RESOLUTION 16-01-2019

DIGEST
Sentencing: Alternative Programs Where Appropriate
Amends Penal Code section 1203.097 to allow courts to order an alternative program where it is more likely to reduce recidivism.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution amends Penal Code section 1203.097 to allow courts to order an alternative program where it is more likely to reduce recidivism. This resolution should be disapproved because it is overbroad and may have unintended consequences.

Under current law, an individual may be sentenced to a batterer's program for a crime that involves a family member but does not include violence or battery on that family member. (Pen. Code § 1203.097)

For example, as currently written, an individual who steals from a spouse is required to attend a batterers program. However, this resolution is not limited to non-violent offenses. As a result, it could have the effect of permitting offenders who actually did engage in domestic violence to evade the programs that are specifically designed to address the psychological dynamics of batterers. This could also permit prosecutors to offer defendants a plea bargain that omits the batterer's program even when it should be required. While it might be possible to improve the law in this area the approach suggested by this resolution is not the way to accomplish that result.

TEXT OF RESOLUTION

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

§1203.097
(a) If a person is granted probation for a crime in which the victim is a person defined in Section 6211 of the Family Code, the terms of probation shall include all of the following:
(1) A minimum period of probation of 36 months, which may include a period of summary probation as appropriate.
(2) A criminal court protective order protecting the victim from further acts of violence, threats, stalking, sexual abuse, and harassment, and, if appropriate, containing residence exclusion or stay-away conditions.
(3) Notice to the victim of the disposition of the case.

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

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

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

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

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

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

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

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

(6) Successful completion of a batterer's program, as defined in subdivision (c), ~~or if none is available, another appropriate counseling program designated by the court,~~ for a period not less than one year with periodic progress reports by the program to the court every three months or less and weekly sessions of a minimum of two hours class time duration. The defendant shall attend consecutive weekly sessions, unless granted an excused absence for good cause by the program for no more than three individual sessions during the entire program, and shall complete the program within 18 months, unless, after a hearing, the court finds good cause to modify the requirements of consecutive attendance or completion within 18 months. <u>If a batterer's program as defined in subdivision (c) is unavailable, or if the court determines that an</u>

alternative treatment program is both appropriate and more likely to reduce the risk that the defendant will reoffend in the future given the circumstances of the case, the court may order the defendant to complete that alternative program in lieu of a batterer's program.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(B) The program shall immediately report any violation of the terms of the protective order, including any new acts of violence or failure to comply with the program requirements, to the court, the prosecutor, and, if formal probation has been ordered, to the probation department.

The probationer shall file proof of enrollment in a batterer's program with the court within 30 days of conviction.

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

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

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

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

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

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

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

(1) The probation department shall make an investigation and take into consideration the defendant's age, medical history, employment and service records, educational background, community and family ties, prior incidents of violence, police report, treatment history, if any,

demonstrable motivation, and other mitigating factors in determining which batterer's program would be appropriate for the defendant. This information shall be provided to the batterer's program if it is requested. The probation department shall also determine which community programs the defendant would benefit from and which of those programs would accept the defendant. The probation department shall report its findings and recommendations to the court.

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

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

(A) Social, economic, and family background.

(B) Education.

(C) Vocational achievements.

(D) Criminal history.

(E) Medical history.

(F) Substance abuse history.

(G) Consultation with the probation officer.

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

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

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

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

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

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

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

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

(D) Procedures to inform the victim regarding the requirements for the defendant's participation in the intervention program as well as regarding available victim resources. The

victim also shall be informed that attendance in any program does not guarantee that an abuser will not be violent.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(ii) The demonstration by the program that it possesses adequate administrative and operational capability to operate a batterer's treatment program. The program shall provide

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

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

(iv) The payment of the approval fee.

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

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

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

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

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

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

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

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

PROPONENT: Los Angeles County Bar Association

STATEMENT OF REASONS

The Problem: Under current law, defendants convicted of offenses impacting members of their own families are required, without exception, to participate in a year-long "batterer's" program. The problem is that not every mandatory offense involves violence, or is best handled by forcing the defendant to undergo a batterer's program. A schizophrenic teenager who, while off his medication, breaks a window in his parents' house, for example, is required under the law to spend a year in a domestic violence class. A girlfriend who steals from her boyfriend is also required, under the law, to spend a year in a "batterer's" program. Such programs are expensive (costing thousands of dollars) and are generally paid out of family funds, often hurting the alleged victim. Such programs are also time consuming (which can negatively impact a low-functioning defendants ability to complete other, more meaningful treatment), and frequently fail to address the cause of the underlying problem.

The Solution: This resolution would permit (but not require) judges to order alternative programs where the individual facts of the case establish that a "batterer's" program is inappropriate and less likely to reduce recidivism. A court would still be required to replace the batterer's program with an alternative program better designed to address the root causes of the defendant's offense.

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: Nick Stewart-Oaten

RESOLUTION 16-02-2019

DIGEST
Sentencing: No Extensions of Sentence Without Conviction or Plea Agreement
Amends Penal Code section 2932 to provide that inmate sentences shall not be extended without a conviction or plea agreement.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution amends Penal Code section 2932 to provide that inmate sentences shall not be extended without a conviction or plea agreement. This resolution should be disapproved because it conflates altering an inmate's sentence with revoking earned good time credit, and because prison disciplinary procedures are not comparable to those of a criminal prosecution.

