RESOLUTION 14-01-2019

DIGEST
Criminal Law: Decriminalization of Sex Work
Deletes Penal Code sections 266, 266h, 314, 653.22 and 653.23, and amends Penal Code sections 266i and 647 to decriminalize sex work, pimping, pandering, prowling, and indecent exposure, among other crimes.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
Similar to Resolutions 03-07-2007, 02-06-2008, 01-06-2010, 03-02-2011, and 12-07-2012, all of which were approved in principle.

Reasons:
This resolution deletes Penal Code sections 266, 266h, 314, 653.22 and 653.23, and amends Penal Code sections 266i and 647 to decriminalize sex work, pimping, pandering, prowling, and indecent exposure, among other crimes. This resolution should be disapproved because it is overbroad and fails to provide any means of regulating sex work.

As written, the resolution would legalize pimping and pandering, even when involving minors, except when done through coercive threats or violence. (See Pen. Code, §§ 266, 266h, 266i.) It would also legalize soliciting or engaging in prostitution with a minor, indecent exposure, peeping Tom behavior, prowling, and public intoxication. (See Pen. Code, §§ 314, 647, subds. (b)(3), (d), (f), (h), (i), (l), and (m).) In addition, it would eliminate exceptions permitting the nonconsensual distribution of intimate images when reporting criminal activity, complying with a subpoena or court order, or done in the course of a lawful public proceeding. (See Pen. Code, § 647, subd. (j)(3)(D).)

Decriminalizing prostitution would help prevent the underground prostitution that occurs today, allowing sex workers to protect themselves from the control and abuse of sex traffickers, pimps, organized crime, and people who engage the services of prostitutes. The settings in which sex work may occur range from brothels or other dedicated establishments to roadsides, markets, petrol stations, truck stops, parks, hotels, bars, restaurants and private homes, and may be recognizable or hidden. Sex work settings may cater to local communities or primarily involve transient, migrant and mobile populations of both sex workers and clients. (*UNAIDS Guidance Note on HIV and Sex Work*, UNAIDS/09.09E / JC1696E (Last updated April 2012).) Decriminalization is the first step toward legalization and regulation, which in turn would allow for taxation and regular medical examinations. To address these difficulties, jurisdictions that have successfully decriminalized sex work have adopted health and safety regulations that provided safety for both customer and sex worker and typically contain strong protections for high-risk children. (New Zealand Prostitution Reform Act 2003, §§ 16 through 29, German Prostitutes Protection Act (*Prostituiertenschutzgesetz – ProstSchG*) 2017). This resolution would eliminate the provisions that criminalize prostitution and other sex-based acts without providing any means for assuring the health and safety of those who engage in sex work.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to delete Penal Code Sections 266, 266h, 314, 653.22 and 653.23; and amend Penal Code Sections 266i and 647 to read as follows:

§266

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

§266h

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

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

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

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

§266i

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

~~(1) Procures another person for the purpose of prostitution.~~

~~(2)~~ (1) By ~~promises,~~ threats~~,~~ or violence~~, or by any device or scheme,~~ coerces ~~causes, induces, persuades, or encourages~~ another person to become a prostitute.

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

~~(4)~~ (2) By ~~promises,~~ threats~~,~~ or violence~~, or by any device or scheme,~~ coerces ~~causes, induces, persuades, or encourages~~ an inmate of a house of prostitution, or any other place in which prostitution is encouraged or allowed, to remain therein as an inmate.

~~(5)~~ (3) By fraud or artifice, or by duress of person or goods, or by abuse of any position of confidence or authority, coerces ~~procures~~ another person for the purpose of prostitution, or to enter any place in which prostitution is encouraged or allowed within this state, or to come into this state or leave this state for the purpose of prostitution.

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

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

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

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

§314

~~Every person who willfully and lewdly, either:~~

~~(1) Exposes his person, or the private parts thereof, in any public place, or in any place where there are present other persons to be offended or annoyed thereby; or,~~

~~(2) Procures, counsels, or assists any person so to expose himself or take part in any model artist exhibition, or to make any other exhibition of himself to public view, or the view of any number of persons, such as is offensive to decency, or is adapted to excite to vicious or lewd thoughts or acts, is guilty of a misdemeanor.~~

~~Every person who violates subdivision 1 of this section after having entered, without consent, an inhabited dwelling house, or trailer coach as defined in Section 635 of the Vehicle Code, or the inhabited portion of any other building, is punishable by imprisonment in the state prison, or in the county jail not exceeding one year.~~

~~Upon the second and each subsequent conviction under subdivision 1 of this section, or upon a first conviction under subdivision 1 of this section after a previous conviction under Section 288, every person so convicted is guilty of a felony, and is punishable by imprisonment in state prison.~~

§647

~~Except as provided in paragraph (5) of subdivision (b) and subdivision (l),~~ Eevery person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor:

(a) An individual who coerces ~~solicits~~ anyone to engage in or who engages in lewd or dissolute conduct in any public place or in any place open to the public or exposed to public view.

~~(b) (1) An individual who solicits, or who agrees to engage in, or who engages in, any act of prostitution with the intent to receive compensation, money, or anything of value from another person. An individual agrees to engage in an act of prostitution when, with specific intent to so engage, he or she manifests an acceptance of an offer or solicitation by another person to so engage, regardless of whether the offer or solicitation was made by a person who also possessed the specific intent to engage in an act of prostitution.~~

~~(2) An individual who solicits, or who agrees to engage in, or who engages in, any act of prostitution with another person who is 18 years of age or older in exchange for the individual providing compensation, money, or anything of value to the other person. An individual agrees to engage in an act of prostitution when, with specific intent to so engage, he or she manifests an acceptance of an offer or solicitation by another person who is 18 years of age or older to so engage, regardless of whether the offer or solicitation was made by a person who also possessed the specific intent to engage in an act of prostitution.~~

~~(3) An individual who solicits, or who agrees to engage in, or who engages in, any act of prostitution with another person who is a minor in exchange for the individual providing compensation, money, or anything of value to the minor. An individual agrees to engage in an act of prostitution when, with specific intent to so engage, he or she manifests an acceptance of an offer or solicitation by someone who is a minor to so engage, regardless of whether the offer or solicitation was made by a minor who also possessed the specific intent to engage in an act of prostitution.~~

~~(4) A manifestation of acceptance of an offer or solicitation to engage in an act of prostitution does not constitute a violation of this subdivision unless some act, in addition to the manifestation of acceptance, is done within this state in furtherance of the commission of the act of prostitution by the person manifesting an acceptance of an offer or solicitation to engage in that act. As used in this subdivision, "prostitution" includes any lewd act between persons for money or other consideration.~~

~~(5) Notwithstanding paragraphs (1) to (3), inclusive, this subdivision does not apply to a child under 18 years of age who is alleged to have engaged in conduct to receive money or other consideration that would, if committed by an adult, violate this subdivision. A commercially exploited child under this paragraph may be adjudged a dependent child of the court pursuant to paragraph (2) of subdivision (b) of Section 300 of the Welfare and Institutions Code and may be taken into temporary custody pursuant to subdivision (a) of Section 305 of the Welfare and Institutions Code, if the conditions allowing temporary custody without warrant are met.~~

~~(c) Who accosts other persons in any public place or in any place open to the public for the purpose of begging or soliciting alms.~~

~~(d) Who loiters in or about any toilet open to the public for the purpose of engaging in or soliciting any lewd or lascivious or any unlawful act.~~

(b) ~~(e)~~ Who lodges in any building, structure, vehicle, or place, whether public or private, without the permission of the owner or person entitled to the possession or in control of it.

~~(f) Who is found in any public place under the influence of intoxicating liquor, any drug, controlled substance, toluene, or any combination of any intoxicating liquor, drug, controlled substance, or toluene, in a condition that he or she is unable to exercise care for his or her own safety or the safety of others, or by reason of his or her being under the influence of intoxicating liquor, any drug, controlled substance, toluene, or any combination of any intoxicating liquor, drug, or toluene, interferes with or obstructs or prevents the free use of any street, sidewalk, or other public way.~~

~~(g) If a person has violated subdivision (f), a peace officer, if he or she is reasonably able to do so, shall place the person, or cause him or her to be placed, in civil protective custody. The person shall be taken to a facility, designated pursuant to Section 5170 of the Welfare and Institutions Code, for the 72-hour treatment and evaluation of inebriates. A peace officer may place a person in civil protective custody with that kind and degree of force that would be lawful~~

~~were he or she effecting an arrest for a misdemeanor without a warrant. A person who has been placed in civil protective custody shall not thereafter be subject to any criminal prosecution or juvenile court proceeding based on the facts giving rise to this placement. This subdivision does not apply to the following persons:~~

~~(1) A person who is under the influence of any drug, or under the combined influence of intoxicating liquor and any drug.~~

~~(2) A person who a peace officer has probable cause to believe has committed any felony, or who has committed any misdemeanor in addition to subdivision (f).~~

~~(3) A person who a peace officer in good faith believes will attempt escape or will be unreasonably difficult for medical personnel to control.~~

~~(h) Who loiters, prowls, or wanders upon the private property of another, at any time, without visible or lawful business with the owner or occupant. As used in this subdivision, "loiter" means to delay or linger without a lawful purpose for being on the property and for the purpose of committing a crime as opportunity may be discovered.~~

~~(i) Who, while loitering, prowling, or wandering upon the private property of another, at any time, peeks in the door or window of any inhabited building or structure, without visible or lawful business with the owner or occupant.~~

(c) ~~(j)~~ (1) A person who looks through a hole or opening, into, or otherwise views, by means of any instrumentality, including, but not limited to, a periscope, telescope, binoculars, camera, motion picture camera, camcorder, or mobile phone, the interior of a bedroom, bathroom, changing room, fitting room, dressing room, or tanning booth, or the interior of any other area in which the occupant has a reasonable expectation of privacy, with the intent to invade the privacy of a person or persons inside. This subdivision does not apply to those areas of a private business used to count currency or other negotiable instruments.

(2) A person who uses a concealed camcorder, motion picture camera, or photographic camera of any type, to secretly videotape, film, photograph, or record by electronic means, another identifiable person under or through the clothing being worn by that other person, for the purpose of viewing the body of, or the undergarments worn by, that other person, without the consent or knowledge of that other person, with the intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of that person and invade the privacy of that other person, under circumstances in which the other person has a reasonable expectation of privacy. For the purposes of this paragraph, "identifiable" means capable of identification, or capable of being recognized, meaning that someone could identify or recognize the victim, including the victim herself or himself. It does not require the victim's identity to actually be established.

(3) (A) A person who uses a concealed camcorder, motion picture camera, or photographic camera of any type, to secretly videotape, film, photograph, or record by electronic means, another identifiable person who may be in a state of full or partial undress, for the purpose of viewing the body of, or the undergarments worn by, that other person, without the consent or knowledge of that other person, in the interior of a bedroom, bathroom, changing room, fitting room, dressing room, or tanning booth, or the interior of any other area in which that other person has a reasonable expectation of privacy, with the intent to invade the privacy of that other person. For the purposes of this paragraph, "identifiable" means capable of identification, or capable of being recognized, meaning that someone could identify or recognize the victim, including the victim herself or himself. It does not require the victim's identity to actually be established.

