition to the sentence provided in subdivision (c). The existence of any fact that would subject a person to a penalty enhancement shall be alleged in the information or indictment and either admitted by the defendant in open court, or found to be true by the jury trying the issue of guilt or by the court where guilt is established by plea of guilty or nolo contendere or by trial by the court sitting without a jury. Any person who violates this section shall be subject to appropriate orders of restitution pursuant to Section 13967 of the Government Code.

(f) Any person who violates paragraph (3) of subdivision (a) and who has two prior

felony convictions for a violation of paragraph (3) of subdivision (a) shall receive a five-year enhancement in addition to the sentence provided in subdivision (c). The existence of any fact that would subject a person to a penalty enhancement shall be alleged in the information or indictment and either admitted by the defendant in open court, or found to be true by the jury trying the issue of guilt or by the court where guilt is established by plea of guilty or nolo contendere or by trial by the court sitting without a jury.

(g) Except as otherwise provided in Section 12022.7, any person who violates paragraph (3) of subdivision (a) shall receive a two-year enhancement for each person other than an accomplice who suffers serious bodily injury resulting from the vehicular collision or accident in a violation of paragraph (3) of subdivision (a).

(h) This section shall not be construed to preclude the applicability of any other provision of criminal law or equitable remedy that applies or may apply to any act committed or alleged to have been committed by a person.

(i) Any fine imposed pursuant to this section shall be doubled if the offense was committed in connection with any claim pursuant to any automobile insurance policy in an auto insurance fraud crisis area designated by the Insurance Commissioner pursuant to Article 4.6 (commencing with Section 1874.90) of Chapter 12 of Part 2 of Division 1 of the Insurance Code.

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

PROPONENT: Los Angeles County Bar Association

STATEMENT OF REASONS

The Problem: The law criminalizing insurance fraud is divided into sections listing various prohibited acts. Some acts are straight felonies, others can either be filed by the prosecutor as a felony or a misdemeanor (known as wobblers). There is no real reason to have some acts punishable only as a felony while others, equally serious, may be punished either as a felony or as a misdemeanor.

The Solution: The solution is to change the straight felony to a "wobbler," which gives the prosecutor the option to file the charge either as a felony or a misdemeanor. In this way, the prosecutor can be sure that the punishment fits the actual crime.

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

CURRENT OR PRIOR RELATED LEGISLATION
None known.

AUTHOR AND/OR PERMANENT CONTACT: Mark Harvis, Los Angeles County Public Defender, 320 W. Temple Street, Suite 590, Los Angeles, CA 90012, phone: 213-974-3066, e-mail: mharvis@pubdef.lacounty.gov

RESPONSIBLE FLOOR DELEGATE: Mark Harvis

RESOLUTION 03-05-2018

DIGEST
Evidence: Allows Participants to Record Conversations for Evidence of Felonious Violence
Amends Penal Code section 633.5 to allow nonconsensual recording of conversations if done to gather evidence of any felony involving violence against anyone.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
Similar to Resolution 06-05-2017, which was disapproved.

Reasons:
This resolution amends Penal Code section 633.5 to allow nonconsensual recording of conversations if done to gather evidence of any felony involving violence against anyone. This resolution should be disapproved because it is too broad and susceptible to misuse.

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

Because the person making the recording is not required to have any relationship with the person at risk, this resolution permits the exemption to be used for purposes other than protecting potential victims of violence. While the resulting evidence would only be admissible in a criminal prosecution, the recording itself would be permissible even if it were merely a fishing expedition for purposes of blackmail, political leverage, or public embarrassment. This carefully crafted exemption to the Privacy Act should not be so broad.

This resolution is related to Resolution 03-06-2018.

TEXT OF RESOLUTION

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

§ 633.5

Sections 631, 632, 632.5, 632.6, and 632.7 do not prohibit one party to a confidential communication from recording the communication for the purpose of obtaining evidence

reasonably believed to relate to the commission by another party to the communication of the crime of extortion, kidnapping, bribery, any felony involving violence against ~~the~~ a person, including, but not limited to, human trafficking, as defined in Section 236.1, or a violation of Section 653m, or domestic violence as defined in Section 13700. Nothing in Section 631, 632, 632.5, 632.6, or 632.7 renders any evidence so obtained inadmissible in a prosecution for extortion, kidnapping, bribery, any felony involving violence against the person, including, but not limited to, human trafficking, as defined in Section 236.1, a violation of Section 653m, or domestic violence as defined in Section 13700, or any crime in connection therewith.

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

PROPONENT: San Diego County Bar Association

STATEMENT OF REASONS

The Problem: Under existing law, recording a communication is prohibited unless all parties consent. A few exceptions exist, including a recording done to obtain evidence reasonably believed to relate to any felony involving violence against *the* person doing the recording. In other words, people cannot record evidence of brutality having been done to someone else, including their spouse, children, or anyone else significant to them because the exception only applies to violent felonies against *the* person doing the recording. During the incident, the victim has a hard time recording anything for obvious reasons. After the incident, if the survivor would like to obtain an admission, the survivor needs to confront the perpetrator again and risk further violence upon himself or herself.

The Solution: This resolution replaces “against the person” with “against a person” because people should be able to collect evidence of violence even if they are not the victim. That enables safer scenarios by preventing the victim from having to record during the act or confront the perpetrator again to get an admission. The non-change to admissibility standards at the end is intentional because the goal is only to ensure those who record evidence of violence on behalf of others are not made into criminals.

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

CURRENT OR PRIOR RELATED LEGISLATION
Assembly Bill 413 (2017).

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

COUNTERARGUMENTS AND STATE BAR SECTION COMMENTS

ORANGE COUNTY BAR ASSOCIATION

This resolution seeks to permit the nonconsensual recording of a confidential communication by anyone so long it is done under the guise of obtaining evidence reasonably believed to relate to the commission by another party to “any felony involving violence against a person”. There is no limitation to as to who may record the communication. No relationship to the victim of the purported violence is required. Anyone who suspects a felony offense involving violence to anyone can call up the alleged perpetrator and attempt to solicit a clandestine recorded confession. Anyone can play detective so long as you reasonably believe you are procuring evidence related to a felonious violence. This proposed amendment abrogates much of the privacy protection afforded by this statute. By not limiting who may secretly record, the resolution undermines that which the statute implicitly prohibits and adds new foundational issues for the potential introduction of this evidence at trial.

RESOLUTION 03-06-2018

DIGEST
Conversations: Allow Participants to Record to Obtain Evidence of Violent Misdemeanors
Amends Penal Code section 633.5 to allow a party to a conversation to record it without consent from all parties if it is to obtain evidence of any misdemeanor involving violence.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
Similar to Resolution 06-05-2017, which was disapproved.

Reasons:
This resolution amends Penal Code section 633.5 to allow a party to a conversation to record it without consent from all parties if it is to obtain evidence of any misdemeanor involving violence. This resolution should be disapproved because it is overly broad.

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

The exception to confidentiality created by Section 633.5 was intended to prevent or expose serious criminal acts; it is only then that the important protections of individual privacy might be outweighed. By including misdemeanor offenses, this resolution goes too far. A slap in the face may be an illegal battery, but it should not justify secretly recording a communication that might mention it. The risk of misuse of the exemption is greatly increased by the inclusion of misdemeanor offenses.

This resolution is related to Resolution 03-05-2018.

TEXT OF RESOLUTION

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

§ 633.5

Sections 631, 632, 632.5, 632.6, and 632.7 do not prohibit one party to a confidential communication from recording the communication for the purpose of obtaining evidence reasonably believed to relate to the commission by another party to the communication of the crime of extortion, kidnapping, bribery, any misdemeanor or felony involving violence against

the person, including, but not limited to, human trafficking, as defined in Section 236.1, or a violation of Section 653m, or domestic violence as defined in Section 13700. Nothing in Section 631, 632, 632.5, 632.6, or 632.7 renders any evidence so obtained inadmissible in a prosecution for extortion, kidnapping, bribery, any felony involving violence against the person, including, but not limited to, human trafficking, as defined in Section 236.1, a violation of Section 653m, or domestic violence as defined in Section 13700, or any crime in connection therewith.

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

PROPONENT: San Diego County Bar Association

STATEMENT OF REASONS

The Problem: Under existing law, recording a communication is prohibited unless all parties consent. A few exceptions exist, including a recording done to obtain evidence reasonably believed to relate to any *felony* involving violence against the person doing the recording. In other words, lay people are expected to check the Penal Code to determine whether a particular act of violence against them is a felony before recording evidence of the violence against them, and if they try submitting recorded proof of a violent action that isn't a felony, they open themselves up to prosecution.

The Solution: This resolution adds misdemeanors involving violence to the exceptions so nobody opens themselves up to prosecution by recording evidence of violence against them if the particular violent act happens not to be a felony. The non-addition of "misdemeanor or" to the admissibility standards at the bottom is intentional because the goal is not to increase the levels of crimes where recordings are admissible at trial, but only to ensure that victims of misdemeanors involving violence do not get treated as criminals for recording evidence of such incidents.