The basis of the argument for this resolution is the claim that a finding of guilt in a disciplinary hearing may result in an "extension of [the inmate's] sentence." On the contrary, the loss of good time credits does not affect a prisoner's underlying sentence. Once a person begins serving a sentence, they are governed by a distinct and exclusive scheme for earning credits to shorten the period of incarceration. (*People v. Buckhalter* (2001) 26 Cal.4th 20, 31.) The denial of, or revocation of, such credits is based on maintaining institutional safety and meeting correctional goals. These decisions are made in "the unique environment in which prison officials must accomplish 'the basic and unavoidable task of providing reasonable personal safety for guards and inmates.'" (*In re Zepeda* (2006) 141 Cal.App.4th 1493, 1498, fn. 5.) Thus, not all rules violations are criminal and prosecutable.

A prisoner has no constitutional right to good conduct credits. While it is unquestioned that once earned, an inmate has a protected liberty interest therein and is entitled to due process before being deprived of them, the Supreme Court has recognized the legitimate institutional needs of assuring the safety of inmates and preserving the disciplinary process as a means of rehabilitation. (*Wolff v. McDonnell* (1974) 418 U.S. 539, 557, 562-563.) Thus, the requirements of due process are met if there is "some evidence from which the conclusion of the administrative tribunal could be deduced." (*Superintendent v. Hill* (1985) 472 U.S. 445, 455-456.) On review, a court will apply an "extraordinarily deferential standard of review" by which disciplinary action will not be disturbed so long as "'some evidence'" supports the action taken. (*Zepeda, supra,* 141 Cal.App.4th at p. 1498.) "Revocation of good time credits is not comparable to a criminal conviction." (*Hill, supra,* 472 U.S. at p. 456.)

An inmate who has lost good time credits through a disciplinary proceeding may seek administrative review, and file for habeas corpus relief in the courts. The inability to immediately seek damages in a civil proceeding is not sufficient reason to place strictures on the correctional scheme established by the Penal Code.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Association recommends that legislation be sponsored to amend Penal Code section 2932, to read as follows

§2932

(a)(1) For any time credit accumulated pursuant to Section 2931 or 2933, not more than 360 days of credit may be denied or lost for a single act of murder, attempted murder, solicitation of murder, manslaughter, rape, sodomy, or oral copulation accomplished against the victim's will, attempted rape, attempted sodomy, or attempted oral copulation accomplished against the victim's will, assault or battery causing serious bodily injury, assault with a deadly weapon or caustic substance, taking of a hostage, escape with force or violence, or possession or manufacture of a deadly weapon or explosive device, whether or not prosecution is undertaken for purposes of this paragraph. Solicitation of murder shall be proved by the testimony of two witnesses, or of one witness and corroborating circumstances.

(2) Not more than 180 days of credit may be denied or lost for a single act of misconduct, except as specified in paragraph (1), which could be prosecuted as a felony whether or not prosecution is undertaken.

(3) Not more than 90 days of credit may be denied or lost for a single act of misconduct which could be prosecuted as a misdemeanor, whether or not prosecution is undertaken.

(4) Not more than 30 days of credit may be denied or lost for a single act of misconduct defined by regulation as a serious disciplinary offense by the Department of Corrections and Rehabilitation. Any person confined due to a change in custodial classification following the commission of any serious disciplinary infraction shall, in addition to any loss of time credits, be ineligible to receive participation or worktime credit for a period not to exceed the number of days of credit which have been lost for the act of misconduct or 180 days, whichever is less. Any person confined in a secure housing unit for having committed any misconduct specified in paragraph (1) in which great bodily injury is inflicted upon a nonprisoner shall, in addition to any loss of time credits, be ineligible to receive participation or worktime credit for a period not to exceed the number of days of credit which have been lost for that act of misconduct. In unusual cases, an inmate may be denied the opportunity to participate in a credit qualifying assignment for up to six months beyond the period specified in this subdivision if the Secretary of the Department of Corrections and Rehabilitation finds, after a hearing, that no credit qualifying program may be assigned to the inmate without creating a substantial risk of physical harm to staff or other inmates. At the end of the six-month period and of successive six-month periods, the denial of the opportunity to participate in a credit qualifying assignment may be renewed upon a hearing and finding by the director.

(5) The prisoner may appeal the decision through the department's review procedure, which shall include a review by an individual independent of the institution who has supervisorial authority over the institution.

(b) For any credit accumulated pursuant to Section 2931, not more than 30 days of participation credit may be denied or lost for a single failure or refusal to participate. Any act of misconduct described by the Department of Corrections and Rehabilitation as a serious disciplinary infraction if committed while participating in work, educational, vocational, therapeutic, or other prison activity shall be deemed a failure to participate.

(c) Any procedure not provided for by this section, but necessary to carry out the purposes of this section, shall be those procedures provided for by the Department of Corrections and Rehabilitation for serious disciplinary infractions if those procedures are not in conflict with this section.

(1)(A) The Department of Corrections and Rehabilitation shall, using reasonable diligence to investigate, provide written notice to the prisoner. The written notice shall be given within 15 days after the discovery of information leading to charges that may result in a possible denial of credit, except that if the prisoner has escaped, the notice shall be given within 15 days of the prisoner's return to the custody of the secretary. The written notice shall include the specific charge, the date, the time, the place that the alleged misbehavior took place, the evidence relied upon, a written explanation of the procedures that will be employed at the proceedings and the prisoner's rights at the hearing. The hearing shall be conducted by an individual who shall be independent of the case and shall take place within 30 days of the written notice.

(B) The Department of Corrections and Rehabilitation may delay written notice beyond 15 days when all of the following factors are true:

(i) An act of misconduct is involved which could be prosecuted as murder, attempted murder, or assault on a prison employee, whether or not prosecution is undertaken.

(ii) Further investigation is being undertaken for the purpose of identifying other prisoners involved in the misconduct.

(iii) Within 15 days after the discovery of information leading to charges that may result in a possible denial of credit, the investigating officer makes a written request to delay notifying that prisoner and states the reasons for the delay.

(iv) The warden of the institution approves of the delay in writing.