(B) Neither of the following is a defense to the crime specified in this paragraph:

(i) The defendant was a cohabitant, landlord, tenant, cotenant, employer, employee, or business partner or associate of the victim, or an agent of any of these.

(ii) The victim was not in a state of full or partial undress.

(4) (A) A person who intentionally distributes the image of the intimate body part or parts of another identifiable person, or an image of the person depicted engaged in an act of sexual intercourse, sodomy, oral copulation, sexual penetration, or an image of masturbation by the person depicted or in which the person depicted participates, under circumstances in which the persons agree or understand that the image shall remain private, the person distributing the image knows or should know that distribution of the image will cause serious emotional distress, and the person depicted suffers that distress.

~~(B) A person intentionally distributes an image described in subparagraph (A) when he or she personally distributes the image, or arranges, specifically requests, or intentionally causes another person to distribute that image.~~

~~(C) As used in this paragraph, "intimate body part" means any portion of the genitals, the anuand in the case of a female, also includes any portion of the breasts below the top of the areola, that is either uncovered or clearly visible through clothing.~~

~~(D) It shall not be a violation of this paragraph to distribute an image described in subparagraph (A) if any of the following applies:~~

~~(i) The distribution is made in the course of reporting an unlawful activity.~~

~~(ii) The distribution is made in compliance with a subpoena or other court order for use in a legal proceeding.~~

~~(iii) The distribution is made in the course of a lawful public proceeding.~~

~~(5) This subdivision does not preclude punishment under any section of law providing for greater punishment.~~

(d) ~~(k)~~ In addition to any punishment prescribed by this section, a court may suspend, for not more than 30 days, the privilege of the person to operate a motor vehicle pursuant to Section 13201.5 of the Vehicle Code for any violation of subdivision (b) that was committed within 1,000 feet of a private residence and with the use of a vehicle. In lieu of the suspension, the court may order a person's privilege to operate a motor vehicle restricted, for not more than six months, to necessary travel to and from the person's place of employment or education. If driving a motor vehicle is necessary to perform the duties of the person's employment, the court may also allow the person to drive in that person's scope of employment.

~~(l) (1) A second or subsequent violation of subdivision (j) is punishable by imprisonment in a county jail not exceeding one year, or by a fine not exceeding two thousand dollars ($2,000), or by both that fine and imprisonment.~~

(e) ~~(2)~~ If the victim of a violation of subdivision (~~j~~c) was a minor at the time of the offense, the violation is punishable by imprisonment in a county jail not exceeding one year, or by a fine not exceeding two thousand dollars ($2,000), or by both that fine and imprisonment.

~~(m) (1) If a crime is committed in violation of subdivision (b) and the person who was solicited was a minor at the time of the offense, and if the defendant knew or should have known that the person who was solicited was a minor at the time of the offense, the violation is punishable by imprisonment in a county jail for not less than two days and not more than one year, or by a fine not exceeding ten thousand dollars ($10,000), or by both that fine and imprisonment.~~

~~(2) The court may, in unusual cases, when the interests of justice are best served, reduce or eliminate the mandatory two days of imprisonment in a county jail required by this~~

~~subdivision. If the court reduces or eliminates the mandatory two days' imprisonment, the court shall specify the reason on the record.~~

§653.22

~~(a) (1) Except as specified in paragraph (2), it is unlawful for any person to loiter in any public place with the intent to commit prostitution. This intent is evidenced by acting in a manner and under circumstances that openly demonstrate the purpose of inducing, enticing, or soliciting prostitution, or procuring another to commit prostitution.~~

~~(2) Notwithstanding paragraph (1), this subdivision does not apply to a child under 18 years of age who is alleged to have engaged in conduct that would, if committed by an adult, violate this subdivision. A commercially exploited child under this paragraph may be adjudged a dependent child of the court pursuant to paragraph (2) of subdivision (b) of Section 300 of the Welfare and Institutions Code and may be taken into temporary custody pursuant to subdivision~~

~~(a) of Section 305 of the Welfare and Institutions Code, if the conditions allowing temporary custody without warrant are met.~~

~~(b) Among the circumstances that may be considered in determining whether a person loiters with the intent to commit prostitution are that the person:~~

~~(1) Repeatedly beckons to, stops, engages in conversations with, or attempts to stop or engage in conversations with passersby, indicative of soliciting for prostitution.~~

~~(2) Repeatedly stops or attempts to stop motor vehicles by hailing the drivers, waving arms, or making any other bodily gestures, or engages or attempts to engage the drivers or passengers of the motor vehicles in conversation, indicative of soliciting for prostitution.~~

~~(3) Has been convicted of violating this section, subdivision (a) or (b) of Section 647, or any other offense relating to or involving prostitution, within five years of the arrest under this section.~~

~~(4) Circles an area in a motor vehicle and repeatedly beckons to, contacts, or attempts to contact or stop pedestrians or other motorists, indicative of soliciting for prostitution.~~

~~(5) Has engaged, within six months prior to the arrest under this section, in any behavior described in this subdivision, with the exception of paragraph (3), or in any other behavior indicative of prostitution activity.~~

~~(c) The list of circumstances set forth in subdivision (b) is not exclusive. The circumstances set forth in subdivision (b) should be considered particularly salient if they occur in an area that is known for prostitution activity. Any other relevant circumstances may be considered in determining whether a person has the requisite intent. Moreover, no one circumstance or combination of circumstances is in itself determinative of intent. Intent must be determined based on an evaluation of the particular circumstances of each case.~~

§653.23

~~(a) It is unlawful for any person to do either of the following:~~

~~(1) Direct, supervise, recruit, or otherwise aid another person in the commission of a violation of subdivision (b) of Section 647 or subdivision (a) of Section 653.22.~~

~~(2) Collect or receive all or part of the proceeds earned from an act or acts of prostitution committed by another person in violation of subdivision (b) of Section 647.~~

~~(b) Among the circumstances that may be considered in determining whether a person is in violation of subdivision (a) are that the person does the following:~~

~~(1) Repeatedly speaks or communicates with another person who is acting in violation of subdivision (a) of Section 653.22.~~

~~(2) Repeatedly or continuously monitors or watches another person who is acting in violation of subdivision (a) of Section 653.22.~~

~~(3) Repeatedly engages or attempts to engage in conversation with pedestrians or motorists to solicit, arrange, or facilitate an act of prostitution between the pedestrians or motorists and another person who is acting in violation of subdivision (a) of Section 653.22.~~

~~(4) Repeatedly stops or attempts to stop pedestrians or motorists to solicit, arrange, or facilitate an act of prostitution between pedestrians or motorists and another person who is acting in violation of subdivision (a) of Section 653.22.~~

~~(5) Circles an area in a motor vehicle and repeatedly beckons to, contacts, or attempts to contact or stop pedestrians or other motorists to solicit, arrange, or facilitate an act of prostitution between the pedestrians or motorists and another person who is acting in violation of subdivision (a) of Section 653.22.~~

~~(6) Receives or appears to receive money from another person who is acting in violation of subdivision (a) of Section 653.22.~~

~~(7) Engages in any of the behavior described in paragraphs (1) to (6), inclusive, in regard to or on behalf of two or more persons who are in violation of subdivision (a) of Section 653.22.~~

~~(8) Has been convicted of violating this section, subdivision (a) or (b) of Section 647, subdivision (a) of Section 653.22, Section 266h, or 266i, or any other offense relating to or involving prostitution within five years of the arrest under this section.~~

~~(9) Has engaged, within six months prior to the arrest under subdivision (a), in any behavior described in this subdivision, with the exception of paragraph (8), or in any other behavior indicative of prostitution activity.~~

~~(c) The list of circumstances set forth in subdivision (b) is not exclusive. The circumstances set forth in subdivision (b) should be considered particularly salient if they occur in an area that is known for prostitution activity. Any other relevant circumstances may be considered. Moreover, no one circumstance or combination of circumstances is in itself determinative. A violation of subdivision (a) shall be determined based on an evaluation of the particular circumstances of each case.~~

~~(d) Nothing in this section shall preclude the prosecution of a suspect for a violation of Section 266h or 266i or for any other offense, or for a violation of this section in conjunction with a violation of Section 266h or 266i or any other offense.~~

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

PROPONENT: Bay Area Lawyers for Individual Freedom

STATEMENT OF REASONS

The Problem: Existing law makes it a crime to solicit, perform, and participate in sex work and to pimp, pander, supervise or aid a sex worker, and loiter for the purpose of sex work. Existing law also makes it a crime to participate in lewd conduct in public and indecent exposure.

The evidence is clear that laws making it illegal for consenting adults to engage in sexual activity in exchange for money hurt public health because they lead to fear of law enforcement and

criminal prosecution, deter use of condoms (they are often used as evidence), and create hurdles to healthcare for sex workers and their clients. The criminalization of sex work results in LGBTQI people, people of color, gay men, and women who sell sex (as opposed to the men who buy it from them) being disproportionately targeted by law enforcement. Indeed, sex workers report that they face more threats from law enforcement than from clients.

California Evidence Code Section 1162 provides that evidence that victims of or witnesses to extortion, stalking, or violence were engaged in sex work at or around the time of the incident is inadmissible in a separate prosecution to prove criminal liability for the sex work.

The Solution: This resolution would decriminalize, decarcerate, and destigmatize sex workers' lives and livelihoods.

The sex workers' rights movement has historic roots in California, going back over 100 years, including the notable 1917 sex worker march in San Francisco. It is time for California to change its laws to be in accord with its longstanding tradition of being a pioneer for marginalized populations, especially in light of recent federal legislation – FOSTA and SESTA, signed by Trump in July 2018 that makes sex work less safe.

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

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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RESPONSIBLE FLOOR DELEGATE: Jennifer Orthwein

RESOLUTION 14-02-2019

DIGEST
Assault: Lesser Included Offense
Amends Penal Code section 245 to clarify when a jury must be instructed that brandishing a deadly weapon is a lesser included offense of assault with a deadly weapon.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution amends Penal Code section 245 to clarify when a jury must be instructed that brandishing a deadly weapon is a lesser included offense of assault with a deadly weapon. This resolution should be disapproved because brandishing is not invariably entailed in an assault with a deadly weapon charge, and as such, the resolution interferes with tactical decision-making of the parties, with due process implications.

"An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (Pen. Code, § 240.) A simple assault is a misdemeanor. (*Id.*, § 241, subds. (a) and (b).) However, when an assault is committed with a deadly instrument, weapon, or firearm, it is a felony with longer sentences. (*Id.*, § 245.)

Brandishing is the drawing or exhibiting of any deadly weapon "in a rude, angry, or threatening manner." It includes the unlawful use of a deadly weapon in a fight or quarrel, except in cases of self-defense. (Pen. Code, § 417.) In most instances, brandishing is a misdemeanor. (*Id.*, §§ 417-417.27, 417.4.) Brandishing a firearm is a felony. (*Id.*, §§ 417.3, 417.6, 417.8.)

Courts hold that because a defendant can assault without brandishing a weapon (e.g., the implied threat of a hidden weapon), defendants are not entitled to a lesser included offense instruction even when a brandishing occurred. (See, e.g., *People v. Escarcega* (1974) 43 Cal.App.3d 391, 398; *People v. Steele* (2000) 83 Cal.App.4th 212, 218, 221; CALCRIM. No. 875.) This makes sense. Assault without brandishing a weapon is a simple assault, and would be a lesser included offense because it is ordinarily a misdemeanor, except when committed against specific classes of people (e.g. peace officers). This resolution is therefore unnecessary.