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

CURRENT OR PRIOR RELATED LEGISLATION
Assem. Bill 413 (2017).

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

COUNTERARGUMENTS AND STATE BAR SECTION COMMENTS

ORANGE COUNTY BAR ASSOCIATION

This resolution destroys any privacy protections left in Penal Code section 633.5 by professing to protect those who erroneously record misdemeanors. First, it eliminates the current statutory application to only felony actions involving violence to the person. It thus broadens the purview of 633.5 to include misdemeanors such as Penal Code sections 415 (Disturbing the Peace) or 422 (Criminal Threats). Secondly, this proposal permits any party to the confidential communication to record the same despite not being the target of the intended criminal act. Under this resolution, any individual overhearing a conversation over the loud speaker of a cell phone would be entitled to record the conversation. Lastly, the resolution leaves the statutory limitation as to the admissibility in court of the recorded communication for misdemeanors intact. Essentially, what we are left with is a statute which authorizes the nonconsensual recording of another anytime one suspects the other person is talking about doing any type of potential violence to any person regardless of whether that person is simply listening to another participating in the confidential communication.

RESOLUTION 03-07-2018

DIGEST
Cannabis Law: Resentencing for Conspiracy and Accessory to Marijuana Offenses
Amends Health and Safety Code section 11361.8 to allow resentencing for conspiracy and accessory to marijuana-related offenses.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution amends Health and Safety Code section 11361.8 to allow resentencing for conspiracy and accessory to marijuana-related offenses. This resolution should be disapproved because conspiracy and accessory after the fact are independent offenses that impede the detection and prosecution of a crime, and fall outside the rationale for decriminalization of marijuana.

It is not clear that Proposition 64 was intended to decriminalize conspiracy crimes. Health and Safety Code section 11360, which deals with sale and transportation for sale of marijuana, provides that it does not "preclude or limit prosecution for any aiding and abetting or conspiracy offenses." (Health & Saf. Code, § 11360, subd. (d).) This is likely because criminal conspiracies are viewed as making crimes more difficult to detect or prevent than the same crimes committed by individuals. Thus, conspiracies can be charged as felonies, even when the underlying crime is a misdemeanor. Accessory after the fact, under Penal Code section 32, relates to helping a felon escape arrest, prosecution, or conviction. It too, represents an independent crime, which hinders the ability of law enforcement officials and courts to address the underlying crimes. Inmates convicted of an accessory offense acted to conceal activity that was criminal at the time, and thus committed a different category of crime from the underlying marijuana offense.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Health and Safety Code section 11361.8 to read as follows:

§ 11361.8

(a) A person currently serving a sentence for a conviction, whether by trial or by open or negotiated plea, who would not have been guilty of an offense, or who would have been guilty of a lesser offense under the Control, Regulate and Tax Adult Use of Marijuana Act had that act been in effect at the time of the offense may petition for a recall or dismissal of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing or dismissal in accordance with Sections 11357, 11358, 11359, 11360, 11362.1, 11362.2, 11362.3, and 11362.4 as those sections have been amended or added by that act. A defendant currently serving a

sentence for conspiracy to commit an offense eligible for dismissal or reduction under this section, pursuant to Penal Code section 182, or as an accessory to an offense eligible for dismissal or reduction, pursuant to Penal Code section 32, may petition for recall or dismissal of that sentence, and is entitled to be resentenced as if he or she had originally been charged with the underlying marijuana offense.

(b) Upon receiving a petition under subdivision (a), the court shall presume the petitioner satisfies the criteria in subdivision (a) unless the party opposing the petition proves by clear and convincing evidence that the petitioner does not satisfy the criteria. If the petitioner satisfies the criteria in subdivision (a), the court shall grant the petition to recall the sentence or dismiss the sentence because it is legally invalid unless the court determines that granting the petition would pose an unreasonable risk of danger to public safety.

(1) In exercising its discretion, the court may consider, but shall not be limited to evidence provided for in subdivision (b) of Section 1170.18 of the Penal Code.

(2) As used in this section, "unreasonable risk of danger to public safety" has the same meaning as provided in subdivision (c) of Section 1170.18 of the Penal Code.

(c) A person who is serving a sentence and is resentenced pursuant to subdivision (b) shall be given credit for any time already served and shall be subject to supervision for one year following completion of his or her time in custody or shall be subject to whatever supervision time he or she 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. Such person is subject to parole supervision under Section 3000.08 of the Penal Code or post-release community supervision under subdivision (a) of Section 3451 of the Penal Code by the designated agency and the jurisdiction of the court in the county in which the offender is released or resides, or in which an alleged violation of supervision has occurred, for the purpose of hearing petitions to revoke supervision and impose a term of custody.

(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) A person who has completed his or her sentence for a conviction under Sections 11357, 11358, 11359, and 11360, whether by trial or open or negotiated plea, who would not have been guilty of an offense or who would have been guilty of a lesser offense under the Control, Regulate and Tax Adult Use of Marijuana Act had that act been in effect at the time of the offense, may file an application before the trial court that entered the judgment of conviction in his or her case to have the conviction dismissed and sealed because the prior conviction is now legally invalid or redesignated as a misdemeanor or infraction in accordance with Sections 11357, 11358, 11359, 11360, 11362.1, 11362.2, 11362.3, and 11362.4 as those sections have been amended or added by that act. A defendant who has completed a sentence for a conspiracy to commit an offense eligible for dismissal or reduction under this section, pursuant to Penal Code section 182, or as an accessory to an offense eligible for dismissal or reduction, pursuant to Penal Code section 32, may petition for recall or dismissal of that sentence, and is entitled to be resentenced as if he or she had originally been charged with the underlying marijuana offense.

(f) The court shall presume the petitioner satisfies the criteria in subdivision (e)

unless the party opposing the application proves by clear and convincing evidence that the petitioner does not satisfy the criteria in subdivision (e). Once the applicant satisfies the criteria in subdivision (e), the court shall redesignate the conviction as a misdemeanor or infraction or dismiss and seal the conviction as legally invalid as now established under the Control, Regulate and Tax Adult Use of Marijuana Act.

(g) Unless requested by the applicant, no hearing is necessary to grant or deny an application filed under subdivision (e).

(h) Any felony conviction that is recalled and resentenced under subdivision (b) or designated as a misdemeanor or infraction under subdivision (f) shall be considered a misdemeanor or infraction for all purposes. Any misdemeanor conviction that is recalled and resentenced under subdivision (b) or designated as an infraction under subdivision (f) shall be considered an infraction for all purposes.

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

(j) Nothing in this section is intended to diminish or abrogate any rights or remedies otherwise available to the petitioner or applicant.

(k) 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 the Control, Regulate and Tax Adult Use of Marijuana Act.

(l) A resentencing hearing ordered under the Control, Regulate and Tax Adult Use of Marijuana Act shall constitute a "post-conviction release proceeding" under paragraph (7) of subdivision (b) of Section 28 of Article I of the California Constitution (Marsy's Law).

(m) The provisions of this section shall apply equally 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 have been guilty of a lesser offense under the Control, Regulate and Tax Adult Use of Marijuana Act.

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

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

PROPONENT: Los Angeles County Bar Association

STATEMENT OF REASONS

The Problem: Under Prop. 64, people who were previously convicted of marijuana related offenses for conduct that is now legal (such as growing marijuana) can apply for relief from their old convictions. Because such convictions are bars to many forms of employment, housing, licensure, and even legal residency, this relief can be life changing and help the formerly convicted reintegrate back into society. Unfortunately, the offenses listed in Prop. 64 do not take into account common alternative charges that were previously offered to less culpable defendants who wanted to avoid drug convictions. For example, defendants charged with marijuana cultivation might plead to a felony accessory charge (PC 32) or to a felony conspiracy charge (PC 182) in lieu of the marijuana offense. Because these alternative charges are not specifically listed in Prop. 64, even the most deserving of these defendants is currently ineligible for relief.

The Solution: This resolution would allow defendants whose conviction for PC 32 or 182 was based on an underlying qualifying marijuana offense to apply for relief under Prop. 64.

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

CURRENT OR PRIOR RELATED LEGISLATION
None known.

AUTHOR AND/OR PERMANENT CONTACT: Nick Stewart-Oaten, Los Angeles Public Defender, 320 W. Temple Street, 5th Floor, Los Angeles CA 90012, phone: 213-974-3000, e-mail: nstewart-oaten@pubdef.lacounty.gov

RESPONSIBLE FLOOR DELEGATE: Nick Stewart-Oaten

RESOLUTION 03-08-2018

DIGEST
Resentencing: Waiver of Appearance Under Propositions 47 and 64
Amends Penal Code section 1170.18 and Health and Safety Code section 11361.8 to allow waiver of personal appearance for resentencing under Propositions 47 and 64.

RESOLUTIONS COMMITTEE RECOMMENDATION
APPROVE IN PRINCIPLE

History:
No similar resolutions found.