The period of delay under this paragraph shall not exceed 30 days. The prisoner's hearing shall take place within 30 days of the written notice.

(2) The prisoner may elect to be assigned an employee to assist in the investigation, preparation, or presentation of a defense at the disciplinary hearing if it is determined by the department that either of the following circumstances exist:

(A) The prisoner is illiterate.

(B) The complexity of the issues or the prisoner's confinement status makes it unlikely that the prisoner can collect and present the evidence necessary for an adequate comprehension of the case.

(3) The prisoner may request witnesses to attend the hearing and they shall be called unless the person conducting the hearing has specific reasons to deny this request. The specific reasons shall be set forth in writing and a copy of the document shall be presented to the prisoner.

(4) The prisoner has the right, under the direction of the person conducting the hearing, to question all witnesses.

(5) At the conclusion of the hearing the charge shall be dismissed if the facts do not support the charge, or the prisoner may be found guilty on the basis of a preponderance of the evidence.

(d) If found guilty the prisoner shall be advised in writing of the guilty finding and the specific evidence relied upon to reach this conclusion and the amount of time-credit loss. The prisoner may appeal the decision through the department's review procedure, and may, upon final notification of appeal denial, within 15 days of the notification demand review of the department's denial of credit to the Board of Parole Hearings, and the board may affirm, reverse,

or modify the department's decision or grant a hearing before the board at which hearing the prisoner shall have the rights specified in Section 3041.5.

(e) Each prisoner subject to Section 2931 shall be notified of the total amount of good behavior and participation credit which may be credited pursuant to Section 2931, and his or her anticipated time-credit release date. The prisoner shall be notified of any change in the anticipated release date due to denial or loss of credits, award of worktime credit, under Section 2933, or the restoration of any credits previously forfeited.

(f)(1) If the conduct the prisoner is charged with also constitutes a crime, the department may refer the case to criminal authorities for possible prosecution. The department shall notify the prisoner, who may request postponement of the disciplinary proceedings pending the referral.

(2) The prisoner may revoke his or her request for postponement of the disciplinary proceedings up until the filing of the accusatory pleading. In the event of the revocation of the request for postponement of the proceeding, the department shall hold the hearing within 30 days of the revocation.

(3) Notwithstanding the notification requirements in this paragraph and subparagraphs (A) and (B) of paragraph (1) of subdivision (c), in the event the case is referred to criminal authorities for prosecution and the authority requests that the prisoner not be notified so as to protect the confidentiality of its investigation, no notice to the prisoner shall be required until an accusatory pleading is filed with the court, or the authority notifies the warden, in writing, that it will not prosecute or it authorizes the notification of the prisoner. The notice exceptions provided for in this paragraph shall only apply if the criminal authority requests of the warden, in writing, and within the 15 days provided in subparagraph (A) of paragraph (1) of subdivision (c), that the prisoner not be notified. Any period of delay of notice to the prisoner shall not exceed 30 days beyond the 15 days referred to in subdivision (c). In the event that no prosecution is undertaken, the procedures in subdivision (c) shall apply, and the time periods set forth in that subdivision shall commence to run from the date the warden is notified in writing of the decision not to prosecute. In the event the authority either cancels its requests that the prisoner not be notified before it makes a decision on prosecution or files an accusatory pleading, the provisions of this paragraph shall apply as if no request had been received, beginning from the date of the cancellation or filing.

(4) In the case where the prisoner is prosecuted by the district attorney, the Department of Corrections and Rehabilitation shall not deny time credit where the prisoner is found not guilty and may deny credit if the prisoner is found guilty, in which case the procedures in subdivision (c) shall not apply.

(g) If time credit denial proceedings or criminal prosecution prohibit the release of a prisoner who would have otherwise been released, and the prisoner is found not guilty of the alleged misconduct, the amount of time spent incarcerated, in excess of what the period of incarceration would have been absent the alleged misbehavior, shall be deducted from the prisoner's parole period.

(h) Nothing in the amendments to this section 1 made at the 1981-82 Regular Session of the Legislature shall affect the granting or revocation of credits attributable to that portion of the prisoner's sentence served prior to January 1, 1983.

(i) No inmate’s sentence shall be extended without a conviction, plea agreement, or negotiated settlement. This includes a loss of credits or anything else that increases the amount of time the inmate might be in prison relative to the amount if the inmate had not been found to have violated the given rule.

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

PROPONENT: San Diego County Bar Association

STATEMENT OF REASONS

The Problem: Current regulations for prison discipline amount to our justice system turned on its head. After an inmate is found to have committed a rule violation, it is referred for possible prosecution. If a trial occurs and the inmate is acquitted, it undoes the guilty disciplinary finding. If no prosecution occurs, the result of guilt and sanctions remains.

In short, after an inmate has been found to have violated a rule by the prison but is innocent, the inmate has to hope to be prosecuted for a chance to vitiate the guilty finding. If the prosecutor decides not to prosecute, whether it be due to resources or lack of evidence, the guilty result remains.

When a guilty finding results in an extension of their sentence, another problem is created: the inmate is precluded from filing a civil action if prevailing would necessarily mean the guilty finding is undone. That is known as the *Preiser-Heck* rule. *Heck v. Humphrey*, 512 U.S. 477 (1994) and *Preiser v. Rodriguez*, 411 U.S. 475 (1973). For example, imagine an inmate is found under the prison disciplinary process to have committed a battery against a peace officer. Part of the sanction is that his sentence gets extended through loss of good-time credits. The officer had actually attacked him unprovoked but made up the story to claim it was self-defense. Not only is the officer not punished while the inmate is, but on top of that, the inmate cannot sue the peace officer for excessive force based on the attack being unprovoked because prevailing would necessarily vitiate the guilty finding in the prison disciplinary process and alter the length of his sentence. If the sanctions *only* altered *conditions* of his confinement, such as loss of yard time or administrative segregation, a civil suit would not be barred. The Supreme Court might not find any constitutional problem with this system, but we can do better. The burden should be higher before an inmate's time can be extended and access to civil court be blocked.