Under the resolution, both the prosecution and the defense would be saddled with a brandishing a weapon instruction where the defendant may otherwise only be charged with assault with a deadly weapon, which is more difficult to prove. The court would be obliged to instruct on brandishing a weapon, even if neither side wants it. (*People v. Breverman* (1998) 19 Cal.4th 142, 162-163; see also *People v. Leal* (2010) 180 Cal.App.4th 782, 792.)

The resolution is problematic because it creates an automatic rule on both the prosecution and defense, which may not be indicated or wanted by either side. This resolution provides a stealthy

way for a defendant who faces the potential of a third strike to request the potential of a non-strike offense in hopes that the jury goes with the lesser offense. A defendant who believes the prosecution failed to establish assault may want the prospect of a complete acquittal over an instruction on brandishing with the prospect of a misdemeanor conviction. That desire would be frustrated by this resolution because the prosecutor, realizing a likely failure to establish assault with a deadly weapon, can spring the lesser brandishing offense on the defendant simply by requesting the brandishing instruction.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Penal Code section 245 to read as follows:

§245

(a) (1) Any person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not exceeding one year, or by a fine not exceeding ten thousand dollars ($10,000), or by both the fine and imprisonment.

(2) Any person who commits an assault upon the person of another with a firearm shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not less than six months and not exceeding one year, or by both a fine not exceeding ten thousand dollars ($10,000) and imprisonment.

(3) Any person who commits an assault upon the person of another with a machinegun, as defined in Section 16880, or an assault weapon, as defined in Section 30510 or 30515, or a .50 BMG rifle, as defined in Section 30530, shall be punished by imprisonment in the state prison for 4, 8, or 12 years.

(4) Any person who commits an assault upon the person of another by any means of force likely to produce great bodily injury shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not exceeding one year, or by a fine not exceeding ten thousand dollars ($10,000), or by both the fine and imprisonment.

(b) Any person who commits an assault upon the person of another with a semiautomatic firearm shall be punished by imprisonment in the state prison for three, six, or nine years.

(c) Any person who commits an assault with a deadly weapon or instrument, other than a firearm, or by any means likely to produce great bodily injury upon the person of a peace officer or firefighter, and who knows or reasonably should know that the victim is a peace officer or firefighter engaged in the performance of his or her duties, when the peace officer or firefighter is engaged in the performance of his or her duties, shall be punished by imprisonment in the state prison for three, four, or five years.

(d)(1) Any person who commits an assault with a firearm upon the person of a peace officer or firefighter, and who knows or reasonably should know that the victim is a peace officer or firefighter engaged in the performance of his or her duties, when the peace officer or firefighter is engaged in the performance of his or her duties, shall be punished by imprisonment in the state prison for four, six, or eight years.

(2) Any person who commits an assault upon the person of a peace officer or firefighter with a semiautomatic firearm and who knows or reasonably should know that the victim is a

peace officer or firefighter engaged in the performance of his or her duties, when the peace officer or firefighter is engaged in the performance of his or her duties, shall be punished by imprisonment in the state prison for five, seven, or nine years.

(3) Any person who commits an assault with a machinegun, as defined in Section 16880, or an assault weapon, as defined in Section 30510 or 30515, or a .50 BMG rifle, as defined in Section 30530, upon the person of a peace officer or firefighter, and who knows or reasonably should know that the victim is a peace officer or firefighter engaged in the performance of his or her duties, shall be punished by imprisonment in the state prison for 6, 9, or 12 years.

(e) When a person is convicted of a violation of this section in a case involving use of a deadly weapon or instrument or firearm, and the weapon or instrument or firearm is owned by that person, the court shall order that the weapon or instrument or firearm be deemed a nuisance, and it shall be confiscated and disposed of in the manner provided by Sections 18000 and 18005.

(f) As used in this section, "peace officer" refers to any person designated as a peace officer in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2.

(g) Where, after the presentation of evidence at trial, a rational trier of fact could conclude that the defendant violated Penal Code section 417, but did not commit an assault as charged under this section, Penal Code section 417 shall be treated as a lesser included offense of the charged assault, and either party shall be entitled to appropriate jury instructions upon request.

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

PROPONENT: Los Angeles County Bar Association

STATEMENT OF REASONS

The Problem: Defendants are entitled under California law to jury instructions on "lesser-included" offenses at trial. Thus, a jury can determine whether the defendant is guilty of the offense the prosecutor argues the defendant committed, or only guilty of lesser offenses included within that offense. For example, if the prosecutor charges the defendant with robbery (theft by force), the defendant can present evidence showing that he stole but did not use force (a theft) and the jury can then choose to convict the defendant of theft if it concludes that the evidence does not support the prosecutor's claim that a robbery occurred. Allowing a jury the final word on what offense (if any) actually occurred is important because it prevents prosecutors from overcharging offenses to coerce plea-bargains, and allows juries to convict the defendant of the offense they actually committed, instead of choosing between an overcharged offense and a straight acquittal. The problem is that while Penal Code section 417 (brandishing a weapon) is almost always a lesser included offense of assault with a deadly weapon, courts have held that because a defendant can assault without brandishing (e.g., via a hidden weapon), they are not entitled to an instruction *even where the evidence establishes that a brandishing occurred.*

The Solution: This resolution would clarify that either side is entitled to a jury instruction on Penal Code section 417, where the prosecution has charged the defendant with assault with a deadly weapon, but the evidence at trial supports a conclusion that the defendant brandished, but did not assault.

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

CURRENT OR PRIOR RELATED LEGISLATION
None known

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RESOLUTION 14-03-2019

DIGEST
Assault: Defense of Implied Consent in Sporting and Social Events
Adds Penal Code sections 240.5 and 242.5 to provide the affirmative defense of implied consent to assault and battery charges in the context of sporting or other consensual social events.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution adds Penal Code sections 240.5 and 242.5 to provide the affirmative defense of implied consent to assault and battery charges in the context of sporting or other consensual social events. This resolution should be disapproved because it would provide immunity to assaults and batteries occurring during sporting and social activities, even when the conduct goes beyond the reasonable expectations of the participants or scope of consent, or when the assault or battery was committed with mens rea.

An assault is "an *unlawful* attempt, coupled with a present ability to commit a violent injury on the person of another. (Pen. Code, § 240 [emphasis added].) "A battery is any *willful and unlawful* use of force or violence upon the person of another." (Pen. Code, § 242 [emphasis added].) Both offenses require the conduct be unlawful and that the defendant acted willfully. (See CALCRIM Nos. 915, 925, 960 (2019).)

While this resolution seeks to create an exception for voluntary participants in sporting and other consensual social activities, akin to the implied assumption of the risk in tort law, it goes too far by failing to protect against instances where the conduct exceeds the reasonable expectations of the participants, the scope of consent, or the act is committed with mens rea. Football players expect to be tackled and possibly injured on the field, but they do not expect to be maliciously hurt for ulterior purposes, intentionally hit in the face, or angrily accosted in a fight on the field.

The same is true in social engagements. In some cases, an unintended injury by reason of contact may be inherent in the activity, in other cases it is willful and beyond reasonable expectations. Take a person who voluntarily chooses to engage with another in bondage or erotic asphyxiation. Some injury may be reasonably foreseeable related to the agreed scope of consent. But that does not mean a participant who exceeds the scope of consent and inflicts serious harm should not be accountable under criminal law. The breadth and automatic application of the implied consent proposed by the resolution, under these circumstances, is an invitation to mischief and inexcusable criminal wrongdoing which should not be insulated or condoned. The resolution would further undermine the protections provided in Penal Code sections 243.8 and 243.83, criminalizing certain conduct perpetrated on sports officials, and prohibiting the throwing of objects during sporting events, which are intended to protect spectators and participants.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to add Penal Code Sections 240.5 and 242.5 to read as follows:

§240.5

Where the person attempting violent injury on the person of another and such other person are voluntary participants in a sport, social, or other activity involving elements of force or restraint, not in itself criminal, and such act is a reasonably foreseeable incident of such activity and does not create an unreasonable risk of great bodily injury or breach of the peace, the act shall not be an assault.

§242.5

Where the person attempting violent injury on the person of another and such other person are voluntary participants in a sport, social, or other activity involving elements of force or restraint, not in itself criminal, and such act is a reasonably foreseeable incident of such activity and does not create an unreasonable risk of great bodily injury or breach of the peace, the act shall not be a battery.

(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 provide for an affirmative defense of consent for assault and battery charges. This creates a problem because defendants are unable to assert the injured party's willingness to receive such contact. In certain contexts, such as sports, body modification, and other social activities that involve elements of force or restraint, it is socially acceptable and foreseeable that injury will occur. However, individuals participating in such social activities may be charged for assault and battery under existing law.

The Solution: The resolution solves the problem by allowing the defendant to assert and provide evidence of the injured party's consent. This affirmative defense would not apply to nonconsensual violent injury on the person of another or contact that causes serious bodily injury as defined by California Penal Code §243(d). Illegal activity such as street fighting would continue to remain prohibited under California Penal Code §415.

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

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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RESOLUTION 14-04-2019

DIGEST
Criminal Threats: Use of Weapons in Connection With Threats
Amends Penal Code section 422 and adds Penal Code section 422.05 to distinguish between criminal threats with a weapon and weaponless threats.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution amends Penal Code section 422 and adds Penal Code section 422.05 to distinguish between criminal threats with a weapon and weaponless threats. This resolution should be disapproved because it is overbroad and does not accomplish its stated objectives.

Willfully threatening to commit a crime that will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat even if there is no intent of actually carrying it out is a crime. (Pen. Code, § 422.)

This resolution proposes the addition of a requirement that a person possess a weapon in order for a threat to be a violation under Penal Code section 422. In the right situation, fists are weapons that can result in death or serious injury. As such, a person would always be in possession of a weapon and would always be charged with Penal Code section 422, not Penal Code section 422.05.

The current structure allows for an application of the totality of the circumstances in determining what crime should be charged against the defendant. While possession of a weapon may be relevant, it should not be determinative. For example, an unarmed gang member with a known violent history threatening a potential witness should be taken as a serious threat. In comparison a mentally ill person threatening a police officer with a screwdriver from thirty feet away, would be likely be less of a threat. However, under this resolution, the person in the second scenario would face a greater penalty, simply because they held an item that could be considered a weapon.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Penal Code section 422 and add Penal Code section 422.05 to read as follows:

§422

(a) Any person who is armed with or uses a dangerous or deadly weapon, and willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety, shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison for 2, 3 or 4 years.

(b) For purposes of this section, "immediate family" means any spouse, whether by marriage or not, parent, child, any person related by consanguinity or affinity within the second degree, or any other person who regularly resides in the household, or who, within the prior six months, regularly resided in the household.

(c) "Electronic communication device" includes, but is not limited to, telephones, cellular telephones, computers, video recorders, fax machines, or pagers. "Electronic communication" has the same meaning as the term defined in Subsection 12 of Section 2510 of Title 18 of the United States Code.

§422.05

(a) Any person who threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety, shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment pursuant to subdivision (h) of Section 1170.

(b) For purposes of this section, "immediate family" means any spouse, whether by marriage or not, parent, child, any person related by consanguinity or affinity within the second degree, or any other person who regularly resides in the household, or who, within the prior six months, regularly resided in the household.