Reasons:
This resolution amends Penal Code section 1170.18 and Health and Safety Code section 11361.8 to allow waiver of personal appearance for resentencing under Propositions 47 and 64. This resolution should be approved in principle because it would allow inmates to receive the benefits of these resentencing statutes without losing housing placements, work assignments, or access to programming.

Proposition 47 allows petitions for resentencing for petty theft, check kiting, and certain drug possession crimes. Proposition 64 does the same for certain marijuana-related crimes. However, Penal Code section 977, subdivision (b)(1), requires that an inmate charged with a felony be present in court for all hearings, including resentencing hearings. Inmates transported to court for such hearings can potentially lose their housing placements while they are away from their facility, and do not have access to any programming or job placement. Penal Code section 977 does allow for an inmate to waive personal appearances, but the waiver applies to all appearances.

The resolution permits a specific waiver to allow an inmate to waive his or her appearance for resentencing, without requiring an inmate to waive his or her appearance at all hearings. Further, the resolution does not require that an inmate waive his or her appearance at the resentencing. So, if an inmate wants to appear at the hearing, he or she will not lose the right to do so. The resolution would also promote judicial economy in both time and money because there will not be delays in waiting for the inmate to appear in court and the system will not incur transportation costs to bring inmates to court.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Penal Code section 1170.18 and Health and Safety Code section 11361.8 to read as follows:

§ 1170.18

(a) A person who, on November 5, 2014, was serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under the act that added this section ("this act") had this act been in effect at the time of the

offense may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing in accordance with Sections 11350, 11357, or 11377 of the Health and Safety Code, or Section 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code, as those sections have been amended or added by this act.

(b) Upon receiving a petition under subdivision (a), the court shall determine whether the petitioner satisfies the criteria in subdivision (a). If the petitioner satisfies the criteria in subdivision (a), the petitioner's felony sentence shall be recalled and the petitioner resentenced to a misdemeanor pursuant to Sections 11350, 11357, or 11377 of the Health and Safety Code, or Section 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code, as those sections have been amended or added by this act, unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety. In exercising its discretion, the court may consider all of the following:

(1) The petitioner's criminal conviction history, including the type of crimes committed, the extent of injury to victims, the length of prior prison commitments, and the remoteness of the crimes.

(2) The petitioner's disciplinary record and record of rehabilitation while incarcerated.

(3) Any other evidence the court, within its discretion, determines to be relevant in deciding whether a new sentence would result in an unreasonable risk of danger to public safety.

(c) As used throughout this Code, "unreasonable risk of danger to public safety" means an unreasonable risk that the petitioner will commit a new violent felony within the meaning of clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667.

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

(e) Under no circumstances may resentencing under this section result in the imposition of a term longer than the original sentence.

(f) A person who has completed his or her sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under this act had this act been in effect at the time of the offense, may file an application before the trial court that entered the judgment of conviction in his or her case to have the felony conviction or convictions designated as misdemeanors.

(g) If the application satisfies the criteria in subdivision (f), the court shall designate the felony offense or offenses as a misdemeanor.

(h) Unless requested by the applicant, no hearing is necessary to grant or deny an application filed under subdivision (f).

(i) The provisions of this section shall not apply to persons who have one or more prior convictions for an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or for an offense requiring registration pursuant to subdivision (c) of Section 290.

(j) Any petition or application under this section shall be filed on or before November 4, 2022, or at a later date upon showing of good cause.

(k) Any felony conviction that is recalled and resentenced under subdivision (b) or

designated as a misdemeanor under subdivision (g) shall be considered a misdemeanor for all purposes, except that such resentencing shall not permit that person to own, possess, or have in his or her custody or control any firearm or prevent his or her conviction under Chapter 2 (commencing with Section 29800) of Division 9 of Title 4 of Part 6.

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

(m) Nothing in this section is intended to diminish or abrogate any rights or remedies otherwise available to the petitioner or applicant.

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

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

(p) Notwithstanding subdivision (b) of Section 977, a person petitioning for resentencing may waive his or her appearance in court for the resentencing. The waiver shall be in writing and signed by the petitioner.

§ 11361.8

(a) A person currently serving a sentence for a conviction, whether by trial or by open or negotiated plea, who would not have been guilty of an offense or who would have been guilty of a lesser offense under the Control, Regulate and Tax Adult Use of Marijuana Act had that Act been in effect at the time of the offense may petition for a recall or dismissal of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing or dismissal in accordance with Sections 11357, 11358, 11359, 11360, 11362.1, 11362.2, 11362.3, and 11362.4 as those sections have been amended or added by this Act.

(b) Upon receiving a petition under subdivision (a), the court shall presume the petitioner satisfies the criteria in subdivision (a) unless the party opposing the petition proves by clear and convincing evidence that the petitioner does not satisfy the criteria. If the petitioner satisfies the criteria in subdivision (a), the court shall grant the petition to recall the sentence or dismiss the sentence because it is legally invalid unless the court determines that granting the petition would pose an unreasonable risk of danger to public safety.

(1) In exercising its discretion, the court may consider, but shall not be limited to evidence provided for in subdivision (b) of Section 1170.18 of the Penal Code.

(2) As used in this section, "unreasonable risk of danger to public safety" has the same meaning as provided in subdivision (c) of Section 1170.18 of the Penal Code.

(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 supervision for one year following completion of his or her time in custody or shall be subject to whatever supervision time he or she 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. Such person is subject to parole supervision under Section 3000.08 of the Penal Code or post-release community supervision under subdivision (a) of Section 3451 of the Penal Code by the designated agency and the jurisdiction of the court in the county in which the offender is released or resides, or in which an alleged violation of supervision has occurred, for the purpose of hearing petitions to revoke supervision and impose a term of custody.

(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) A person who has completed his or her sentence for a conviction under Sections 11357, 11358, 11359, and 11360, whether by trial or open or negotiated plea, who would not have been guilty of an offense or who would have been guilty of a lesser offense under the Control, Regulate and Tax Adult Use of Marijuana Act had that Act been in effect at the time of the offense, may file an application before the trial court that entered the judgment of conviction in his or her case to have the conviction dismissed and sealed because the prior conviction is now legally invalid or redesignated as a misdemeanor or infraction in accordance with Sections 11357, 11358, 11359, 11360, 11362.1, 11362.2, 11362.3, and 11362.4 as those sections have been amended or added by this act.

(f) The court shall presume the petitioner satisfies the criteria in subdivision (e) unless the party opposing the application proves by clear and convincing evidence that the petitioner does not satisfy the criteria in subdivision (e). Once the applicant satisfies the criteria in subdivision (e), the court shall redesignate the conviction as a misdemeanor or infraction or dismiss and seal the conviction as legally invalid as now established under the Control, Regulate and Tax Adult Use of Marijuana Act.

(g) Unless requested by the applicant, no hearing is necessary to grant or deny an application filed under subdivision (e).

(h) Any felony conviction that is recalled and resentenced under subdivision (b) or designated as a misdemeanor or infraction under subdivision (f) shall be considered a misdemeanor or infraction for all purposes. Any misdemeanor conviction that is recalled and resentenced under subdivision (b) or designated as an infraction under subdivision (f) shall be considered an infraction for all purposes.

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

(j) Nothing in this section is intended to diminish or abrogate any rights or remedies otherwise available to the petitioner or applicant.

(k) 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 the Control, Regulate and Tax Adult Use of Marijuana Act.

(l) A resentencing hearing ordered under the Control, Regulate and Tax Adult Use of Marijuana Act shall constitute a "post-conviction release proceeding" under paragraph (7) of subdivision (b) of Section 28 of Article I of the California Constitution (Marsy's Law).

(m) The provisions of this section shall apply equally 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 have been guilty of a lesser offense under the Control, Regulate and Tax Adult Use of Marijuana Act.

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

(o) Notwithstanding subdivision (b) of Section 977, a person petitioning for resentencing or dismissal may waive his or her appearance in court for the resentencing or dismissal. The waiver shall be in writing and signed by the petitioner.

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

PROPONENT: Los Angeles County Bar Association

STATEMENT OF REASONS

The Problem: Criminal defendants have a statutory right to be present for sentencing and resentencing. Many incarcerated defendants, however, do not want to be transported from prison to court to be present when their case is resentenced, particularly if the resentencing does not mean the person will be released from custody. Inmates will lose housing location and work assignments. If the inmate is involved in programming, that programming will be lost. When the voters passed Proposition 36 (Three Strikes Reform) they included a provision allowing a waiver of personal presence. The waiver provision was not included in Propositions 47 and 64, both of which contain resentencing provisions.

The Solution: The solution is to allow defendants to waive, in writing, their presence in court for a Proposition 47 or 64 resentencing. No defendant will be required to waive his or her presence. It is entirely up to the inmate.

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

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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RESPONSIBLE FLOOR DELEGATE: Mark Harvis

RESOLUTION 03-09-2018

DIGEST
Incarceration: National Standards to Prevent, Detect and Respond to Prison Rape
Adds Penal Code sections 2635.5, 2644, 2645 and 2646, and amends section 2636 regarding prison searches and inmate housing, with an implementation deadline of July 1, 2021.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
Similar to Resolutions 06-12-2014, 08-03-2015, and 06-03-2017, which were approved in principle, and Resolution 01-09-2016, which was disapproved.