The Solution: This resolution ensures that an inmate's sentence cannot be extended without a conviction, plea agreement, or negotiated settlement. The prison disciplinary process could still be used to punish inmates related to conditions of confinement, such as time in solitary confinement, loss of privileges, and so on. It would only prohibit the disciplinary process from extending an inmate's time in prison. This is not only better when it comes to due process, but it will ensure that inmates are not blocked from filing a civil action against those who wrong them when they have not been convicted or agreed to a plea.

IMPACT STATEMENT

This resolution may require related amendments to the California Code of Regulations. The specific regulation is Title 15, Division 3, Chapter 1, Subchapter 4, Article 5, Section 3316 (15 CCR § 3316).

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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RESOLUTION 16-03-2019

DIGEST
Prison: Desegregation of Transgender Individuals in California Prisons
Amends California Code of Regulations, title 15, section 3269, to ban separate-but-equal accommodations for transgender prisoners in the California jail system.

RESOLUTIONS COMMITTEE RECOMMENDATION
APPROVE IN PRINCIPLE

History:
No similar resolutions found.

Reasons:
This resolution amends California Code of Regulations, title 15, section 3269, to ban separate-but-equal accommodations for transgender prisoners in the California jail system. This resolution should be approved in principle because it will have the effect of making conditions safer.

Currently, the Department of Corrections and Rehabilitation generally houses inmates according to their assigned gender at birth. But transgender people suffer extreme rates of physical and sexual violence in jails and prisons. This is particularly true for transgender women who are housed with male prisoners. A study of California prisons has shown that 59 percent of transgender prisoners experience sexual assault, versus only 4.4 percent of the overall prison population. (www.ama-assn.org/press-center/press-releases/ama-urges-appropriate-placement-transgender-prisoners). Shortly after the Trump administration rolled back Obama-era protections for transgender prisoners, the American Medical Association adopted a new policy challenging the practice of prisons and jails housing transgender prisoners according to their birth or biological sex. The AMA urged that housing policies be changed to allow transgender prisoners, if they so choose, to be placed in correctional facilities that are reflective of their affirmed gender status. (*Ibid*.)

The current use of administrative segregation to reduce the risks of sex-based housing isolates those prisoners and differs little from punitive segregation or solitary confinement. It acts as further punishment by removing prisoners from the companionship of others, denying prisoners access to prison programs, and has been found to be psychologically damaging. While this resolution may go too far in mandating the classification committee accept the transgender inmate's preference, the proposed changes allow the inmates more autonomy in selection of their housing while requiring the prison staff to formulate proper plans to find and provide proper housing for transgender inmates instead of placing them in punitive conditions.

Last year, San Francisco County jails implemented some of the first transgender, gender variant, and non-binary policies and procedures in the country. In an effort to make conditions safer for all inmates, San Francisco County jails allow individuals who identify in these ways to choose their preferred housing, be identified by their proper pronoun, and choose the gender of the person conducting searches of them. (Gribbon, *S.F. County Jails First in Nation to Implement New Transgender Policies*, S. F. Examiner, Feb. 22, 2018.) While this resolution

addresses only the ability of transgender inmates to be housed in facilities that match their preferred gender identity, it is a start to treating these prisoners fairly and safely.

SB 132, sponsored by Senator Scott Wiener, is working its way through the Legislature. Among other things, the bill would require prison housing be consistent with the inmate's gender preference. Unlike the resolution, it provides for exceptions based on the health and safety needs of that individual.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that the Department of Corrections and Rehabilitation amend California Code of Regulations, title 15, section 3269 to read as follows:

§3269

Inmates shall accept Inmate Housing Assignments (IHAs) as directed by staff. It is the expectation that all inmates double cell, whether being housed in a Reception Center, General Population (GP), an Administrative Segregation Unit (ASU), a Security Housing Unit (SHU), or specialty housing unit. If staff determines an inmate is suitable for double celling, based on the criteria as set forth in this section, the inmate shall accept the housing assignment or be subject to disciplinary action for refusing. IHAs shall be made on the basis of available documentation and individual case factors. Inmates are not entitled to single cell assignment, housing location of choice, or to a cellmate of their choice.

(a) Upon arrival at an institution, facility, or program reception center, a designated custody supervisor shall screen an inmate for an appropriate housing assignment. The screening authority involved in the review and approval of an inmate's housing assignment must evaluate all factors to be considered when completing the Initial Housing Review, including but not limited to:

- Inmate name, CDC number, and Personal Identification number.
- Personal factors such as race, date of birth, age, weight, height, birth place, and whether the inmate is a foreign national.
- Receiving Institution.
- County of commitment.
- Out to court return and escape history.
- Length of sentence.
- Enemies and victimization history.
- Criminal influence demonstrated over other inmates.
- Previous housing status.
- Reason(s) for prior segregation.
- History of "S" suffix determination pursuant to CCR subsection 3377.1(c).
- History of in-cell assaults and/or violence.
- Security Threat Group affiliation.
- Involvement in a race based incident(s).
- Nature of commitment offense.
- Documented reports from prior cellmate(s) that the inmate intimidated, threatened, forced, and/or harassed him or her for sex.

• Documentation that the cellmate(s) refused to return to a cell occupied by the inmate because of fear, threats, or abuse perpetrated by the inmate.

• Documentation that the inmate has been the victim of a sexual assault or was previously single celled.

• Adjudicated Department Rules Violations Reports (RVR) where the inmate was found guilty as a perpetrator in an act of physical abuse, sexual abuse, sodomy, or other act of force against a cellmate.