(c) "Electronic communication device" includes, but is not limited to, telephones, cellular telephones, computers, video recorders, fax machines, or pagers. "Electronic communication" has the same meaning as the term defined in Subsection 12 of Section 2510 of Title 18 of the United States Code.

(d) Any act of criminal threats not involving being armed with or using a dangerous or deadly weapon shall only be filed pursuant to subdivision (a) of this section.

(Proposed new language underlined, language to be deleted striken)

PROPONENT: Los Angeles County Bar Association.

STATEMENT OF REASONS

The Problem: The law of "criminal threats" has been stretched beyond imagination. Statements made in anger by arrestees handcuffed and hobbled in the caged rear seat of a police car are considered to be threats of such magnitude the complaining arresting officer is purportedly in "sustained fear." Statements made to third-parties are charged as criminal threats even though there is no intention that the threat be taken seriously or transmitted to the "target." On the other hand, serious threats made while armed with or using a dangerous or deadly weapon, threats that should be taken most seriously, are punished no more seriously than angry retorts where the perpetrator's mouth is the weapon.

The Solution: This resolution distinguishes between armed criminal threats (the punishment is increased) and unarmed criminal threats which is still chargeable as a felony. That change in the law is sensible and does not water down the ability of the prosecution to punish a person who makes criminal threats.

IMPACT STATEMENT:
This proposed resolution does not affect any other law, statute or rule.

CURRENT OR PRIOR RELATED LEGISLATION:
None known.

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RESOLUTION 14-05-2019

DIGEST

Misdemeanor: 911 Calls Based on Racial Discrimination

Amends Penal Code section 653x to include animus against a protected class as evidence of an intent to annoy or harass.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE WITH RECOMMENDED AMENDMENTS

History:

No similar resolutions found.

Reasons:

This resolution amends Penal Code section 653x to include animus against a protected class as evidence of an intent to annoy or harass. This resolution should be approved in principle with recommended amendments because the resolution should not have the unintended consequence of precluding a felony prosecution under existing law.

This resolution would create a misdemeanor subcategory of annoying and harassing calls to include 911 calls based on discriminatory motive. Presumably, this would address instances in which false or exaggerated 911 calls were made against minorities, imperiling their safety.

Under existing law, a person who misuses the 911 system to elicit an armed response against another based on racial animus can be prosecuted for a felony. "No person, whether or not acting under color of law, shall by force or threat of force, willfully injure, intimidate, interfere with, oppress, or threaten any other person in the free exercise or enjoyment of any right or privilege secured to him or her by the Constitution or laws of this state or by the Constitution or laws of the United States in whole or in part because of one or more of the actual or perceived characteristics of the victim listed in subdivision (a) of Section 422.55." (Pen. Code, § 422.6, subd. (a).) The characteristics include (1) disability, (2) gender, (3) nationality, (4) race or ethnicity, (5) religion, (6) sexual orientation, and (7) association with a person or group with one or more of these actual or perceived characteristics. (Pen. Code, § 422.55.)

By creating a more specific misdemeanor offense, this resolution may have the unintended consequence of precluding a felony hate crime prosecution for the proscribed conduct. "Under the *Williamson* rule, if a general statute includes the same conduct as a special statute, the court infers that the Legislature intended that conduct to be prosecuted exclusively under the special statute. In effect, the special statute is interpreted as creating an exception to the general statute for conduct that otherwise could be prosecuted under either statute." (*People v. Murphy* (2011) 52 Cal.4th 81, 86; citing *In re Williamson* (1954) 43 Cal.2d 651, 654.). Thus, Resolutions Committee recommends adding the following language as subparagraph (iii) to subdivision (b): "Nothing in this section prohibits prosecution under any other provision of law."

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Penal Code section 653x as follows:

§ 653x

(a) A person who telephones or uses an electronic communication device to initiate communication with the 911 emergency system with the intent to annoy or harass another person is guilty of a misdemeanor punishable by a fine of not more than one thousand dollars ($1,000), by imprisonment in a county jail for not more than six months, or by both the fine and imprisonment. Nothing in this section shall apply to telephone calls or communications using electronic devices made in good faith.

(b) An intent to annoy or harass is established by:

(i) proof of repeated calls or communications over a period of time, however short, that are unreasonable under the circumstances.; or

(ii) proof that the person who initiates the communication with the 911 emergency system could not reasonably believe that the activity being reported involved an imminent threat of harm to any person or property and there is evidence from which a reasonable person could infer that the person initiating the communication was motivated by animus toward the person or persons engaged in the activity reported on account of race, national origin, sexual preference, gender identity or religion.

(c) Upon conviction of a violation of this section, a person also shall be liable for all reasonable costs incurred by any unnecessary emergency response.

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

PROPONENT: Bar Association of San Francisco

STATEMENT OF REASONS

The Problem: During 2018 the media was replete with stories (sometimes accompanied by video) regarding people calling 911 to report non-criminal activity of people of color, such as "Barbeque Betty" and "Permit Patty." The mis-use of the 911 system when people take offense at lawful and innocent activities being conducted by people of color (mostly African American, but probably not so limited) should be treated as a crime. First, such calls take up time of 911 dispatchers who should not be distracted from handling genuine calls. Second, the police seem to be obligated to respond to reports received through 911, and responding to false reports based on the caller's animus towards people of color is a serious waste of law enforcement resources. Third, any time police interact with people of color (especially African Americans) when a crime has been reported, the situation is fraught with peril and could become tragic. Consequently, using the 911 system in this manner should not be tolerated.

The Solution: Penal Code section 653x already makes it a misdemeanor to use the 911 system with the intent to annoy or harass another person. Law enforcement might be more likely to prosecute persons for using the 911 system to harass people on account of their race, national origin, gender identity or religion if the code made that violation explicit. Amending the law and an occasional arrest might also send a message to people who are inclined to mis-use the 911 system in this manner.

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

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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RESOLUTION 14-06-2019

DIGEST
Misdemeanors: Conspiracy to Commit
Amends Penal Code section 182 to require that a conspiracy to commit a non-violent misdemeanor to be prosecuted as a misdemeanor.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution amends Penal Code section 182 to require that a conspiracy to commit a non-violent misdemeanor to be prosecuted a misdemeanor. This resolution should be disapproved because a conspiracy to commit a misdemeanor is a "wobbler," which can be charged as either a felony or misdemeanor depending on the circumstances and the seriousness of the offense.

The resolution offers the example of a conspiracy related to a "beer run" to suggest that it is excessive to prosecute the case as a felony conspiracy. However, courts already have discretion to reduce felony conspiracy charges to misdemeanors pursuant to Penal Code section 17 subdivision (b).

While many non-violent misdemeanors should not be up-charged simply because two or more individuals were involved in a conspiracy to commit that offense, the facts and circumstances of the crime (such as elder abuse) may warrant a felony charge. For example, in *People v. Martin* (2018) 26 Cal.App.5th 825, the court found: "Here, a professional thief entered in to an international conspiracy to commit as many petty thefts as she could get away with. … It is difficult, if not impossible, to believe that the electorate intended that a person, such as respondent, with five prior separate prison terms who joined an international conspiracy to commit petty theft, would deserve misdemeanor treatment." (*Id.* at 828.)

"The courts have long recognized the enhanced dangers of a conspiracy. … [C]ollaborative criminal activities pose a greater potential threat to the public than individual acts. 'Criminal liability for conspiracy, separate from and in addition to that imposed for the substantive offense which the conspirators agree to commit, has been justified by a 'group danger' rationale. The division of labor inherent in group association is seen to encourage the selection of more elaborate and ambitious goals and to increase the likelihood that the scheme will be successful. Moreover, the moral support of the group is seen as strengthening the perseverance of each member of the conspiracy, thereby acting to discourage any reevaluation of the decision to commit the offense which a single offender might undertake. And even if a single conspirator reconsiders and contemplates stopping the wheels which have been set in motion to attain the object of the conspiracy, a return to the status quo will be much more difficult since it will entail persuasion of the other conspirators." (*Id.* at 836.)

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Penal Code section 182 to read as follows:

§182

(a) If two or more persons conspire:

(1) To commit any crime.

(2) Falsely and maliciously to indict another for any crime, or to procure another to be charged or arrested for any crime.

(3) Falsely to move or maintain any suit, action, or proceeding.

(4) To cheat and defraud any person of any property, by any means which are in themselves criminal, or to obtain money or property by false pretenses or by false promises with fraudulent intent not to perform those promises.

(5) To commit any act injurious to the public health, to public morals, or to pervert or obstruct justice, or the due administration of the laws.

(6) To commit any crime against the person of the President or Vice President of the United States, the Governor of any state or territory, any United States justice or judge, or the secretary of any of the executive departments of the United States.

They are punishable as follows:

When they conspire to commit any crime against the person of any official specified in paragraph (6), they are guilty of a felony and are punishable by imprisonment pursuant to subdivision (h) of Section 1170 for five, seven, or nine years.

When they conspire to commit any other felony, they shall be punishable in the same manner and to the same extent as is provided for the punishment of that felony. If the felony is one for which different punishments are prescribed for different degrees, the jury or court which finds the defendant guilty thereof shall determine the degree of the felony the defendant conspired to commit. If the degree is not so determined, the punishment for conspiracy to commit the felony shall be that prescribed for the lesser degree, except in the case of conspiracy to commit murder, in which case the punishment shall be that prescribed for murder in the first degree.

If the felony is conspiracy to commit two or more felonies which have different punishments and the commission of those felonies constitute but one offense of conspiracy, the penalty shall be that prescribed for the felony which has the greater maximum term.

When they conspire to do an act described in paragraph (4), they shall be punishable by imprisonment in a county jail for not more than one year, or by imprisonment pursuant to subdivision (h) of Section 1170, or by a fine not exceeding ten thousand dollars ($10,000), or by both that imprisonment and fine.

When they conspire to do any of the other acts described in this section, they shall be punishable by imprisonment in a county jail for not more than one year, or pursuant to subdivision (h) of Section 1170, or by a fine not exceeding ten thousand dollars ($10,000), or by both that imprisonment and fine. When they receive a felony conviction for conspiring to commit identity theft, as defined in Section 530.5, the court may impose a fine of up to twenty-five thousand dollars ($25,000).

<u>When they conspire to commit a misdemeanor not involving force or violence</u>

they shall be punished by imprisonment in the county jail for not more than one year. When they conspire to commit a misdemeanor involving force or violence they shall be punished by imprisonment in a county jail for not more than one year, or pursuant to subdivision (h) of Section 1170.

All cases of conspiracy may be prosecuted and tried in the superior court of any county in which any overt act tending to effect the conspiracy shall be done.

(b) Upon a trial for conspiracy, in a case where an overt act is necessary to constitute the offense, the defendant cannot be convicted unless one or more overt acts are expressly alleged in the indictment or information, nor unless one of the acts alleged is proved; but other overt acts not alleged may be given in evidence.

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

PROPONENT: Los Angeles County Bar Association

STATEMENT OF REASONS

The Problem: One guy goes into a store on a "beer run" and shoplifts a 12-pack. That crime is charged as a misdemeanor shoplift. But, one guy drives a second guy to the store on a "beer run" and the second guy shoplifts a 12 pack. That shoplift becomes felony conspiracy to shoplift and both thieves can now be punished by up to three years imprisonment. That's quite excessive.