Reasons:
This resolution adds Penal Code sections 2635.5, 2644, 2645 and 2646, and amends section 2636 regarding prison searches and inmate housing, with an implementation deadline of July 1, 2021. This resolution should be disapproved because the policies of the California Department of Corrections and Rehabilitation already conform to the national standards and the proposed changes do not.

On May 15, 2018, the California Department of Corrections and Rehabilitation (CDCR) updated their policies with respect to transgender inmates to conform with the National Standards to Prevent, Detect and Respond to Prison Rape (28 C.F.R. § 115). (See Notice of Change to Department Operations Manual, https://www.cdcr.ca.gov/Regulations/Adult_Operations/docs/DOM/NCDOM/ 2018NCDOM/18-08/NCDOM_18-08.pdf.) Since 2016, CDCR facilities have undergone audits to verify implementation of these standards. (See *Prison Rape and Elimination Act (PREA) Audits and Reports*, California Department of Corrections and Rehabilitation, http://www.cdcr.ca.gov/PREA/ Reports-Audits.html.) Thus far, every facility audited has met or exceeded these standards, and identified deficiencies have been addressed by the policy update.

Although the resolution ostensibly seeks to ensure compliance with federal guidelines, it contains provisions that conflict with them and would endanger the safety of all inmates. The amendments to subdivisions (a) and (f) of Penal Code section 2636 would remove consideration of whether an inmate is 'violent or non-violent' in housing assignments, requiring housing assignments for transgender, non-binary, or intersex inmates to be based solely on that inmate's own perception. By contrast, the national standards require consideration of both subjective and objective criteria, including, but not limited to, the inmate's perception of safety, mental illness, and mental disability "with the goal of keeping all residents safe and free from sexual abuse." (28 C.F.R. § 115.342.)

Also, the addition of Penal Code section 2645 would mandate an impractical search policy not found in the national standards. Under subdivision (b), an inmate could arbitrarily determine whether a search requires multiple officers and engage in gender discrimination, such as requiring a searching officer's gender to be "nonbinary." (See Veh. Code, § 12800.)

TEXT OF RESOLUTION

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

§ 2635.5

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

(a) "Intersex" is an umbrella term used to describe natural bodily variations, which can include external genitalia, internal sex organs, chromosomes, or hormonal differences that transcend typical ideas of male and female.

(b) "Nonbinary" is an umbrella term for people whose gender falls somewhere outside of the traditional conceptions of strictly either female or male.

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

§ 2636

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

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

(a) All inmates and wards in the custody of the California Department of Corrections and Rehabilitation, shall be assessed during an intake screening for their risk of being sexually abused by other inmates and wards.

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

~~(a)~~ (c) The Department of Corrections and Rehabilitation inmate classification and housing assignment procedures shall take into account risk factors that can lead to inmates and wards becoming the target of sexual victimization.

~~Relevant considerations include~~ The following must be considered:

(1) Age of the inmate or ward.

~~(2) Whether the offender is a violent or nonviolent offender;~~

(~~3~~2) Whether the inmate or ward has a history of mental illness.

(3) Whether the inmate or ward is transgender, intersex, or nonbinary.

(4) Whether the inmate or ward is, or is perceived to be gay, lesbian, or bisexual.

(5) Whether the inmate or ward has previously experienced sexual victimization.

(d) The information from the risk screening required by (d) shall be used to inform housing, bed, work, education, and program assignments with the goal of keeping vulnerable inmates and wards safe from sexual victimization.

(e) Individualized determinations shall be made about how to ensure the safety of each inmate and ward.

(f) In deciding whether to assign a transgender, nonbinary or intersex person to a male or female facility and in making other housing and programming assignments, placements shall be considered on a case-by-case basis based on the inmate's or ward's own perception of safety.

(g) In general, transgender, nonbinary and intersex people must be housed in the general population of the facility, unless the individual requests another type of housing for their own safety (such as single cell, double cell, or administrative segregation), or staff raise and document serious, specific, and articulable security or management concerns about placement of that particular individual in that type of housing.

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

(i) Lesbian, gay, bisexual, transgender, nonbinary or intersex inmates and wards shall not be placed in dedicated facilities, units, or wings solely on the basis of such identification or status.

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

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

(l) Inmates and wards may not be disciplined for refusing to answer, or for not disclosing complete information in response to, questions asked pursuant to section (d).

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

~~(b)~~ (n) The Department of Corrections and Rehabilitation shall ensure that staff members intervene and respond quickly when an inmate or ward appears to be the target of sexual harassment or intimidation.

§ 2644

(a) Inmates or wards at high risk for sexual victimization shall not be placed in involuntary segregated housing unless an assessment of all available alternatives has been made, and a determination has been made that there is no available alternative means of separation from likely abusers. If a facility cannot conduct such an assessment immediately, the facility may hold the inmate or ward in involuntary segregated housing for up to 36 hours while completing the assessment.

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

(1) The opportunities that have been limited;

(2) The duration of the limitation; and

(3) The reasons for such limitations.

(c) Inmates and wards shall only be assigned to such involuntary segregated housing until an alternative means of separation from likely abusers can be arranged, and such an assignment shall not ordinarily exceed a period of 7 days.

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

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

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

(e) In the event an inmate or ward is voluntarily placed in segregated housing, or if placed there involuntarily for over seven days, the facility shall afford each such inmate a review to determine whether there is a continuing need for separation from the general population every 4 days.

§ 2645

(a) When performing searches, the California Department of Corrections and Rehabilitation custody staff will exercise sensitivity and provide explanations and an opportunity for inmates to ask questions.

(b) Transgender, nonbinary, and intersex inmates must be given the opportunity to choose the gender(s) of the person(s) who will perform any searches. Where the inmate chooses to have two officers of different genders involved in the search, the inmate must be provided the choice of which body parts are searched by whom. The inmate will be offered privacy in which to be searched, including any search of prosthetics.

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

(d) Staff shall not search or physically examine an inmate or ward for the sole purpose of determining their genital status.

(e) The agency shall train security staff in how to conduct searches of transgender, nonbinary and intersex inmates and wards in a professional and respectful manner, and in the least intrusive manner possible, consistent with security needs.

§ 2646

The California Department of Corrections and Rehabilitation shall adopt and implement policies or procedures consistent with the requirements of sections 2636, 2644, and 2645. Adoption of these policies or procedures shall take place no later than July 1, 2021.

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

PROPONENT: Bay Area Lawyers for Individual Freedom

STATEMENT OF REASONS

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

address the safety of the most vulnerable in custody, specifically lesbian, gay bisexual, transgender, nonbinary and intersex (LGBTNI) prisoners. Sexual violence is a rampant problem across all correctional and detention settings in California causing extreme psychological trauma and undue punishment beyond that of a person's incarceration or detention. LGBTNI protections under the PREA Standards have yet to be adopted in California placing LGBTNI prisoners, particularly transgender women, in serious physical and psychiatric danger. LGBTNI inmates and wards are particularly vulnerable to sexual violence. LGBTNI prisoners experience "the highest rates of sexual victimization" while in custody according to the U.S. Department of Justice. A study conducted by the University of California at Irvine with 315 transgender women as participants found transgender women in the custody of the CDCR were 14 times more likely to be sexually assaulted in prison than non-transgender individuals. Transgender women are also subjected to coercive sex from fellow prisoners and correctional staff. Coercive sex "is oftentimes exchanged for protection or special privileges and is too often seen by officials as consensual." Unfortunately, because of the high incidents of sexual assault, transgender women are often housed in solitary confinement "for their own protection" either preemptively or as punishment for reporting abuses.

The Solution: Require the California Department of Corrections and Rehabilitation (CDCR) to adopt federal policies and procedures under PREA and its implementing regulations to create a safer environment for inmates or arrestees, including LGBTQI prisoners. By putting CDCR in line with many of the carefully considered federal guidelines under PREA to protect prisoners from sexual violence both by guards and other prisoners. This resolution would establish a number of important protections set forth in federal regulations to keep people from facing further punitive measures - including confinement in administrative segregation - for their own protection

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

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

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RESOLUTION 03-10-2018

DIGEST
Domestic Violence: Extends Probation and Mandates Battered Shelter Fees and Restitution
Amends Penal Code section 1203.097 to increase probation in domestic violence cases to five years and impose mandatory fees or restitution.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution amends Penal Code section 1203.097 to increase probation in domestic violence cases to five years and impose mandatory fees or restitution. This resolution should be disapproved because the court already has discretion to impose a lengthier period of probation and the mandatory payment of fees or restitution does not take into account the defendant's financial situation.

As Penal Code section 1203.097 is currently written, a court has discretion to impose a probation period of more than 36 months. The section requires, "a minimum period of probation of 36 months, which may include a period of summary probation as appropriate." Currently, there is nothing preventing the court from imposing a probationary period of five years or longer. However, the proposed language would place a cap on the amount of time that a court could impose on a defendant. As currently drafted this amendment is likely to have unintended consequence of either increasing the standard sentence to a five year probationary period as a precautionary measure, or decreasing the three year minimum requirement that was previously required.