(b) The screening authority shall complete the Initial Housing Review stating if the inmate is suitable for dorm/cell housing with or without special restrictions. Restrictions are any case factors which may limit the inmate's housing placement options such as, but not limited to:

• Security issues including ASU, Restricted Custody General Population (RCGP), and SHU placement.

• Request for Protective Custody.

• Medical or mental health issues.

• Personal factors such as age, weight, and height.

• Integrated Housing Code.

Staff shall ensure that the housing policies regarding special category inmates covered under specific litigation remain in place during the housing assignment.

(c) Upon placement in an ASU or SHU, inmates shall be screened for an appropriate cell assignment using the same criteria as inmates being screened for housing in the general population. The reason for ASU or SHU placement shall also be taken into consideration.

Based on available information and the inmate interview, the screening authority shall determine if the inmate is suitable for single or double celled housing, and shall complete a CDC Form 114-A1 (rev. 10/98), Inmate Segregation Profile. Unless approved for single cell assignment, an inmate in ASU or SHU is expected to share a cell with another inmate.

(d) Single cell status shall be considered for those inmates who demonstrate a history of in-cell abuse, significant in-cell violence towards a cell partner, verification of predatory behavior towards a cell partner, or who have been victimized in-cell by another inmate. Staff shall consider the inmate's pattern of behavior, not just an isolated incident. An act of mutual combat in itself does not warrant single cell status. The following factors must be considered when evaluating single cell status, noting these factors are not exclusive of other considerations:

(1) Predatory behavior is characterized by aggressive, repeated attempts to physically or sexually abuse another inmate.

(2) Documented and verified instances of being a victim of in-cell physical or sexual abuse by another inmate.

(e) Should the screening authority determine that single cell designation is appropriate, the inmate's case factors shall be reviewed by a classification committee for determination of appropriate housing and designation for an “S” suffix. A classification committee may consider whether an inmate with single cell designation has since proven capable of being double-celled.

(f) In cases where single cell status is recommended by clinical staff due to mental health or medical concerns, a classification committee shall make the final determination of an inmate's cell assignment. The classification committee shall consider the clinical recommendations made by the evaluating clinician with assistance from the clinician who participates in the committee and review the inmate's case factors when determining the housing assignment. Single cell status based upon clinical recommendation is usually a temporary short-term measure and must be

periodically reviewed, minimally at an inmate's annual review or more frequently at the inmate's/clinician's request.

(g) Transgender inmates and inmates having symptoms of gender dysphoria as identified and documented in SOMS by medical or mental health personnel within a CDCR institution shall be referred to a classification committee for a determination of appropriate housing at a designated institution, pursuant to Article 10 of Subchapter 4. This classification committee must allow transgender women to be housed in female jail facilities, and trans men in male jail facilities, in a de-facto status, and must take all available steps to avoid harmful isolation cells, seperate but equal gender non-conforming housing pods, and housing under the wrong type of assumed gender in the California jail system.

(h) If an inmate refuses to be housed as determined to be appropriate to this section, the inmate shall be subject to the disciplinary process. Refusal to participate will result in the issuance of a Rules Violation Report (RVR) for Conduct, subsection 3005(c), Refusing to Accept Assigned Housing, for the Specific Act of Willfully Resisting, Delaying, or Obstructing any Peace Officer in the performance of Duty (CCR subsection 3323(f)(6)). Subsequent acts of the above listed offense will result in the issuance of additional disciplinary reports.

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

PROPONENT: Bar Association of San Francisco

STATEMENT OF REASONS

The Problem: Currently transgender women are classified de facto into male jail facilities in the California jail system, with the almost certain result that they will be put into segregational housing. The recent creation of a separate-but-equal “Gender-Nonconforming” housing pod in the SF jail system as an “alternative” for transgender women clearly does not solve the housing discrimination situation for them. It fails to address the fact that transgender women are female, and by keeping them blocked from female jail housing, they are also de facto being segregated from their proper jail population by clearly discriminatory means. This goes for transgender men as well, and also for other people on the trans spectrum in the jail system in inappropriate inmate housing.

This issue with the law as it stands now is that it uses an unregulated jail committee to handle transgender inmates cases housing situation by using outdated internal standards, which directly has led to the currently harmful discriminatory housing for trans inmates. By adding specific directions to the committee aforementioned in the statutory language, this type of draconian housing situation for the trans in jail housing can be eliminated.

The Solution: This resolution would add direct language to hold the trans jail classification committee responsible for their actions towards the trans community in California jails, by holding that the classification committee must provide transgender women to be housed in female jail facilities, and trans men in male jail facilities, in a de-facto status, and must take all available steps to avoid harmful isolation cells, separate but equal gender non-conforming housing pods, and housing under the wrong type of assumed gender in the California jail system.

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

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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COUNTERARGUMENTS BY BAR ASSOCIATIONS AND CLA SECTIONS

BANSDC

This resolution is flawed in that it assumes that mere assignment to a facility means that any inmate will fit in as there would not be any bases, legitimate or illegitimate, upon which inmates would discriminate against each other, or attack one another. The goal should be to use the classification committee process to place an inmate in a facility that is the safest and most conducive to the inmate's rehabilitation. The discretion placed with that committee should not be circumscribed, as it has the necessary information to make the appropriate judgment in each individual situation, much of which is not available to the general public. The resolution ignores the real physical dangers faced by transgendered individuals in the current prison system.

RESOLUTION 16-04-2019

DIGEST
Criminal: Allows Parents to Record Evidence of Violence Against Dependents
Amends Penal Code section 633.5 to allow parents to record conversations for evidence of violence against their minor dependents.

RESOLUTIONS COMMITTEE RECOMMENDATION
APPROVE IN PRINCIPLE

History:
Similar to Resolutions 06-05-2017, 03-05-2018, and 03-06-2018, which were disapproved.