The Solution: This resolution takes a reasonable approach to conspiracy to commit a misdemeanor. Conspiracy to commit a non-violent misdemeanor will be a misdemeanor, subject to imprisonment in the county jail for up to one year. Conspiracy to commit a misdemeanor involving force or violence is a "wobbler," meaning it can be charged as either a felony or a misdemeanor with imprisonment for up to three years.

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

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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RESPONSIBLE FLOOR DELEGATE: Mark Harvis

RESOLUTION 14-07-2019

DIGEST
Pepper Spray: Increase Permitted Amount and Type for Personal Use
Amends Penal Code section 22810 to increase the legal amount of pepper spray from 2.5 ounces to 3.5 ounces and permit pepper spray to be stored as a gel or foam.

RESOLUTIONS COMMITTEE RECOMMENDATION
APPROVE IN PRINCIPLE

History:
No similar resolutions found.

Reasons:
This resolution amends Penal Code section 22810 to increase the legal amount of pepper spray from 2.5 ounces to 3.5 ounces and permit pepper spray to be stored as a gel or foam. This resolution should be approved in principle because it improves the safety and self-defense capability of a less-than-lethal product.

Of the less-than-lethal weapons available to those who travel alone at night, pepper-spray is among the most affordable and easiest to carry. However, for no apparent reason, the amount that can be carried is capped at 2.5 ounces net weight. By contrast, most states have higher thresholds or none at all. Air travel guidelines permit pepper spray containers of up to four fluid ounces to be transported in checked luggage. (See https://www.tsa.gov/travel/security-screening/whatcanibring/items/pepper-spray.)

Similarly, for no apparent reason, the law requires pepper spray to be possessed as an aerosol. Permitting the spray to be carried as a foam or gel would make it safer to deploy, as an aerosol disperses in the air more widely.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Penal Code section 22810 to read as follows:

§22810

Notwithstanding any other provision of law, any person may purchase, possess, or use tear gas or any tear gas weapon for the projection or release of tear gas if the tear gas or tear gas weapon is used solely for self-defense purposes, subject to the following requirements:

(a) No person convicted of a felony or any crime involving an assault under the laws of the United States, the State of California, or any other state, government, or country, or convicted of misuse of tear gas under subdivision (g), shall purchase, possess, or use tear gas or any tear gas weapon.

(b) No person addicted to any narcotic drug shall purchase, possess, or use tear gas or any tear gas weapon.

(c) No person shall sell or furnish any tear gas or tear gas weapon to a minor.

(d) No minor shall purchase, possess, or use tear gas or any tear gas weapon.

(e) (1) No person shall purchase, possess, or use any tear gas weapon that expels a projectile, or that expels the tear gas by any method other than an aerosol spray, gel, or foam or that contains more than ~~2.5~~ 3.5 ounces net weight of aerosol spray, gel, or foam.

(2) Every tear gas container and tear gas weapon that may be lawfully purchased, possessed, and used pursuant to this section shall have a label that states: "WARNING: The use of this substance or device for any purpose other than self-defense is a crime under the law. The contents are dangerous — use with care."

(3) After January 1, 1984, every tear gas container and tear gas weapon that may be lawfully purchased, possessed, and used pursuant to this section shall have a label that discloses the date on which the useful life of the tear gas weapon expires.

(4) Every tear gas container and tear gas weapon that may be lawfully purchased pursuant to this section shall be accompanied at the time of purchase by printed instructions for use.

(f) Effective March 1, 1994, every tear gas container and tear gas weapon that may be lawfully purchased, possessed, and used pursuant to this section shall be accompanied by an insert including directions for use, first aid information, safety and storage information, and explanation of the legal ramifications of improper use of the tear gas container or tear gas product.

(g) (1) Except as provided in paragraph (2), any person who uses tear gas or any tear gas weapon except in self-defense is guilty of a public offense and is punishable by imprisonment pursuant to subdivision (h) of Section 1170 for 16 months, or two or three years or in a county jail not to exceed one year or by a fine not to exceed one thousand dollars ($1,000), or by both the fine and imprisonment.

(2) If the use is against a peace officer, as defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2, engaged in the performance of official duties and the person committing the offense knows or reasonably should know that the victim is a peace officer, the offense is punishable by imprisonment pursuant to subdivision (h) of Section 1170 for 16 months or two or three years or by a fine of one thousand dollars ($1,000), or by both the fine and imprisonment.

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

PROPONENT: Contra Costa County Bar Association

STATEMENT OF REASONS

The Problem: Pepper spray is a cost effective and non-lethal form of self-defense. Unlike a Taser which costs hundreds of dollars, pepper spray costs $10-$20 for a canister. Unlike a firearm, pepper spray is not lethal and only causes discomfort for about an hour. Unfortunately, in California the law only permits people to carry very small amounts of pepper spray and only in the spray form.

As for the amount, the current law restricts people to 2.5 oz. Pepper spray tends to come in the following sizes:.75 oz (small keyring/pocket size), 1.5 oz (medium pocket size), and 3.0 oz and so on. Thus, as practical matter, people in California are restricted to the 1.5 oz as their

maximum size since 2.5 oz sizes are unavailable or very uncommon. If someone needed to defend themselves for more than a few seconds or had to defend against multiple attackers, the amount permitted in California would not be enough for self-defense. Thus, I'm proposing a modest increase in the permitted amount.

The second problem is that California law only permits pepper spray to be in the form of "aerosol spray". Aerosols sprays goes directly to a target, but the particles can go airborne and potentially affect an unintended target. This can be very bad in hospitals, airports, and other places with lots of people, particularly indoors. To prevent unintended contamination from happening, pepper spray makers have produced the same product in a gel and foam forms that work the same way. Gel has better range and does not go airborne. Foam has a wider range and does not go airborne as much as spray. But current law, prohibits these sensible alternative forms of pepper spray.

As background, California has one of the strictest laws in the county related to purchasing and possessing pepper spray. Until 1994, pepper spray was unlawful to possess in California. At that time, you had to watch a video and receive a state certification to use it. In 1996, Assemblywoman Jackie Speier sponsored legislation that permitted anyone to purchase pepper spray, provided it was in spray form and did not exceed 2.5 oz. She argued that pepper spray was an effective and important tool for self-defense, especially for women. In most states, pepper spray is completely unregulated. Only Hawaii (1/2 oz), Michigan (1.2 oz), Florida (2 oz), New Jersey (.75 oz), and Wisconsin (2 oz) are more restrictive than California.

The Solution: A slight increase in the amount of pepper spray and its form would permit a person to defend themselves in a greater number of situations. Permitting people to carry a gel or foam would help prevent cross contamination indoors, crowded areas, or sensitive areas. In addition, this law gives people more options for a cheap but effective alternative to expensive options like tasers or lethal options like firearms.

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

CURRENT OR PRIOR RELATED LEGISLATION
None known.

AUTHOR AND/OR PERMANENT CONTACT: Dorian A. Peters, Attorney at Law, 535 Main St., Martinez, CA 94553; (510) 684-7696; dorian@petersesq.com.

RESPONSIBLE FLOOR DELEGATE: Dorian A. Peters

RESOLUTION 14-08-2019

DIGEST

Resentencing: Retroactive Dismissal for Acts that are No Longer Criminal
Amends Health and Safety Code section 11379 to provide retroactive relief to a defendant charged with drug-related conduct that is no longer illegal.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:
No similar resolutions found.

Reasons:
This resolution amends Health and Safety Code section 11379 to provide retroactive relief to a defendant charged with drug-related conduct that is no longer illegal. This resolution should be approved in principle because it provides relief to defendants in an appropriate manner, and establishes a procedure that can be implemented incrementally which would reduce costs to the courts, and public defender and district attorney offices.

This resolution permits a defendant who was convicted of a marijuana-related offense, as defined, prior to January 1, 2015, to seek retroactive dismissal of that offense for all purposes, upon a prima facie showing that the conviction was based on the transportation of a controlled substance for personal use. Upon receiving a request for dismissal, the court shall order the conviction retroactively recalled upon a prima facie showing that the offense was based on the transportation of a controlled substance for personal use and thereafter dismiss the offense for all purposes unless the prosecution opposes the request and, through admissible evidence either proves that the defendant is currently serving a sentence for the conviction and establishes by clear and convincing evidence that dismissal would pose an unreasonable risk of danger to public safety as defined in Penal Code section 1170.18, or establishes by a preponderance of the evidence that the defendant's former conduct underlying the conviction would remain subject to conviction under this section if the conduct underlying the conviction had occurred on or after January 1, 2015.

Essentially, the proposed resolution would allow, on a defendant by defendant basis, retroactive dismissal of charges that are now considered legal pursuant to the state's legalization of the recreational use of marijuana by adults. Because this resolution would allow these dismissals on a case by case basis, rather than on a wholesale across-the board basis, this approach allows appropriate relief to defendants while also not over-burdening courts, or public defenders and district attorney's offices throughout the state.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Health and Safety Code section 11379 to read as follows:

§11379

(a) Except as otherwise provided in subdivision (b) and in Article 7 (commencing with Section 4211) of Chapter 9 of Division 2 of the Business and Professions Code, every person who transports, imports into this state, sells, furnishes, administers, or gives away, or offers to transport, import into this state, sell, furnish, administer, or give away, or attempts to import into this state or transport any controlled substance which is (1) classified in Schedule III, IV, or V and which is not a narcotic drug, except subdivision (g) of Section 11056, (2) specified in subdivision (d) of Section 11054, except paragraphs (13), (14), (15), (20), (21), (22), and (23) of subdivision (d), (3) specified in paragraph (11) of subdivision (c) of Section 11056, (4) specified in paragraph (2) or (3) of subdivision (f) of Section 11054, or (5) specified in subdivision (d) or (e), except paragraph (3) of subdivision (e), or specified in subparagraph (A) of paragraph (1) of subdivision (f), of Section 11055, unless upon the prescription of a physician, dentist, podiatrist, or veterinarian, licensed to practice in this state, shall be punished by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code for a period of two, three, or four years.

(b) Notwithstanding the penalty provisions of subdivision (a), any person who transports any controlled substances specified in subdivision (a) within this state from one county to another noncontiguous county shall be punished by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code for three, six, or nine years.

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

(d) Nothing in this section is intended to preclude or limit prosecution under an aiding and abetting theory, accessory theory, or a conspiracy theory.

(e) A defendant who was convicted of a violation of this section prior to January 1, 2015 may seek retroactive dismissal of that offense for all purposes, upon a prima facie showing that the conviction was based on the transportation of a controlled substance for personal use.

(1) Upon receiving a request for dismissal and a prima facie showing pursuant to this section, a court shall order the conviction retroactively recalled, and thereafter dismiss the offense for all purposes unless the prosecution opposes the request and, through admissible evidence either:

(A) Proves that the defendant is currently serving a sentence for the conviction, and establishes by clear and convincing evidence that dismissal would pose an unreasonable risk of danger to public safety as defined in Penal Code section 1170.18.

(B) Establishes by a preponderance of the evidence that the defendant's former conduct underlying the conviction would remain subject to conviction under this section if the conduct underlying the conviction had occurred on or after January 1, 2015.