The proposed amendment would also require the court to order a mandatory minimum payment of $500 to a battered women's shelter or pay restitution. While it is true that shelters are cash strapped and hurting for funds, mandating either a mandatory minimum payment of $500 or restitution without consideration of the defendant's financial situation could result in probation violation(s) when a defendant is financially incapable of paying the fine. Worse, these funds could be taken from funds shared with the victim where the victim is the spouse of the perpetrator. The court should maintain discretion to make such an order.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Penal Code section 1203.097 to read as follows:

§ 1203.097

(a) If a person is granted probation for a crime in which the victim is a person defined in Section 6211 of the Family Code, the terms of probation shall include all of the following:

(1)The court shall have discretion to impose ~~A~~a minimum period of probation of 36 months up to a maximum period of 60 months, which may include a period of summary probation as appropriate.

(2) A criminal court protective order protecting the victim from further acts of violence, threats, stalking, sexual abuse, and harassment, and, if appropriate, containing residence exclusion or stay-away conditions.

(3) Notice to the victim of the disposition of the case.

(4) Booking the defendant within one week of sentencing if the defendant has not already been booked.

(5)(A) A minimum payment by the defendant of a fee of five hundred dollars ($500) to be disbursed as specified in this paragraph. If, after a hearing in open court, the court finds that the defendant does not have the ability to pay, the court may reduce or waive this fee. If the court exercises its discretion to reduce or waive the fee, it shall state the reason on the record.

(B) Two-thirds of the moneys deposited with the county treasurer pursuant to this section shall be retained by counties and deposited in the domestic violence programs special fund created pursuant to Section 18305 of the Welfare and Institutions Code, to be expended for the purposes of Chapter 5 (commencing with Section 18290) of Part 6 of Division 9 of the Welfare and Institutions Code. Of the moneys deposited in the domestic violence programs special fund, no more than 8 percent may be used for administrative costs, as specified in Section 18305 of the Welfare and Institutions Code.

(C) The remaining one-third of the moneys shall be transferred, once a month, to the Controller for deposit in equal amounts in the Domestic Violence Restraining Order Reimbursement Fund and in the Domestic Violence Training and Education Fund, which are hereby created, in an amount equal to one-third of funds collected during the preceding month. Moneys deposited into these funds pursuant to this section shall be available upon appropriation by the Legislature and shall be distributed each fiscal year as follows:

(i) Funds from the Domestic Violence Restraining Order Reimbursement Fund shall be distributed to local law enforcement or other criminal justice agencies for state-mandated local costs resulting from the notification requirements set forth in subdivision (b) of Section 6380 of the Family Code, based on the annual notification from the Department of Justice of the number of restraining orders issued and registered in the state domestic violence restraining order registry maintained by the Department of Justice, for the development and maintenance of the domestic violence restraining order databank system.

(ii) Funds from the Domestic Violence Training and Education Fund shall support a statewide training and education program to increase public awareness of domestic violence and to improve the scope and quality of services provided to the victims of domestic violence. Grants to support this program shall be awarded on a competitive basis and be administered by the State Department of Public Health, in consultation with the statewide domestic violence coalition, which is eligible to receive funding under this section.

(D) The fee imposed by this paragraph shall be treated as a fee, not as a fine, and shall not be subject to reduction for time served as provided pursuant to Section 1205 or 2900.5.

(E) The fee imposed by this paragraph may be collected by the collecting agency, or the agency's designee, after the termination of the period of probation, whether probation is terminated by revocation or by completion of the term.

(6) Successful completion of a batterer's program, as defined in subdivision (c), or if none is available, another appropriate counseling program designated by the court, for a period

not less than one year with periodic progress reports by the program to the court every three months or less and weekly sessions of a minimum of two hours class time duration. The defendant shall attend consecutive weekly sessions, unless granted an excused absence for good cause by the program for no more than three individual sessions during the entire program, and shall complete the program within 18 months, unless, after a hearing, the court finds good cause to modify the requirements of consecutive attendance or completion within 18 months.

(7)(A)(i) The court shall order the defendant to comply with all probation requirements, including the requirements to attend counseling, keep all program appointments, and pay program fees based upon the ability to pay.

(ii) The terms of probation for offenders shall not be lifted until all reasonable fees due to the counseling program have been paid in full, but in no case shall probation be extended beyond the term provided in subdivision (a) of Section 1203.1. If the court finds that the defendant does not have the ability to pay the fees based on the defendant's changed circumstances, the court may reduce or waive the fees.

(B) Upon request by the batterer's program, the court shall provide the defendant's arrest report, prior incidents of violence, and treatment history to the program.

(8) The court also shall order the defendant to perform a specified amount of appropriate community service, as designated by the court. The defendant shall present the court with proof of completion of community service and the court shall determine if the community service has been satisfactorily completed. If sufficient staff and resources are available, the community service shall be performed under the jurisdiction of the local agency overseeing a community service program.

(9) If the program finds that the defendant is unsuitable, the program shall immediately contact the probation department or the court. The probation department or court shall either recalendar the case for hearing or refer the defendant to an appropriate alternative batterer's program.

(10)(A) Upon recommendation of the program, a court shall require a defendant to participate in additional sessions throughout the probationary period, unless it finds that it is not in the interests of justice to do so, states its reasons on the record, and enters them into the minutes. In deciding whether the defendant would benefit from more sessions, the court shall consider whether any of the following conditions exists:

(i) The defendant has been violence free for a minimum of six months.

(ii) The defendant has cooperated and participated in the batterer's program.

(iii) The defendant demonstrates an understanding of and practices positive conflict resolution skills.

(iv) The defendant blames, degrades, or has committed acts that dehumanize the victim or puts at risk the victim's safety, including, but not limited to, molesting, stalking, striking, attacking, threatening, sexually assaulting, or battering the victim.

(v) The defendant demonstrates an understanding that the use of coercion or violent behavior to maintain dominance is unacceptable in an intimate relationship.

(vi) The defendant has made threats to harm anyone in any manner.

(vii) The defendant has complied with applicable requirements under paragraph (6) of subdivision (c) or subparagraph (C) to receive alcohol counseling, drug counseling, or both.

(viii) The defendant demonstrates acceptance of responsibility for the abusive behavior perpetrated against the victim.

(B) The program shall immediately report any violation of the terms of the protective

order, including any new acts of violence or failure to comply with the program requirements, to the court, the prosecutor, and, if formal probation has been ordered, to the probation department. The probationer shall file proof of enrollment in a batterer's program with the court within 30 days of conviction.

(C) Concurrent with other requirements under this section, in addition to, and not in lieu of, the batterer's program, and unless prohibited by the referring court, the probation department or the court may make provisions for a defendant to use his or her resources to enroll in a chemical dependency program or to enter voluntarily a licensed chemical dependency recovery hospital or residential treatment program that has a valid license issued by the state to provide alcohol or drug services to receive program participation credit, as determined by the court. The probation department shall document evidence of this hospital or residential treatment participation in the defendant's program file.

(11) The conditions of probation ~~may~~ shall include, in lieu of a fine, but not in lieu of the fund payment required under paragraph (5), one or more of the following requirements:

(A) That the defendant make payments to a battered women's shelter, of a minimum of $500.00 up to a maximum of five thousand dollars ($5,000).

(B) That the defendant reimburse the victim for reasonable expenses that the court finds are the direct result of the defendant's offense.

For any order to pay a fine, to make payments to a battered women's shelter, or to pay restitution as a condition of probation under this subdivision, the court shall make a determination of the defendant's ability to pay. Determination of a defendant's ability to pay may include his or her future earning capacity. A defendant shall bear the burden of demonstrating lack of his or her ability to pay. Express findings by the court as to the factors bearing on the amount of the fine shall not be required. In no event shall any order to make payments to a battered women's shelter be made if it would impair the ability of the defendant to pay direct restitution to the victim or court-ordered child support. When the injury to a married person is caused, in whole or in part, by the criminal acts of his or her spouse in violation of this section, the community property shall not be used to discharge the liability of the offending spouse for restitution to the injured spouse, as required by Section 1203.04, as operative on or before August 2, 1995, or Section 1202.4, or to a shelter for costs with regard to the injured spouse, until all separate property of the offending spouse is exhausted.

(12) If it appears to the prosecuting attorney, the court, or the probation department that the defendant is performing unsatisfactorily in the assigned program, is not benefiting from counseling, or has engaged in criminal conduct, upon request of the probation officer, the prosecuting attorney, or on its own motion, the court, as a priority calendar item, shall hold a hearing to determine whether further sentencing should proceed. The court may consider factors, including, but not limited to, any violence by the defendant against the former or a new victim while on probation and noncompliance with any other specific condition of probation. If the court finds that the defendant is not performing satisfactorily in the assigned program, is not benefiting from the program, has not complied with a condition of probation, or has engaged in criminal conduct, the court shall terminate the defendant's participation in the program and shall proceed with further sentencing.