Reasons:
This resolution amends Penal Code section 633.5 to allow parents to record conversations for evidence of violence against their minor dependents. This resolution should be approved in principle because the intent of the privacy exemption should not preclude a parent from seeking evidence of a threat of violence against their minor dependent.

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

There may be circumstances where a conversation discusses threatened violence against a person not a party thereto who is a minor dependent of the person making the recording. This broadening of the exemption provided for in section 633.5 is reasonable and narrowly tailored to occur only in such limited circumstances.

This resolution is related to Resolution 16-05-2019.

TEXT OF RESOLUTION

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

§633.5

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

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

(a) As used in this section, "the person" shall include (1) the person doing the recording, and (2) a minor dependent of the parent or legal guardian doing the recording.

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

PROPONENT: San Diego County Bar Association

STATEMENT OF REASONS

The Problem: Existing law is a problem from the perspectives of rights, morals, and practicality. One may not record a communication unless all parties consent, or it is in a public place or place where parties can reasonably expect to be overheard (Penal Code § 632). Exceptions exist if it is to get evidence of (1) extortion, (2) kidnapping, (3) bribery, (4) domestic violence, (5) annoying telephone calls, or (6) any felony involving violence against the person. Unlike the others, only the person who was subject to the violence can record violent felonies. Simply, if someone kidnapped a child, parents can call or confront the perpetrator to record an admission. If, however, someone raped, severely beat, or committed another violent felony against a child, the parent cannot call or confront the perpetrator to get a recorded admission; except in one appellate district, only the child may do the recording. In Fifth District, *In re Trever P.*, 14 Cal.App.5th 486, 221 Cal.Rptr.3d 871 (Ct. App. 2017), the Court adopted the "vicarious consent" doctrine, which allows parents to record communications between their child and someone else to obtain evidence of the listed exceptions. That, however, is limited to one district and would likely not apply to the parent calling or confronting the perpetrator directly.

Regardless of whether the parent doing so is strategically smart, it should not be illegal. Parents have the right and duty to protect their children, and helping get prosecuted those who harm their children is part of protecting them. Furthermore, if a child has a right to do something, the parents have a right to do it on their behalf. Morally, everything is wrong about a law telling kids that unless they can "suck it up" and call or confront the person who committed a violent felony against them, no recording can be made.

This law manufactures more criminals and dangerous situations than it punishes or prevents. (1) Many parents whose children have been raped or severely beaten will not think to check the Penal Code, so they will just call or confront and get a recording. When they turn it into the prosecution, they can be in for a triple-nasty surprise. First, the parents did it for nothing because the recording is inadmissible. Second, parents opened themselves up to prosecution. Most prosecutors are good people and probably would not prosecute the parents, but it shouldn't be a matter of discretion. Third, the same cannot be said of the perpetrator, who now has a civil action against the parent (PC 637.2). (2) For those parents who check the Penal Code, they would not

record. If children are old enough, they might take it into their own hands and call or confront the perpetrator and risk mental and physical danger.

The Solution: This resolution ensures that any recording by a parent or guardian to get evidence of a violent felony against their child is as legal and valid as a recording done by the child.

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

CURRENT OR PRIOR RELATED LEGISLATION
AB 413 (2017). Resolutions 06-05-2017, 03-05-2018.

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RESOLUTION 16-05-2019

DIGEST
Criminal: Allows Recording Conversations for Evidence of Violence at Another's Request
Amends Penal Code section 633.5 to provide that people may record conversations for evidence of violence when asked to do so by another.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
Similar to Resolutions 06-05-2017, 03-05-2018, and 03-06-2018, which were disapproved.

Reasons:
This resolution amends Penal Code section 633.5 to provide that people may record conversations for evidence of violence when asked to do so by another. This resolution should be disapproved because it is too broad and susceptible to misuse.

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

Presumably, the intent of the author was to provide for recording by either the intended victim of the threatened violence or, if they cannot do so, to allow them to requests assistance from someone else. However, the language of the resolution would have the unintended consequence of making anyone—not matter how attenuated—a permissible recorder simply because they were requested to do so by a potential victim. This expands the exception too far. Because the person making the recording is not required to have any relationship with the person at risk, this resolution permits the exemption to be used for purposes other than protecting potential victims of violence. While the resulting evidence would only be admissible in a criminal prosecution, the recording itself would be permissible even if it were merely a fishing expedition for purposes of blackmail, political leverage, or public embarrassment.

This resolution is related to Resolution 16-04-2019.

TEXT OF RESOLUTION

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

§633.5

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

(a) As used in this section, "the person" shall include (1) the person doing the recording, and (2) the person who requested to the recorder that the recording be done.

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

PROPONENT: San Diego County Bar Association

STATEMENT OF REASONS

The Problem: Under existing law, one may not record a communication unless all parties consent, or it is in a public place or place where parties can reasonably expect to be overheard (Penal Code § 632). Exceptions exist if it is to get evidence of (1) extortion, (2) kidnapping, (3) bribery, (4) domestic violence, (5) annoying telephone calls, or (6) any felony involving violence against the person. Unlike the others, only the person who was subject to the violence can record violent felonies. That is wrong from the perspectives of rights, morals, and practicality.

Under any concept of rights, if one has a right to do something, one has a right to ask another do it for them. E.g., because we have a right to defend ourselves, we have a right to delegate defense of ourselves to someone else. Similarly, if we have a right to record someone to get evidence of a violent felony against us, we have the right to ask someone else to do it for us. Under current law, that right is not recognized.

Morally, one should not need to be the victim to do the recording. Survivors should be able to consider their safety and have someone they trust do it for them. Prohibiting them from doing so is wrong.