(Proposed language underlined; language to be deleted stricken)

PROPONENT: Los Angeles County Bar Association

STATEMENT OF REASONS

The Problem: Under the pre-January 1, 2015 version of this statute, a defendant who transported drugs for personal use (a drug user) was prosecuted under the same felony statute used to prosecute defendants who transported drugs for sale (a drug dealer). In 2015, the Legislature addressed this inequity by modifying the statute to remove drug users from its scope (drug users remain subject to prosecution under misdemeanor statutes). The problem is that while under

every other statute defendants are eligible to apply for retroactive resentencing in light of legislative drug reforms, no such mechanism has yet been adopted under this section. As a result, defendants whose former conviction were for drug use continue to be (incorrectly) treated as drug dealers, even when their former conduct would not be subject to prosecution under this statute if charged today.

The Solution: This resolution would allow defendants convicted under the old version of the statute to seek resentencing in light of the changes to the statute, absent evidence that resentencing would pose a danger to the public, or that the defendant's former conduct would remain subject to prosecution under this statute if it occurred today.

IMPACT STATEMENT
None known.

CURRENT OR PRIOR RELATED LEGISLATION
None known

AUTHOR AND/OR PERMANENT CONTACT: Nick Stewart-Oaten, P: 213-974-3000, 320 W. Temple Street, 5th Floor, Los Angeles, CA 90012

RESPONSIBLE FLOOR DELEGATE: Nick Stewart-Oaten

RESOLUTION 14-09-2019

DIGEST
Criminal: Anti-Gun Trafficking Programs
Amends Penal Code section 28225 and adds Penal Code sections 28226, 28227, and 28228 to allow for the creation of funds, task forces and programs to combat gun trafficking.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution amends Penal Code section 28225 and adds Penal Code sections 28226, 28227, and 28228 to allow for the creation of funds, task forces and programs to combat gun trafficking. This resolution should be disapproved because it would allow funds to be diverted from other state programs without determining the cost or effectiveness of the new funds, task forces or programs created.

Under current law, Penal Code section 28255 and its related regulation, 11 California Code of Regulations section 4001, authorize the collection of a Dealer's Record of Sale (DROS) processing fee which may be adjusted for inflation. The fee charged goes towards the costs related to tracking firearms transfers and for related state-mandated local costs for various firearm notification requirements. The current fee, last revised in 2015, is $19.00. (See https://oag.ca.gov/sites/all/files/agweb/pdfs/firearms/pdf/firearms-fees.pdf.) In addition, there is a Dealer Fee for Private Party Transfer (per firearm) authorized by Penal Code section 28055. Under current law, fees may only be set at an amount necessary to cover the reasonable costs of providing services necessary to the activity for which the fee is charged and which are not levied for unrelated revenue purposes. (See *Sinclair Paint Co. v. State Board of Equalization* (1997) 15 Cal.4th 866, 878.)

This resolution would authorize programs without actually funding those programs, and without regard for the costs associated with providing the services. It is not clear if funds would be diverted from other state programs and there is no information or evidence that these proposed programs are effective or successful in other states. There is also no information provided as to whether the programs in other states are cost-effective.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Association recommends that legislation be sponsored to amend Penal Code section 28225 and adds sections 28226, 28227 and 28228 to read as follows:

§28225

(a) The Department of Justice may require the dealer to charge each firearm purchaser a fee not to exceed fourteen dollars ($14), except that the fee may be increased at a rate not to exceed any increase in the California Consumer Price Index as compiled and reported by the Department of Industrial Relations.

(b) The fee under subdivision (a) shall be no more than is necessary to fund the following:

(1) The department for the cost of furnishing this information.

(2) The department for the cost of meeting its obligations under paragraph (2) of subdivision (b) of Section 8100 of the Welfare and Institutions Code.

(3) Local mental health facilities for state-mandated local costs resulting from the reporting requirements imposed by Section 8103 of the Welfare and Institutions Code.

(4) The State Department of State Hospitals for the costs resulting from the requirements imposed by Section 8104 of the Welfare and Institutions Code.

(5) Local mental hospitals, sanitariums, and institutions for state-mandated local costs resulting from the reporting requirements imposed by Section 8105 of the Welfare and Institutions Code.

(6) Local law enforcement agencies for state-mandated local costs resulting from the notification requirements set forth in subdivision (a) of Section 6385 of the Family Code.

(7) Local law enforcement agencies for state-mandated local costs resulting from the notification requirements set forth in subdivision (c) of Section 8105 of the Welfare and Institutions Code.

(8) For the actual costs associated with the electronic or telephonic transfer of information pursuant to Section 28215.

(9) The Department of Food and Agriculture for the costs resulting from the notification provisions set forth in Section 5343.5 of the Food and Agricultural Code.

(10) The department for the costs associated with subdivisions (d) and (e) of Section 27560.

(11) The department for the costs associated with funding Department of Justice firearms-related regulatory and enforcement activities related to the sale, purchase, possession, loan, or transfer of firearms pursuant to any provision listed in Section 16580.

(12) A statewide firearms trafficking task force, as described in Section 28226

(13) A Firearms Bounty Fund, as described in Section 28227

(14) An Anti-Gun Trafficking Council Grant Program, as described in Section 28228

(c) The fee established pursuant to this section shall not exceed the sum of the actual processing costs of the department, the estimated reasonable costs of the local mental health facilities for complying with the reporting requirements imposed by paragraph (3) of subdivision (b), the costs of the State Department of State Hospitals for complying with the requirements imposed by paragraph (4) of subdivision (b), the estimated reasonable costs of local mental hospitals, sanitariums, and institutions for complying with the reporting requirements imposed by paragraph (5) of subdivision (b), the estimated reasonable costs of local law enforcement agencies for complying with the notification requirements set forth in subdivision (a) of Section 6385 of the Family Code , the estimated reasonable costs of local law enforcement agencies for complying with the notification requirements set forth in subdivision (c) of Section 8105 of the Welfare and Institutions Code imposed by paragraph (7) of subdivision (b), the estimated reasonable costs of the Department of Food and Agriculture for the costs resulting from the

notification provisions set forth in Section 5343.5 of the Food and Agricultural Code , the estimated reasonable costs of the department for the costs associated with subdivisions (d) and (e) of Section 27560 , and the estimated reasonable costs of department firearms-related regulatory and enforcement activities related to the sale, purchase, possession, loan, or transfer of firearms pursuant to any provision listed in Section 16580 .

(d) Where the electronic or telephonic transfer of applicant information is used, the department shall establish a system to be used for the submission of the fees described in this section to the department.

§28226

If funding is provided, there shall be within the California Highway Patrol, a statewide firearms trafficking task force for the effective cooperative enforcement of the laws of this state concerning the distribution and possession of firearms.

(a) The task force shall be comprised of municipal and state law-enforcement officers and may include federal law enforcement officers. Such task force shall be authorized to conduct any investigation authorized by this section at any place within the state as may be deemed necessary.

(b) The task force may request and may receive from any federal, state or local agency, cooperation and assistance in the performance of its duties, including the temporary assignment of personnel, which may be necessary to carry out the performance of its functions.

(c) The task force may enter into mutual assistance and cooperation agreements with other states pertaining to firearms law-enforcement matters extending across state boundaries and may consult and exchange information and personnel with agencies of other states with reference to firearms law enforcement problems of mutual concern.

(d) The Commissioner of the CHP may appoint a commanding officer and such other personnel as the commissioner deems necessary for the duties of the task force, within available appropriations.

(e) The task force shall: (1) Review the problem of illegal trafficking in firearms and its effects, including its effects on the public, and implement solutions to address the problem; (2) identify persons illegally trafficking in firearms and focus resources on prosecuting such persons; (3) track firearms which were sold or distributed illegally and implement solutions to remove such firearms from persons illegally in possession of them; and (4) coordinate its activities with other law enforcement agencies within and without the state.

§28227

If funding is provided, there shall be the Firearms Bounty Fund (“Fund”) to be administered by the California Highway Patrol. The Fund shall be operated as a proprietary fund and shall consist of monies appropriated to the Fund, federal grants to the Fund, or private monies donated to the Fund.

(a) Disbursements from the Fund shall be used exclusively for the payment of cash rewards to persons who provide California law enforcement agencies with tips that lead to the adjudication or conviction of:

(1) A person or entity engaged in the illegal sale, rental, lease, or loan of a firearm in exchange for money or another thing of value; or

(2) A person who has committed a crime with a firearm.

(b) The amount of each cash reward shall be determined at the discretion of the Commissioner of the CHP, and the cash reward may range up to $100,000 per tip.

(c) The Commissioner of the CHP shall report annually to the Governor and Legislature all income and expenditures of the Fund.

(d) The Governor, by a proposed notice to the Legislature, may terminate the Fund if the Governor determines that the Fund is no longer necessary.

(e) If monies exist in the Fund at the time of its termination, the monies shall be deposited in the General Fund or if donated, returned to the donor(s).

(f) The proposed notice to terminate the Fund shall be submitted to the Legislature for a 45-day period of review, excluding Saturdays, Sundays, legal holidays, and days of recess. If the Legislature does not approve or disapprove by resolution within the 45-day review period, the proposed notice to terminate the Fund shall be deemed approved

§28228

If funding is provided, there shall be an Anti-Gun Trafficking Council Grant Program

(a) When making grants, the Council shall consider and give priority to:

(1) Comprehensive and coordinated law enforcement and prosecution programs that target criminals and juveniles who use or illegally possess firearms;

(2) Law enforcement and prosecution salaries and overtime in support of firearm-violence reduction programs;

(3) Covert firearms-related investigations and debriefing of criminal and juvenile arrestees and offenders for information related to illegal firearms trafficking;

(4) Initiatives that support the tracing of firearms used to commit crimes or delinquent acts and the identification of illegal firearms traffickers;

(5) Purchases of technology and information systems to support firearm violence reduction initiatives; and

(6) Other efforts that aid in apprehending and prosecuting criminals or apprehending and filing a complaint against juveniles who use or illegally possess firearms.

(b) The Legislature shall adopt regulations for the grant process and the oversight of grants made by the Council.

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

PROPONENT: San Diego County Bar Association

STATEMENT OF REASONS

The Problem: Gun trafficking is a serious problem, and fighting it does not get nearly as many resources as it deserves. Other states have implemented various programs to combat gun trafficking, but California has lagged.

The Solution: This resolution allows but does not require the creation and funding of three programs to combat gun trafficking: (1) Modeled after Connecticut, a task force of state and local law enforcement officers to identify and prosecute gun traffickers, track and remove guns that are illegally possessed, and coordinate with law enforcement agencies outside the state. (2) Modeled after D.C., a bounty fund that pays a cash bonus to anyone who provides information

leading to the adjudication or conviction of a gun trafficker. (3) Modeled after Maryland, a grant program for projects to fight gun trafficking.

IMPACT STATEMENT
This resolution does not affect any other law, statute, or rule. Additional changes might be warranted if the legislature adopts any of the new programs, but this resolution does not require they be adopted.

CURRENT OR PRIOR RELATED LEGISLATION
None known

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RESPONSIBLE FLOOR DELEGATE: Ben Rudin

RESOLUTION 14-10-2019

DIGEST
Firearms: Felony Conviction for Possession Only if Person is Aware of Outstanding Warrant
Amends Penal Code sections 29800 and 29805 to prohibit the conviction of an individual who legally possesses a firearm when they are unaware of an outstanding warrant.