(b) If a person is granted formal probation for a crime in which the victim is a person defined in Section 6211 of the Family Code, in addition to the terms specified in subdivision (a), all of the following shall apply:

(1) The probation department shall make an investigation and take into consideration the

defendant's age, medical history, employment and service records, educational background, community and family ties, prior incidents of violence, police report, treatment history, if any, demonstrable motivation, and other mitigating factors in determining which batterer's program would be appropriate for the defendant. This information shall be provided to the batterer's program if it is requested. The probation department shall also determine which community programs the defendant would benefit from and which of those programs would accept the defendant. The probation department shall report its findings and recommendations to the court.

(2) The court shall advise the defendant that the failure to report to the probation department for the initial investigation, as directed by the court, or the failure to enroll in a specified program, as directed by the court or the probation department, shall result in possible further incarceration. The court, in the interests of justice, may relieve the defendant from the prohibition set forth in this subdivision based upon the defendant's mistake or excusable neglect. Application for this relief shall be filed within 20 court days of the missed deadline. This time limitation may not be extended. A copy of any application for relief shall be served on the office of the prosecuting attorney.

(3) After the court orders the defendant to a batterer's program, the probation department shall conduct an initial assessment of the defendant, including, but not limited to, all of the following:

(A) Social, economic, and family background.

(B) Education.

(C) Vocational achievements.

(D) Criminal history.

(E) Medical history.

(F) Substance abuse history.

(G) Consultation with the probation officer.

(H) Verbal consultation with the victim, only if the victim desires to participate.

(I) Assessment of the future probability of the defendant committing murder.

(4) The probation department shall attempt to notify the victim regarding the requirements for the defendant's participation in the batterer's program, as well as regarding available victim resources. The victim also shall be informed that attendance in any program does not guarantee that an abuser will not be violent.

(c) The court or the probation department shall refer defendants only to batterer's programs that follow standards outlined in paragraph (1), which may include, but are not limited to, lectures, classes, group discussions, and counseling. The probation department shall design and implement an approval and renewal process for batterer's programs and shall solicit input from criminal justice agencies and domestic violence victim advocacy programs.

(1) The goal of a batterer's program under this section shall be to stop domestic violence. A batterer's program shall consist of the following components:

(A) Strategies to hold the defendant accountable for the violence in a relationship, including, but not limited to, providing the defendant with a written statement that the defendant shall be held accountable for acts or threats of domestic violence.

(B) A requirement that the defendant participate in ongoing same-gender group sessions.

(C) An initial intake that provides written definitions to the defendant of physical, emotional, sexual, economic, and verbal abuse, and the techniques for stopping these types of abuse.

(D) Procedures to inform the victim regarding the requirements for the defendant's

participation in the intervention program as well as regarding available victim resources. The victim also shall be informed that attendance in any program does not guarantee that an abuser will not be violent.

(E) A requirement that the defendant attend group sessions free of chemical influence.

(F) Educational programming that examines, at a minimum, gender roles, socialization, the nature of violence, the dynamics of power and control, and the effects of abuse on children and others.

(G) A requirement that excludes any couple counseling or family counseling, or both.

(H) Procedures that give the program the right to assess whether or not the defendant would benefit from the program and to refuse to enroll the defendant if it is determined that the defendant would not benefit from the program, so long as the refusal is not because of the defendant's inability to pay. If possible, the program shall suggest an appropriate alternative program.

(I) Program staff who, to the extent possible, have specific knowledge regarding, but not limited to, spousal abuse, child abuse, sexual abuse, substance abuse, the dynamics of violence and abuse, the law, and procedures of the legal system.

(J) Program staff who are encouraged to utilize the expertise, training, and assistance of local domestic violence centers.

(K) A requirement that the defendant enter into a written agreement with the program, which shall include an outline of the contents of the program, the attendance requirements, the requirement to attend group sessions free of chemical influence, and a statement that the defendant may be removed from the program if it is determined that the defendant is not benefiting from the program or is disruptive to the program.

(L) A requirement that the defendant sign a confidentiality statement prohibiting disclosure of any information obtained through participating in the program or during group sessions regarding other participants in the program.

(M) Program content that provides cultural and ethnic sensitivity.

(N) A requirement of a written referral from the court or probation department prior to permitting the defendant to enroll in the program. The written referral shall state the number of minimum sessions required by the court.

(O) Procedures for submitting to the probation department all of the following uniform written responses:

(i) Proof of enrollment, to be submitted to the court and the probation department and to include the fee determined to be charged to the defendant, based upon the ability to pay, for each session.

(ii) Periodic progress reports that include attendance, fee payment history, and program compliance.

(iii) Final evaluation that includes the program's evaluation of the defendant's progress, using the criteria set forth in subparagraph (A) of paragraph (10) of subdivision (a), and recommendation for either successful or unsuccessful termination or continuation in the program.

(P) A sliding fee schedule based on the defendant's ability to pay. The batterer's program shall develop and utilize a sliding fee scale that recognizes both the defendant's ability to pay and the necessity of programs to meet overhead expenses. An indigent defendant may negotiate a deferred payment schedule, but shall pay a nominal fee, if the defendant has the ability to pay the nominal fee. Upon a hearing and a finding by the court that the defendant does not have the

financial ability to pay the nominal fee, the court shall waive this fee. The payment of the fee shall be made a condition of probation if the court determines the defendant has the present ability to pay the fee. The fee shall be paid during the term of probation unless the program sets other conditions. The acceptance policies shall be in accordance with the scaled fee system.

(2) The court shall refer persons only to batterer's programs that have been approved by the probation department pursuant to paragraph (5). The probation department shall do both of the following:

(A) Provide for the issuance of a provisional approval, provided that the applicant is in substantial compliance with applicable laws and regulations and an urgent need for approval exists. A provisional approval shall be considered an authorization to provide services and shall not be considered a vested right.

(B) If the probation department determines that a program is not in compliance with standards set by the department, the department shall provide written notice of the noncompliant areas to the program. The program shall submit a written plan of corrections within 14 days from the date of the written notice on noncompliance. A plan of correction shall include, but not be limited to, a description of each corrective action and timeframe for implementation. The department shall review and approve all or any part of the plan of correction and notify the program of approval or disapproval in writing. If the program fails to submit a plan of correction or fails to implement the approved plan of correction, the department shall consider whether to revoke or suspend approval and, upon revoking or suspending approval, shall have the option to cease referrals of defendants under this section.

(3) No program, regardless of its source of funding, shall be approved unless it meets all of the following standards:

(A) The establishment of guidelines and criteria for education services, including standards of services that may include lectures, classes, and group discussions.

(B) Supervision of the defendant for the purpose of evaluating the person's progress in the program.

(C) Adequate reporting requirements to ensure that all persons who, after being ordered to attend and complete a program, may be identified for either failure to enroll in, or failure to successfully complete, the program or for the successful completion of the program as ordered. The program shall notify the court and the probation department, in writing, within the period of time and in the manner specified by the court of any person who fails to complete the program. Notification shall be given if the program determines that the defendant is performing unsatisfactorily or if the defendant is not benefiting from the education, treatment, or counseling.

(D) No victim shall be compelled to participate in a program or counseling, and no program may condition a defendant's enrollment on participation by the victim.

(4) In making referrals of indigent defendants to approved batterer's programs, the probation department shall apportion these referrals evenly among the approved programs.

(5) The probation department shall have the sole authority to approve a batterer's program for probation. The program shall be required to obtain only one approval but shall renew that approval annually.

(A) The procedure for the approval of a new or existing program shall include all of the following:

(i) The completion of a written application containing necessary and pertinent information describing the applicant program.

(ii) The demonstration by the program that it possesses adequate administrative and

operational capability to operate a batterer's treatment program. The program shall provide documentation to prove that the program has conducted batterer's programs for at least one year prior to application. This requirement may be waived under subparagraph (A) of paragraph (2) if there is no existing batterer's program in the city, county, or city and county.

(iii) The onsite review of the program, including monitoring of a session to determine that the program adheres to applicable statutes and regulations.

(iv) The payment of the approval fee.

(B) The probation department shall fix a fee for approval not to exceed two hundred fifty dollars ($250) and for approval renewal not to exceed two hundred fifty dollars ($250) every year in an amount sufficient to cover its costs in administering the approval process under this section. No fee shall be charged for the approval of local governmental entities.

(C) The probation department has the sole authority to approve the issuance, denial, suspension, or revocation of approval and to cease new enrollments or referrals to a batterer's program under this section. The probation department shall review information relative to a program's performance or failure to adhere to standards, or both. The probation department may suspend or revoke an approval issued under this subdivision or deny an application to renew an approval or to modify the terms and conditions of approval, based on grounds established by probation, including, but not limited to, either of the following:

(i) Violation of this section by any person holding approval or by a program employee in a program under this section.

(ii) Misrepresentation of any material fact in obtaining the approval.

(6) For defendants who are chronic users or serious abusers of drugs or alcohol, standard components in the program shall include concurrent counseling for substance abuse and violent behavior, and in appropriate cases, detoxification and abstinence from the abused substance.