Practically, the current law puts people in dangerous situations, physically and mentally. When people who have been subject to violence have to "suck it up" and confront or call their perpetrator, or no recording can be done, it puts them in danger. Facing them in person puts the survivor at risk of the perpetrator striking again. With calling, anything, including the mere sound of the perpetrator's voice, can trigger a panic attack. By letting them ask someone they trust to record, those situations can be avoided.

The last paragraph assumes they would think to check the Penal Code. Many would not and would just ask the person they trust to record. If done successfully and turned into the prosecution, they can be subject to a quadruple-nasty surprise: First, the recording was for nothing because it is inadmissible. Second, the recorder has exposure to prosecution. Most prosecutors are good people and probably would not prosecute the recorder, but it should not be a matter of discretion. Third, the survivor is open to prosecution because by asking someone to do something illegal, that person has taken a substantial step toward it and committed attempt. Again, most prosecutors are good people and probably would not prosecute, but it should not be a choice. Fourth, the same good nature cannot be said of the perpetrator, who now has a civil action against the recorder (PC 637.2).

The question is not whether recording the perpetrator is smart. The question is whether those who do it in those circumstances should be prosecuted and sued. The answer is a resounding no.

The Solution: This allows people to record to obtain evidence of a violent felony at the request of the person subject to the violent felony.

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

CURRENT OR PRIOR RELATED LEGISLATION
AB 413 (2017). Resolutions 06-05-2017, 03-05-2018.

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RESOLUTION 16-06-2019

DIGEST
Marijuana: Possession and Sale
Amends Health and Safety Code section 11359 to make the punishment for possession and sale of marijuana consistent with the punishment for transportation for sale of marijuana.

RESOLUTIONS COMMITTEE RECOMMENDATION
APPROVE IN PRINCIPLE

History:
No similar resolutions found.

Reasons:
This resolution amends Health and Safety Code section 11359 to make the punishment for possession and sale of marijuana consistent with the punishment for transportation for sale of marijuana. This resolution should be approved in principle because it aligns two related code sections which currently treat marijuana possession for sale and transportation for sale differently.

Under California's marijuana legalization law, one can only sell marijuana, or transport it for sale if one has obtained a license to do so. If one does not have a license, then selling marijuana, or transporting it for sale, is still a crime. Transportation and possession of marijuana without intent to sell - with or without a license - is not a crime in California as long as no more than 28.5 grams (slightly more than one ounce) of marijuana or eight grams of concentrated cannabis is being transported, and the recipient of this free marijuana or concentrate is 21 years of age or older.

Section 11360 currently states that anyone who transports for sale more than 28.5 grams of cannabis, other than concentrated cannabis, without a license may be imprisoned for a period up to six months, by a fine of up to $500 dollars, or both. This punishment is reiterated in the current language of section 11359, which states that the sale of marijuana without a license may also be punishable by imprisonment for a period of up to six months, by a fine of up to $500 dollars, or both. The distinction between these two code sections arises when the amount of marijuana being transported for sale or sold is less than 28.5 grams. If this lesser amount is being sold, the above punishment does not change. If this lesser amount is being transported, the punishment is a fine of $100. This resolution would bring these two code sections into parity such that the $100 fine would be applicable to both code sections. This is a reasonable approach, and the resolution should therefore be approved in principle.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to modify Health and Safety Code section 11359 to read as follows:

§11359

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

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

(b) Every person 18 years of age or over who possesses not more than 28.5 grams of marijuana for sale is guilty of an infraction and shall be punished by a fine of not more than one hundred dollars ($100). In any case in which a person is arrested for a violation of this subdivision and does not demand to be taken before a magistrate, that person shall be released by the arresting officer upon presentation of satisfactory evidence of identity and giving his or her written promise to appear in court, as provided in Section 853.6 of the Penal Code, and shall not be subjected to booking.

(~~b~~c) Every person 18 years of age or over who possesses more than 28.5 grams of cannabis for sale shall be punished by imprisonment in a county jail for a period of not more than six months or by a fine of not more than five hundred dollars ($500), or by both such fine and imprisonment.

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

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

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

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

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

(Proposed language underlined; language to be deleted stricken)

PROPONENT: Los Angeles County Bar Association

STATEMENT OF REASONS

The Problem: After the passage of Proposition 64, *transportation* for sale of an ounce or less of marijuana by an adult is now an infraction subject to a $100 fine upon conviction. However, due to a drafting error, *possession* for sale (without transportation) of an ounce or less of marijuana is subject to a stricter penalty, including potential prosecution as a felony. To put it another way, under current law, a person who tries to sell a small amount of marijuana while standing still is subject to *more* jail time than a person who tries to sell a small amount of marijuana while driving.

The Solution: This resolution would clarify that possession for sale of an ounce or less of marijuana is not subject to *greater* punishment than possession for sale of an ounce or less in a car.

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 16-07-2019

DIGEST
Criminal: Expands Ban on Recording Confidential Communications to Non-Violent Actions
Amends Penal Code section 632 to expand the ban on recording communications to all non-violent actions.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
Similar to Resolution 06-05-2017, 03-05-2018 and 03-06-2018, all of which were disapproved.

Reasons:
This resolution amends Penal Code section 632 to expand the ban on recording communications to all non-violent actions. This resolution should be disapproved because it contains unnecessary qualifying language and it is not necessary to include exception for live acts of violence in this section.

The resolution attempts to address what the proponent perceives as differences in cases from different appellate districts that purport to be conflicting opinions. Arguably, however, the reported decisions in the Third and Fourth appellate districts can be distinguished in a way that makes them consistent. In *People v. Gibbons* (1989) 215 Cal.App.3d 1204 (Fourth District), the defendant secretly recorded his sex acts, and his conviction was upheld because "communication" is broader than "conversation" and includes conduct. The court considered a sex act to be "communication" between the parties to the sex act. *People v. Drennan* (2000) 84 Cal.App.4th 1349 (Third District), which was decided after *Gibbons,* focused on the question of whether still pictures of people engaged in a confidential communication were covered by the statute. In *Drennan*, the defendant hid a video camera to take periodic pictures for months, and then his conviction was overturned because it did not capture contents of "audible or symbol-based communications." *Drennan* can be distinguished because the still pictures did not include anything that could be construed as communication.