RESOLUTIONS COMMITTEE RECOMMENDATION
APPROVE IN PRINCIPLE

History:
Similar to Resolution 06-10-2018, which was approved in principle.

Reasons:
This resolution amends Penal Code sections 29800 and 29805 to prohibit the conviction of an individual who legally possesses a firearm when they are unaware of an outstanding warrant. This resolution should be approved in principle because it furthers due process and prevents unwarranted intrusions into a potentially innocent person's life.

Under the current language of Penal Code section 29800, an individual may be arrested and convicted of felony possession of a firearm based on having an outstanding warrant regardless of whether the individual has notice of this warrant. Under Penal Code section 29805, an individual may be arrested and convicted of misdemeanor possession of a firearm based on them having an outstanding warrant regardless of whether the individual has notice of this warrant.

A warrant is not a conviction and can be issued without notice for various reasons, none of which should deprive an individual of his or her right to legally own or possess a firearm without due process. The proposed language would remove the possibility of a person receiving a felony or misdemeanor conviction for possession of a firearm when that person lawfully owns, possesses, purchases, or controls a firearm if they are unaware that a warrant has been issued for their arrest and is currently outstanding. If an individual is aware that there is an outstanding warrant for their arrest, then they would be guilty of felony or misdemeanor possession of a firearm. Because the proposed resolution limits conviction for possessing a firearm to someone who has knowledge that a warrant has been issued and is outstanding, the resolution should be approved.

This resolution is similar to Senate Bill 701 (Jones), which was vetoed by the Governor on July 30, 2019, and is in the Senate for consideration of the veto.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Penal Code sections 29800 and 29805 to read as follows:

§29800

(a) (1) Any person who has been convicted of, or has knowledge that a warrant has been issued and is outstanding for ~~an outstanding warrant for~~, a felony under the laws of the United States, the State of California, or any other state, government, or country, or of an offense enumerated in subdivision (a), (b), or (d) of Section 23515, or who is addicted to the use of any narcotic drug, and who owns, purchases, receives, or has in possession or under custody or control any firearm is guilty of a felony.

(2) Any person who has two or more convictions for violating paragraph (2) of subdivision (a) of Section 417 and who owns, purchases, receives, or has in possession or under custody or control any firearm is guilty of a felony.

(b) Notwithstanding subdivision (a), any person who has been convicted of a felony or of an offense enumerated in Section 23515, when that conviction results from certification by the juvenile court for prosecution as an adult in an adult court under Section 707 of the Welfare and Institutions Code, and who owns or has in possession or under custody or control any firearm is guilty of a felony.

(c) Subdivision (a) shall not apply to a person who has been convicted of a felony under the laws of the United States unless either of the following criteria is satisfied:

(1) Conviction of a like offense under California law can only result in imposition of felony punishment.

(2) The defendant was sentenced to a federal correctional facility for more than 30 days, or received a fine of more than one thousand dollars ($1,000), or received both punishments

§29805

(a) Except as provided in Section 29855, subdivision (a) of Section 29800, or subdivision (b), any person who has been convicted of, or has knowledge that a warrant has been issued and is outstanding for ~~or has an outstanding warrant for,~~ a misdemeanor violation of Section 71, 76, 136.1, 136.5, or 140, subdivision (d) of Section 148, subdivision (f) of Section 148.5, Section 171b, paragraph (1) of subdivision (a) of Section 171c, Section 171d, 186.28, 240, 241, 242, 243, 243.4, 244.5, 245, 245.5, 246.3, 247, 273.5, 273.6, 417, 417.6, 422, 422.6, 626.9, 646.9, 830.95, 17500, 17510, 25300, 25800, 30315, or 32625, subdivision (b) or (d) of Section 26100, or Section 27510, or Section 8100, 8101, or 8103 of the Welfare and Institutions Code, any firearm-related offense pursuant to Sections 871.5 and 1001.5 of the Welfare and Institutions Code, Section 490.2 if the property taken was a firearm, or of the conduct punished in subdivision (c) of Section 27590, and who, within 10 years of the conviction, or if the individual has knowledge that a warrant has been issued and is outstanding ~~has an outstanding warrant,~~ owns, purchases, receives, or has in possession or under custody or control, any firearm is guilty of a public offense, punishable by imprisonment in a county jail not exceeding one year or in the state prison, by a fine not exceeding one thousand dollars ($1,000), or by both that imprisonment and fine.

(b) Any person who is convicted, on or after January 1, 2019, of a misdemeanor violation of Section 273.5, and who subsequently owns, purchases, receives, or has in possession or under custody or control, any firearm is guilty of a public offense, punishable by imprisonment in a county jail not exceeding one year or in the state prison, by a fine not exceeding one thousand dollars ($1,000), or by both that imprisonment and fine.

(c) The court, on forms prescribed by the Department of Justice, shall notify the department of persons subject to this section. However, the prohibition in this section may be reduced, eliminated, or conditioned as provided in Section 29855 or 29860.

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

PROPONENT: Los Angeles County Bar Association.

STATEMENT OF REASONS

The Problem: It has long been the law that before a person is prohibited from owning a firearm there must be a conviction for a disqualifying crime. (There are exceptions for domestic violence restraining orders and "red flag" gun removal that have nothing to do with this resolution.) In 2017 the Legislature added a disqualifier when a person has an outstanding warrant. This is problematic. A person may not even know that an arrest warrant is outstanding. Courts issue arrest and/or bench warrants without notification. Thus a warrant could issue and the person become a felon for possessing a firearm even though there was no knowledge that the person was prohibited from owning a firearm.

The Solution: This resolution fixes the problem by requiring the person to have knowledge that a warrant has issued and is outstanding. Persons with convictions for disqualifying crimes remain disqualified from owning/possessing firearms.

IMPACT STATEMENT
This proposed resolution does not affect any other law, statute or rule.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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

RESPONSIBLE FLOOR DELEGATE: Mark Harvis

RESOLUTION 14-11-2019

DIGEST
Firearms: Automated Disabling of Firearms
Adds Penal Code section 23635.1 to require installation of GPS or similar technology that automatically disengages or disables a firearm within one thousand feet of specified locations.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution adds Penal Code section 23635.1 to require installation of GPS or similar technology that automatically disengages or disables a firearm within one thousand feet of specified locations. This resolution should be disapproved because it is likely unconstitutional, and fails to demonstrate that the proposal is technologically feasible and can be implemented within the proposed time frame.

The resolution is constitutionally infirm. The United States Supreme Court struck down a similar requirement that guns be rendered inoperable in the home. (See *Heller v. D.C.* (2008) 554 U.S. 570.) This resolution would deprive homeowners who live within 1,000 feet of a school, place of worship, or government building, from the right to defend themselves with an operable firearm. The 1,000-foot requirement concerning a plethora of protected buildings in the community would effectively render all firearms inoperable throughout most cities and suburban areas, further exacerbating the proposal's constitutional infirmity.

Moreover, there is no showing that the requirement is technologically feasible. While global positioning systems may work in an electronic device, such as a mobile phone, firearms are not electronic devices. Even if transformed into electronic devices with GPS capability, there is no showing that the mechanical function of a firearm can be electronically disabled. Even if technologically feasible, it is doubtful that the required alternations of firearms can be implemented within the time frame specified by the resolution.

TEXT OF RESOLUTION

RESOLVED, that the Conference of California Bar Associations recommends that legislation be sponsored to add Penal Code section 23635.1 to read as follows:

§23635.1

(a) Any firearm sold or transferred in this state by a licensed firearms dealer, including a private transfer through a dealer, and any firearm manufactured in this state, shall include global positioning technology and/or similar technology which automatically disengages and/or

disables any firearm within one thousand (1000) feet of a school, religious place of worship, and/or state government building and/or facility.

(b) Nothing in this division applies to a local government, local agency, or state law enforcement agency.

(c) This section shall be effective on January 1, 2022.

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

PROPONENT: Joseph A. Goldstein, Jonathan A. Goldstein, Charles H. Goldstein, Marc Sallus, Arwen Johnson, Nick Stuart-Oaten, Robert Bitonte, Cacilia Kim, Marc Harvis, Jeeane Desanto

STATEMENT OF REASONS

The Problem: Currently, existing law as it applies to firearms does not utilize global positioning technology common in cell phones to prevent mass murder. Mass murder in schools, religious places of worship, and/or state government buildings and/or facilities is unfortunately a common fact of life in the United States.

The Solution: This proposed resolution would require any firearm sold or transferred in this state by a licensed firearms dealer, including a private transfer through a dealer, and any firearm manufactured in this state, shall include global positioning technology and/or similarly technology which automatically disengages and disables any firearm within one thousand (1000) feet of a school, religious place of worship, and/or state government building and/or facility. This resolution will save lives and could prevent mass murder.

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

CURRENT OR PRIOR RELATED LEGISLATION
None known.

AUTHOR AND/OR PERMANENT CONTACT: Joseph A. Goldstein, The Goldstein Law Firm, 8912 Burton Way, Beverly Hills, California 90211; 310 553-4746; fax 310 282 8070; josephgoldsteinesq@gmail.com

RESPONSIBLE FLOOR DELEGATE: Joseph A. Goldstein

COUNTERARGUMENTS BY BAR ASSOCIATIONS AND CLA SECTIONS

SDCBA

The SDCBA Delegation recommends Disapproval of Resolution 14-11-2019. Delegation members have supported and proposed gun safety proposals in the past, but this one raises serious constitutional and moral issues. Constitutionally, the Supreme Court has struck down

requirements that guns be rendered inoperable in the home. (See *Heller v. D.C.* (2008) 554 U.S. 570.) For those who live within 1,000 feet of a school, place of worship, or government building, their constitutional rights would be violated by this resolution. Indeed, the 1000 foot requirement combined with the various covered buildings would practically require all guns be rendered inoperable throughout most cities, urban communities and suburban communities. Morally, people should not lose the right to defend themselves in their home based on where their home is located, and under this resolution, they would.

RESOLUTION 14-12-2019

DIGEST
Perjury: Change from Felony to Wobbler
Amends Penal Code section 126 to make the crime of perjury a wobbler.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution amends Penal Code section 126 to make the crime of perjury a wobbler. This resolution should be disapproved because perjury undermines our system of government and should be treated as a serious felony-level crime with the degree of severity addressed in relation to the length of sentence, and DMV falsifications can already be charged as a misdemeanor.

Perjury is a felony under current law. (Pen. Code, § 126.) The court may sentence a person convicted of the crime to a term of two, three or four years. (*Ibid*.) Falsifications in DMV paperwork may be charged as a misdemeanor. (See Veh. Code, § 20.)

The proponent argues that certain instances of perjury are not as serious as other instances, thereby warranting discretion in charging and/or sentencing the offense as a misdemeanor. The problem is that perjury, no matter how small, undermines the confidence, dignity and efficacy of our system of government. In addition, perjury is often hard to detect and prove. As such, a higher level of punishment is necessary to meaningfully foster respect for governmental processes and proceedings, and to deter the temptation to lie in the first place. Punishing perjury as a felony serves a needed, valid governmental interest. Without a serious consequence for perjury, there is no real disincentive to lie under oath.

This resolution should be disapproved because it is unnecessary. An example is given of an undocumented immigrant who makes a false statement under oath to the DMV to procure a driver's license. However, false statements to the DMV can be charged as a misdemeanor under Vehicle Code section 20.