(7) The program shall conduct an exit conference that assesses the defendant's progress during his or her participation in the batterer's program.

(d) An act or omission relating to the approval of a batterer's treatment programs under paragraph (5) of subdivision (c) is a discretionary act pursuant to Section 820.2 of the Government Code.

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

PROPONENT: Los Angeles County Bar Association

STATEMENT OF REASONS

The Problem: The primary purpose of probation is to rehabilitate the defendant, to protect society from further criminal conduct by the defendant, and to protect the rights of the victim. Domestic violence crimes are cyclical in nature and typically escalate in frequency and intensity. Repeat offenders consume enormous resources both in additional court time, law enforcement, and housing shelters and services available to victims of abuse. For the more serious cases the court loses jurisdiction over the defendant, and rather than holding a probation violation hearing, the court would have to engage in a full trial process in order to reinforce the laws to protect the victims and society. Additionally, funds are needed for battered women's shelters. Many women and children are displaced from the violent actions of their abusers. There are not enough shelters and beds available for women and children and many victims are turned away

from shelters for lack of availability. The fees and fines have not been increased since their inception, nor is there a mandatory requirement that fees be allocated to the battered women's shelter. Further, there is no requirement that restitution be paid for the destruction of property or medical expenses.

The Solution: Allowing the court discretion to grant probation from three years to a maximum of five years give the court discretion in more serious cases to maintain jurisdiction over defendants. This would save court resources by allowing the court and prosecutors the ability to file probation violations in lieu of new cases. Probation violations would add a further deterrent in the courts ability to impose immediate punishment for acts of violence. The mandatory minimum payments to shelters would provide necessary revenues to address the shortages in availability shelter, food and service for women and children displaced by acts of domestic violence. The law as it currently stands does not mandate that any fees be directed towards the shelters. There are provisions towards education, restraining orders, law enforcement, and other programs, but the fees to the battered women's shelter are discretionary or are lieu of other fines. Making these fines mandatory as well as making restitution a mandatory condition of probation would help to protect the rights and safety of victims.

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

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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COUNTERARGUMENTS AND STATE BAR SECTION COMMENTS

ORANGE COUNTY BAR ASSOCIATION

This resolution proposes to permit the increase of the length of probation in domestic violence cases and to require a mandatory minimum payment by a defendant of $500.00 dollars to a battered women's shelter. Both proposals are unnecessary under present law. Penal Code section 273.5 already provides for mandatory increased punishment for prior convictions which have occurred within seven years. In addition to increased sentencing, Penal Code section 1203.097(a)(2) allows the court to impose a criminal protective order; a violation of which is a separate crime with additional punishment and probation. For misdemeanor offenses involving domestic violence, the court presently can consider increased punishment based upon an offender's past conviction history and compliance with probation.

The court already has discretion to order a defendant to make payments to a battered women's shelter up to a maximum of five thousand dollars ($5,000) pursuant to section 1203.097(a)(11)(A). Imposing a mandatory minimum of $500.00 is unworkable as it ignores the inability of indigent defendants to make such payments. Further, imposition of a mandatory minimum will require the court to conduct a hearing on the defendant's ability to pay in every case under subdivision (a)(11)(B). A statutory amendment is not needed where no evidence is proffered that the court is not properly exercising its discretion. Should a payment be mandated even where the victim has not spent time in a battered women's shelter? While not to suggest that battered women's shelters are not laudable, the criminal justice system should not be turned into a funding enterprise.

RESOLUTION 03-11-2018

DIGEST
Protective Orders: Post-Conviction Issuance in Non-Domestic Violence Cases
Amends Penal Code section 136.2 to allow for the issuance of a post-conviction protective order in non-domestic violence cases.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution amends Penal Code section 136.2 to allow for the issuance of a post-conviction protective order in non-domestic violence cases. This resolution should be disapproved because its scope is far too broad, and potentially violates due process.

Under Penal Code section 136.2, a restraining order protecting a victim or witness terminates upon judgment as it is intended to protect a victim or witness from intimidation during the pendency of the matter. If the victim or a witness wish to seek protection after the matter is resolved, he or she needs to seek protection through a civil restraining order or separate action. Under current law, this allows the victim or a witness the opportunity to present their case and provides the defendant with due process.

A special exception is created in this section for the victims or witnesses of domestic violence and does allow the court to grant a restraining order which would not terminate once the matter is resolved. The public policy is to protect the victims and witnesses of domestic violence because of the highly emotional and often familial relationships of the parties involved. This special exception should not be extended to include witnesses or victims of any crime. Additionally, it is unclear at what point in the trial or upon whose request the court would consider the restraining order.

While it would be helpful to have the same judicial officer who heard the original action also be empowered to order a post-resolution restraining order to protect a witness or victim, this is not the proper means to do so. While potentially cumbersome, these extra steps in the current statutory scheme protect a defendant's due process rights because the burden of proof in a civil restraining order is clear and convincing evidence verse good cause in the criminal matter.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Penal Code section 136.2 to read as follows:

§ 136.2

(a)(1) Upon a good cause belief that harm to, or intimidation or dissuasion of, a victim or

witness has occurred or is reasonably likely to occur, a court with jurisdiction over a criminal matter may issue orders, including, but not limited to, the following:

(A) An order issued pursuant to Section 6320 of the Family Code .

(B) An order that a defendant shall not violate any provision of Section 136.1 .

(C) An order that a person before the court other than a defendant, including, but not limited to, a subpoenaed witness or other person entering the courtroom of the court, shall not violate any provision of Section 136.1.

(D) An order that a person described in this section shall have no communication whatsoever with a specified witness or a victim, except through an attorney under reasonable restrictions that the court may impose.

(E) An order calling for a hearing to determine if an order as described in subparagraphs (A) to (D), inclusive, should be issued.

(F)(i) An order that a particular law enforcement agency within the jurisdiction of the court provide protection for a victim or a witness, or both, or for immediate family members of a victim or a witness who reside in the same household as the victim or witness or within reasonable proximity of the victim's or witness' household, as determined by the court. The order shall not be made without the consent of the law enforcement agency except for limited and specified periods of time and upon an express finding by the court of a clear and present danger of harm to the victim or witness or immediate family members of the victim or witness.

(ii) For purposes of this paragraph, “immediate family members” include the spouse, children, or parents of the victim or witness.

(G)(i) An order protecting a victim or witness of violent crime from all contact by the defendant, or contact, with the intent to annoy, harass, threaten, or commit acts of violence, by the defendant. The court or its designee shall transmit orders made under this paragraph to law enforcement personnel within one business day of the issuance, modification, extension, or termination of the order, pursuant to subdivision (a) of Section 6380 of the Family Code. It is the responsibility of the court to transmit the modification, extension, or termination orders made under this paragraph to the same agency that entered the original protective order into the Domestic Violence Restraining Order System.

(ii)(I) If a court does not issue an order pursuant to clause (i) in a case in which the defendant is charged with a crime involving domestic violence as defined in Section 13700 or in Section 6211 of the Family Code , the court on its own motion shall consider issuing a protective order upon a good cause belief that harm to, or intimidation or dissuasion of, a victim or witness has occurred or is reasonably likely to occur, that provides as follows:

(ia) The defendant shall not own, possess, purchase, receive, or attempt to purchase or receive, a firearm while the protective order is in effect.

(ib) The defendant shall relinquish any firearms that he or she owns or possesses pursuant to Section 527.9 of the Code of Civil Procedure.

(II) Every person who owns, possesses, purchases, or receives, or attempts to purchase or receive, a firearm while this protective order is in effect is punishable pursuant to Section 29825 .

(iii) An order issued, modified, extended, or terminated by a court pursuant to this subparagraph shall be issued on forms adopted by the Judicial Council of California that have been approved by the Department of Justice pursuant to subdivision (i) of Section 6380 of the Family Code . However, the fact that an order issued by a court pursuant to this section was not issued on forms adopted by the Judicial Council and approved by the Department of Justice shall not, in and of itself, make the order unenforceable.

(iv) A protective order issued under this subparagraph may require the defendant to be placed on electronic monitoring if the local government, with the concurrence of the county sheriff or the chief probation officer with jurisdiction, adopts a policy to authorize electronic monitoring of defendants and specifies the agency with jurisdiction for this purpose. If the court determines that the defendant has the ability to pay for the monitoring program, the court shall order the defendant to pay for the monitoring. If the court determines that the defendant does not have the ability to pay for the electronic monitoring, the court may order electronic monitoring to be paid for by the local government that adopted the policy to authorize electronic monitoring. The duration of electronic monitoring shall not exceed one year from the date the order is issued. At no time shall the electronic monitoring be in place if the protective order is not in place.

(2) For purposes of this subdivision, a minor who was not a victim of, but who was physically present at the time of, an act of domestic violence, is a witness and is deemed to have suffered harm within the meaning of paragraph (1).