The resolution also includes exemption language intended to address recording of violent acts. This is unnecessary because Penal Code section 633.5 already allows for recording reasonably related to acts of violence.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Association recommends that legislation be sponsored to amend California Penal Code section 632 to read as follows:

§632

(a) Every person who, intentionally and without the consent of all parties to a confidential communication, by means of any electronic amplifying or recording device, eavesdrops upon or

records the confidential communication, whether the communication is carried on among the parties in the presence of one another or by means of a telegraph, telephone, or other device, except a radio, shall be punished by a fine not exceeding two thousand five hundred dollars ($2,500), or imprisonment in the county jail not exceeding one year, or in the state prison, or by both that fine and imprisonment. If the person has previously been convicted of a violation of this section or Section 631, 632.5, 632.6, 632.7, or 636, the person shall be punished by a fine not exceeding ten thousand dollars ($10,000), by imprisonment in the county jail not exceeding one year, or in the state prison, or by both that fine and imprisonment.

(b) The term "person" includes an individual, business association, partnership, corporation, limited liability company, or other legal entity, and an individual acting or purporting to act for or on behalf of any government or subdivision thereof, whether federal, state, or local, but excludes an individual known by all parties to a confidential communication to be overhearing or recording the communication.

(c) (1) The term "confidential communication" includes any communication carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties thereto, but excludes a communication made in a public gathering or in any legislative, judicial, executive or administrative proceeding open to the public, or in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded.

(2) Along with sound- and symbol-based expressions, the term "communication" shall also encompass all actions except live acts of violence that are heard or seen by another person from a lawful vantage point. Any sound- or symbol-based expressions contemporaneously made with a live act of violence seen or heard by another person from a lawful vantage point shall not be considered a "confidential communication."

(d) Except as proof in an action or prosecution for violation of this section, no evidence obtained as a result of eavesdropping upon or recording a confidential communication in violation of this section shall be admissible in any judicial, administrative, legislative, or other proceeding.

(e) This section does not apply (1) to any public utility engaged in the business of providing communications services and facilities, or to the officers, employees or agents thereof, where the acts otherwise prohibited by this section are for the purpose of construction, maintenance, conduct or operation of the services and facilities of the public utility, or (2) to the use of any instrument, equipment, facility, or service furnished and used pursuant to the tariffs of a public utility, or (3) to any telephonic communication system used for communication exclusively within a state, county, city and county, or city correctional facility.

(f) This section does not apply to the use of hearing aids and similar devices, by persons afflicted with impaired hearing, for the purpose of overcoming the impairment to permit the hearing of sounds ordinarily audible to the human ear.

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

PROPONENT: San Diego County Bar Association

STATEMENT OF REASONS

The Problem: California courts are split on whether "communication," in the prohibition on recording a "confidential communication" includes actions or just words and symbols. California's Third District COA says it only includes communications through "sound or symbol." (*People v. Zuber*, No. C032200, 2002 WL 169660, at *5 (2002); *People v. Drennan*, 84 Cal. App. 4th 1349 (2000)). By contrast, California's Fourth District states it includes all communications, regardless of form. (*People v. Gibbons*, 215 Cal. App. 3d 1204, (Ct. App. 1989); *People v. McCallister*, No. E029538, 2002 WL 1724003, at *7 (2002).)

The differing opinions make a huge difference. Under one interpretation, video recording without sound would be permitted unless they are communicating in sign language. Under the other interpretation, that would be prohibited regardless. In *Zuber*, the defendant secretly recorded his sex acts. The Third District upheld his conviction **only** because the recording included a separate conversation. In *Drennan*, the defendant hid a video camera to take periodic pictures for months, and then his conviction was overturned because it did not capture contents of "audible or symbol-based communications." By contrast, in *Gibbons*, the defendant secretly recorded his sex acts, and the Fourth District upheld his conviction because "communication" is broader than "conversation" and includes conduct. In *McCallister*, the defendant hid a video camera with no sound in his wife's bedroom, and his conviction was similarly upheld.

Clarity is needed so people understand what is permitted and prohibited. When one COA upholds a conviction that the other would reverse, people lack the notice to comport their behavior within the law. The law should be clear that secretly recording actions in a confidential setting is just as prohibited as recording words and symbols, except live acts of violence when seen or heard from a lawful vantage point because people should not have a claim to privacy while committing violence. Given that a live act of violence legally and morally justifies using violence to defend oneself or others, it can certainly justify lesser actions, such as recording.

The Solution: Recording actions in confidential settings, except acts of violence from a lawful vantage point, will be prohibited. That accomplishes three benefits: (1) it resolves the judicial split and clarifies that communications in a private setting, including actions, cannot be recorded. (2) It provides a safe harbor for those who record violence from anywhere that they are allowed to be. Smartphones with recording abilities are in everyday use and many people's first instinct when seeing violence is to record. Not only should they not be prosecuted and punished, but they should have a sense of security that they cannot be. Just like body cameras on police officers, recordings can provide clarity of what exactly happened. (3) Those who commit violence will lose any ability to legally claim victimhood based on their action being recorded. The current civil remedy given to those recorded against the recorder (Penal Code § 637.2) will be unavailable to them.

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

CURRENT OR PRIOR RELATED LEGISLATION
AB 413 (2017). Resolutions 06-05-2017, 03-05-2018, and 03-06-2018.

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