This resolution should be disapproved because it goes too far and marginalizes the significance of perjury in administrative matters. There are good reasons why applicant declarations under oath for other licenses and applications should remain felonies. The agencies that license and regulate professions, like contractors, real estate agents, etc., need to ensure applicant information is truthful. Felony level punishment for perjured statements should remain in those instances.

The resolution does not necessarily accomplish its intended goal. Immigrants can still be charged with violations of Penal Code sections 114 (use of false documents to conceal true citizenship or resident alien status) and 115 (procuring and offering false or forged instrument to be filed, registered, or recorded in any public office), both of which are felonies, independent of the lie made in order to conceal and mislead.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Penal Code section 126 to read as follows:

§126

Perjury is punishable by imprisonment <u>in the county jail not exceeding one year or by imprisonment</u> pursuant to subdivision (h) of Section 1170 for two, three or four years.

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

PROPONENT: Los Angeles County Bar Association.

STATEMENT OF REASONS

<u>The Problem</u>: Perjury is currently a straight felony punishable by up to four years. Perjury is not a good thing, but not all perjury is the same. Perjury in a civil deposition is much less serious (in most cases) than perjury on the witness stand in a criminal trial. Making a false statement in a DMV application because of immigration issues is not as serious as the serial identity thief who perjures himself to obtain numerous fake driver's licenses. Regardless of seriousness, all perjury is punished as a felony.

<u>The Solution</u>: This resolution gives the District Attorney the discretion to charge perjury either as a felony or misdemeanor. This allows the prosecutor to evaluate the seriousness and determine the fair and proper charging level.

IMPACT STATEMENT
This proposed resolution does not affect any other law, statute or rule.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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RESOLUTION 14-13-2019

DIGEST
Shoplifting: Unauthorized Use of Personal Identifying Information
Amends Penal Code section 530.5 to require the unauthorized use of personal identifying information to obtain property not exceeding $950 to be treated as shoplifting.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reason:
This resolution amends Penal Code section 530.5 to require the unauthorized use of personal identifying information to obtain property to not exceeding $950 to be treated as shoplifting. This resolution should be disapproved because the Legislature has made it clear that a violation of section 530.5 is not a theft crime and therefore is outside of the scope of Proposition 47.

The author identifies a conflict between different appellate courts regarding the application of Proposition 47 to crimes charged under Penal Code section 530.5 (See *People v. Jimenez* (2018) 22 Cal.App.5th 1282; *People v. Garrett* (2016) 248 Cal.App.4th 82; *People v. Liu* (2018) 21 Cal.App.5th 143); and *People v. Sanders* (2018) 22 Cal.App.5th 397.) These cases are under review by the California Supreme Court. The resolution would resolve the conflict by finding that Proposition 47 does apply to crimes of unlawful use of identifying information.

The Legislature has made its intention clear through the language and placement of the statute. "Section 530.5 is placed in the chapter of the Pen. Code defining 'False Personation and Cheats,' which includes crimes such as marriage by false pretenses [Pen. Code, § 528] and falsifying birth certifications and licenses [Pen. Code, §§ 529a, 529.5]." (*People v. Liu* (2018) 21 Cal.App.5th 143,151.) Thus, the Legislature has used "just about every way available" to make sure that a violation of section 530.5 is not a theft offense. (*People v. Romanowski* (2017) 2 Cal.5th 903, 908.) The unauthorized use of personal identifying information is also distinguishable from theft offenses because the harm to the victim flowing from the misuse of the information far exceeds the value of any actual property obtained by the misuse. (*People v. Valenzuela* (2012) 205 Cal.App.4th 800, 808 [quoting Sen. Com. on Public Safety, Analysis of Assem. Bill No 2885 (2005-2006 Reg. Sess.) as amended May 26, 2006: "Identity theft in the electronic age is an essentially unique crime, not simply a form of grand theft …. Grand theft is typically a discrete event, not a crime that creates ripples of harm to the victim that flow from the initial misappropriation."].)

Proposition 47 was approved by the voters in 2014 to reduce the punishment for many theft related offenses to misdemeanors included shoplifting where the value taken did not exceed $950. While the California Supreme Court in *People v. Gonzales* (2017) 2 Cal.5th 858, has applied the statute to stolen checks, and in *People v. Garrett* (2016) 248 Cal.App.4th 82, the court deemed the use of a stolen credit card as shoplifting, both of these cases involved a theft crime. Prosecutors should maintain the discretion to charge a section 530.5 crime as a felony when called for by the facts and circumstances of the crime, while courts retain discretion to

reduce the charge to a misdemeanor pursuant to Penal Code section 17, subdivision (b), if appropriate.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Penal Code Code section 530.5 to read as follows:

§530.5

(a) Every person who willfully obtains personal identifying information, as defined in subdivision (b) of Section 530.55, of another person, and uses that information for any unlawful purpose, including to obtain, or attempt to obtain, credit, goods, services, real property, or medical information without the consent of that person, is guilty of a public offense, and upon conviction therefor, shall be punished by a fine, by imprisonment in a county jail not to exceed one year, or by both a fine and imprisonment, or by imprisonment pursuant to subdivision (h) of Section 1170.

(b) In any case in which a person willfully obtains personal identifying information of another person, uses that information to commit a crime in addition to a violation of subdivision (a), and is convicted of that crime, the court records shall reflect that the person whose identity was falsely used to commit the crime did not commit the crime.

(c)(1) Every person who, with the intent to defraud, acquires or retains possession of the personal identifying information, as defined in subdivision (b) of Section 530.55, of another person is guilty of a public offense, and upon conviction therefor, shall be punished by a fine, by imprisonment in a county jail not to exceed one year, or by both a fine and imprisonment.

(2) Every person who, with the intent to defraud, acquires or retains possession of the personal identifying information, as defined in subdivision (b) of Section 530.55, of another person, and who has previously been convicted of a violation of this section, upon conviction therefor shall be punished by a fine, by imprisonment in a county jail not to exceed one year, or by both a fine and imprisonment, or by imprisonment pursuant to subdivision (h) of Section 1170.

(3) Every person who, with the intent to defraud, acquires or retains possession of the personal identifying information, as defined in subdivision (b) of Section 530.55, of 10 or more other persons is guilty of a public offense, and upon conviction therefor, shall be punished by a fine, by imprisonment in a county jail not to exceed one year, or by both a fine and imprisonment, or by imprisonment pursuant to subdivision (h) of Section 1170.

(d) (1) Every person who, with the intent to defraud, sells, transfers, or conveys the personal identifying information, as defined in subdivision (b) of Section 530.55, of another person is guilty of a public offense, and upon conviction therefor, shall be punished by a fine, by imprisonment in a county jail not to exceed one year, or by both a fine and imprisonment, or by imprisonment pursuant to subdivision (h) of Section 1170.

(2) Every person who, with actual knowledge that the personal identifying information, as defined in subdivision (b) of Section 530.55, of a specific person will be used to commit a violation of subdivision (a), sells, transfers, or conveys that same personal identifying information is guilty of a public offense, and upon conviction therefor, shall be punished by a fine, by imprisonment pursuant to subdivision (h) of Section 1170, or by both a fine and imprisonment.

(e) Every person who commits mail theft, as defined in Section 1708 of Title 18 of the United States Code, is guilty of a public offense, and upon conviction therefor shall be

punished by a fine, by imprisonment in a county jail not to exceed one year, or by both a fine and imprisonment. Prosecution under this subdivision shall not limit or preclude prosecution under any other provision of law, including, but not limited to, subdivisions (a) to (c), inclusive, of this section.

(f) An interactive computer service or access software provider, as defined in subsection (f) of Section 230 of Title 47 of the United States Code, shall not be liable under this section unless the service or provider acquires, transfers, sells, conveys, or retains possession of personal information with the intent to defraud.

(g) Notwithstanding subdivisions a and c, where the person's unlawful purpose or intended fraud in using the personal identifying information of another amounts to shoplifting as defined in Penal Code section 459.5, the prosecution shall allege that charge only, except that a person with 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 may be punished pursuant to subdivision (h) of Section 1170.

(h) Notwithstanding subdivisions a and c, where the person's unlawful purpose or intended fraud in using the personal identifying information of another involves the obtaining of any money, services, credit, labor, goods, real or personal property valued equal to or less than $950, the offense shall be punished pursuant to Penal Code section 490.2, except that a person with 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 may be punished pursuant to subdivision (h) of Section 1170.

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

PROPONENT: Sacramento County Bar Association

STATEMENT OF REASONS

The Problem: The current version of Penal Code section 530.5 provides for both misdemeanor and felony punishment for a range of fraudulent and/or unlawful use of another's personal identifying information. In 2014, voters approved Proposition 47, the Reduced Penalties for Some Crimes Initiative, also known as the Safe Neighborhoods and Schools Act. Among the changes and with some exceptions, the proposition mandated misdemeanor-only treatment for theft-related offenses where the value of the property taken did not exceed $950. The proposition also created Penal Code section 459.5 and 490.2. Section 459.5 expressly defines shoplifting conduct and prohibits prosecutors from charging burglary or other theft crimes for the same conduct. The statute also requires section 459.5 be charged when the facts apply Any act of shoplifting as defined in subdivision (a) shall be charged as shoplifting." (Penal Code § 459.5(b).)

After Proposition 47, prosecutors seeking to avoid the effects of the new theft-related statutes began charging shoplifting and other similar theft-related conduct as felonies under new theories, including Penal Code section 530.5. The result has been inconsistent prosecutions across the counties, contrary to the intent of the people.

In *People v. Gonzales*, the Supreme Court of California interpreted the new statute to apply to a defendant who had cashed personal checks belonging to another. (*People v. Gonzales* (2017) 2 Cal.5th 858.) In *People v. Jimenez*, the Court of Appeal held similarly when it

prohibited a prosecution under section 530.5 for conduct that fell under the definition of shoplifting. (*People v. Jimenez* (2018) 22 Cal.App.5th 1282.) And in *People v. Garrett*, the Court of Appeal also explained that when someone enters a store and makes purchases with a stolen credit, that person commits shoplifting. (*People v. Garrett* (2016) 248 Cal.App.4th 82.)

Two appellate courts have reached arguably different results. In *People v. Liu*, the Court of Appeal found a conviction under section 530.5, subdivision c, did not qualify for resentencing under Prop. 47. (*People v. Liu* (2018) 21 Cal.App.5th 143.) Even though the facts in *Liu* did not contemplate shoplifting, the court broadly indicated section 530.5 lies outside the effect of Prop. 47. In *People v. Sanders*, the court also found section 530.5 outside the effect of Prop. 47 in holding that it is not a theft crime. (*People v. Sanders* (2018) 22 Cal.App.5th 397.) Both cases fail to address the Supreme Court's ruling in *Gonzales.*

The Solution: This amendment will bring Penal Code section 530.5 in line with the intentions of the people and jurisprudence. Specifically and with exceptions, the prosecution will not be able to allege a felony offense where (1) the underlying conduct amounts to shoplifting as defined in section 459.5 or (2) the underlying conduct amounts to a theft where the value of the money, services, credit, labor, goods, real or personal property obtained lost was less than $950.

IMPACT STATEMENT
This resolution may require additional statutory changes, potentially including Penal Code Sections 459.5, 490.2, and 490.4.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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