(b) A person violating an order made pursuant to subparagraphs (A) to (G), inclusive, of paragraph (1) of subdivision (a) may be punished for any substantive offense described in Section 136.1 , or for a contempt of the court making the order. A finding of contempt shall not be a bar to prosecution for a violation of Section 136.1. However, a person so held in contempt shall be entitled to credit for punishment imposed therein against a sentence imposed upon conviction of an offense described in Section 136.1 . A conviction or acquittal for a substantive offense under Section 136.1 shall be a bar to a subsequent punishment for contempt arising out of the same act.

(c)(1)(A) Notwithstanding subdivision (e), an emergency protective order issued pursuant to Chapter 2 (commencing with Section 6250) of Part 3 of Division 10 of the Family Code or Section 646.91 shall have precedence in enforcement over any other restraining or protective order, provided the emergency protective order meets all of the following requirements:

(i) The emergency protective order is issued to protect one or more individuals who are already protected persons under another restraining or protective order.

(ii) The emergency protective order restrains the individual who is the restrained person in the other restraining or protective order specified in clause (i).

(iii) The provisions of the emergency protective order are more restrictive in relation to the restrained person than are the provisions of the other restraining or protective order specified in clause (i).

(B) An emergency protective order that meets the requirements of subparagraph (A) shall have precedence in enforcement over the provisions of any other restraining or protective order only with respect to those provisions of the emergency protective order that are more restrictive in relation to the restrained person.

(2) Except as described in paragraph (1), a no-contact order, as described in Section 6320 of the Family Code, shall have precedence in enforcement over any other restraining or protective order.

(d)(1) A person subject to a protective order issued under this section shall not own, possess, purchase, or receive, or attempt to purchase or receive, a firearm while the protective order is in effect.

(2) The court shall order a person subject to a protective order issued under this section to relinquish any firearms he or she owns or possesses pursuant to Section 527.9 of the Code of Civil Procedure .

(3) A person who owns, possesses, purchases, or receives, or attempts to purchase or

receive, a firearm while the protective order is in effect is punishable pursuant to Section 29825 .

(e)(1) In all cases in which the defendant is charged with a crime involving domestic violence, as defined in Section 13700 or in Section 6211 of the Family Code, or a violation of Section 261, 261.5, or 262, or any crime that requires the defendant to register pursuant to subdivision (c) of Section 290, the court shall consider issuing the abovedescribed orders on its own motion. All interested parties shall receive a copy of those orders. In order to facilitate this, the court's records of all criminal cases involving domestic violence or a violation of Section 261, 261.5, or 262, or any crime that requires the defendant to register pursuant to subdivision (c) of Section 290, shall be marked to clearly alert the court to this issue.

(2) In those cases in which a complaint, information, or indictment charging a crime involving domestic violence, as defined in Section 13700 or in Section 6211 of the Family Code, or a violation of Section 261, 261.5, or 262, or any crime that requires the defendant to register pursuant to subdivision (c) of Section 290, has been issued, except as described in subdivision (c), a restraining order or protective order against the defendant issued by the criminal court in that case has precedence in enforcement over a civil court order against the defendant.

(3) Custody and visitation with respect to the defendant and his or her minor children may be ordered by a family or juvenile court consistent with the protocol established pursuant to subdivision (f), but if ordered after a criminal protective order has been issued pursuant to this section, the custody and visitation order shall make reference to, and, if there is not an emergency protective order that has precedence in enforcement pursuant to paragraph (1) of subdivision (c), or a no-contact order, as described in Section 6320 of the Family Code , acknowledge the precedence of enforcement of, an appropriate criminal protective order. On or before July 1, 2014, the Judicial Council shall modify the criminal and civil court forms consistent with this subdivision.

(f) On or before January 1, 2003, the Judicial Council shall promulgate a protocol, for adoption by each local court in substantially similar terms, to provide for the timely coordination of all orders against the same defendant and in favor of the same named victim or victims. The protocol shall include, but shall not be limited to, mechanisms for ensuring appropriate communication and information sharing between criminal, family, and juvenile courts concerning orders and cases that involve the same parties, and shall permit a family or juvenile court order to coexist with a criminal court protective order subject to the following conditions:

(1) An order that permits contact between the restrained person and his or her children shall provide for the safe exchange of the children and shall not contain language either printed or handwritten that violates a “no-contact order” issued by a criminal court.

(2) Safety of all parties shall be the courts' paramount concern. The family or juvenile court shall specify the time, day, place, and manner of transfer of the child, as provided in Section 3100 of the Family Code.

(g) On or before January 1, 2003, the Judicial Council shall modify the criminal and civil court protective order forms consistent with this section.

(h)(1) In any case in which a complaint, information, or indictment charging a crime involving domestic violence, as defined in Section 13700 or in Section 6211 of the Family Code, has been filed, the court may consider, in determining whether good cause exists to issue an order under subparagraph (A) of paragraph (1) of subdivision (a), the underlying nature of the offense charged, and the information provided to the court pursuant to Section 273.75.

(2) In any case in which a complaint, information, or indictment charging a violation of Section 261, 261.5, or 262, or any crime that requires the defendant to register pursuant to

subdivision (c) of Section 290 , has been filed, the court may consider, in determining whether good cause exists to issue an order under paragraph (1) of subdivision (a), the underlying nature of the offense charged, the defendant's relationship to the victim, the likelihood of continuing harm to the victim, any current restraining order or protective order issued by any civil or criminal court involving the defendant, and the defendant's criminal history, including, but not limited to, prior convictions for a violation of Section 261 , 261.5 , or 262 , a crime that requires the defendant to register pursuant to subdivision (c) of Section 290, any other forms of violence, or any weapons offense.

(i)(1) In all cases in which a criminal defendant has been convicted of a crime involving domestic violence as defined in Section 13700 or in Section 6211 of the Family Code, a violation of Section 261, 261.5, or 262, or any crime that requires the defendant to register pursuant to subdivision (c) of Section 290 , the court, at the time of sentencing, shall consider issuing an order restraining the defendant from any contact with the victim. The order may be valid for up to 10 years, as determined by the court. This protective order may be issued by the court regardless of whether the defendant is sentenced to the state prison or a county jail or subject to mandatory supervision, or whether imposition of sentence is suspended and the defendant is placed on probation. It is the intent of the Legislature in enacting this subdivision that the duration of any restraining order issued by the court be based upon the seriousness of the facts before the court, the probability of future violations, and the safety of the victim and his or her immediate family.

(2) An order under this subdivision may include provisions for electronic monitoring if the local government, upon receiving the concurrence of the county sheriff or the chief probation officer with jurisdiction, adopts a policy authorizing electronic monitoring of defendants and specifies the agency with jurisdiction for this purpose. If the court determines that the defendant has the ability to pay for the monitoring program, the court shall order the defendant to pay for the monitoring. If the court determines that the defendant does not have the ability to pay for the electronic monitoring, the court may order the electronic monitoring to be paid for by the local government that adopted the policy authorizing electronic monitoring. The duration of the electronic monitoring shall not exceed one year from the date the order is issued.

(j) For purposes of this section, “local government” means the county that has jurisdiction over the protective order.

(Amended (as amended by Stats. 2010, Ch. 178, Sec. 42) by Stats. 2011, Ch. 155, Sec. 1. Effective January 1, 2012. Operative January 1, 2012, pursuant to Stats. 2010, Ch. 178, Sec. 107.)

(k) In all non-domestic violence cases wherein the defendant has been convicted, sentenced to jail or prison time or have received a non-probationary sentence, upon a good cause belief that harm to, or intimidation of a victim or witness may occur or is reasonably likely to occur, any court post conviction criminal matter may issue protective orders.

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

PROPONENT: Los Angeles County Bar Association

STATEMENT OF REASONS

The Problem: In non-domestic violence cases, the court can order a defendant to have no contact or restrict the contact with the alleged victim or witness. However, this protective order, even if it has a termination date years in to the future, expires as a matter of law at the conclusion of the case. In other words, if the defendant pleads guilty or is convicted and sentenced after trial, this order automatically expires unless a new post-conviction protective order is issued. This issue was definitely clarified by the California Court of Appeal in 2009, in a case called People v Ponce, 173 Cal.App.4th 378: The court found that "under (Penal Code) section 136.2 …, during the pendency of a criminal proceeding when the court has a 'good cause belief that harm to, or intimidation or dissuasion of, a victim or witness has occurred or is reasonably likely to occur,' the court is authorized to issue a restraining order." But orders issued under this section are of a limited duration. The trial court has jurisdiction to issue one only during 'the pendency of [a] criminal action' before it." [Internal Citations Omitted]. See Also People v. Stone 123 Cal.App.4 153.

The Solution: Amends the code to allow the issuance of protective order post-conviction. This would save court resources and protect victims in non-domestic violence crime from having to go to multiple courts in order to obtain protective orders to prevent annoying or harassing or abusive contact by the defendant. The protective order could be issued by the same criminal court that maintains jurisdiction over the criminal matter.

IMPACT STATEMENT
Affects case law *People v. Stone* (2004) 123 Cal.App.4th 153, which states protective orders under 136.2(a) cannot be issued post-conviction.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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