RESOLUTION 09-01-2020

WITHDRAWN BY PROPONENT

RESOLUTION 09-02-2020

DIGEST
Disorderly Conduct: Loitering Around Public Toilets is Not Disorderly Conduct
Amends Penal Code section 647 to remove loitering at a public restroom for purposes of lewd, lascivious, or unlawful acts from the crime of disorderly conduct.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution amends Penal Code section 647 to remove loitering at a public restroom for purposes of lewd, lascivious, or unlawful acts from the crime of disorderly conduct. This resolution should be disapproved because there is no evidence that the law is being inequitably applied to the LGBTQ community or that it does not serve the legitimate public purpose for which it was enacted.

Penal Code section 647 defines "disorderly conduct" to include, among other things, anyone "[w]ho 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." It consists of the unlawful conduct coupled with criminal intent.

While laws should not codify discrimination, no evidence suggests that this criminal provision is being misapplied or directed solely at persons based on their LGBTQ status. The California Supreme Court, in *People v. Superior Court (Caswell)* (1988) 46 Cal.3d 381, 401, expressly recognized the potential for discriminatory application, but nevertheless found the statute constitutional because it specifically found that "a potential suspect's sexual orientation is not in itself, a sufficient "articulable fact" to give rise to probable cause and that the police must apply equal standards to both homosexuals and heterosexuals in determining whether an individual's conduct in fact provides probable cause to believe that he is loitering with the proscribed intent." In so holding, the Supreme Court stated: "Just as all races have the equal right to use the public streets in all neighborhoods without fear of being arrested on a 'guilt by association' theory, both homosexual and heterosexual persons must have the equal right to use public restrooms without fear of police harassment." (*Ibid.*)

It is not legitimate to linger by a public toilet for an improper purpose, such as to solicit for or commit a lewd, lascivious or unlawful act. Members of the public should be able to use public toilets without having their rights compromised by those who are loitering there for an improper reason, be it theft, drug use or transactions, voyeurism, molestation, exposure or indecent acting-out in a public place, or soliciting sex. Such behavior interferes with the proper purpose and use of public restroom facilities.

Additionally, the statute does not permit law enforcement to use one's sexual orientation or LGBTQ status as the basis for the crime.

Therefore, the resolution should be disapproved.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Penal Code section 647 to read as follows:

§ 647

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

(a) An individual who 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.~~

~~(e)~~ (d) 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)~~ (e) 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)~~ (f) 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)~~ (g) 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)~~ (h) 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.

~~(j)~~ (i) (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 anus and 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.

~~(k)~~ (j) 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)~~ (k) (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.

(2) If the victim of a violation of subdivision (j) 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)~~ (l) (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.

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

PROPONENT: Bay Area Lawyers for Individual Freedom

STATEMENT OF REASONS

The Problem: Existing law singles out a segment of the population on the basis of sexual orientation and is homophobic in origin. The vagueness of subdivision (d) provides unchecked power to law enforcement officers or even an emboldened and/or prejudiced private citizen to take the law into their own hands. Unpopular groups, including people of color, poor people, immigrants, and people who do not conform to gender norms are distinctly vulnerable to this statute.

The Solution: This resolution would remove a vague and ambiguous statute from the penal code, leaving law enforcement with subdivision (a) to prosecute harmful conduct. 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 the steps backward taken at the federal level with regard to protections for LGBTQ individuals.

CURRENT OR PRIOR RELATED LEGISLATION

Not known.

IMPACT STATEMENT

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

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RESOLUTION 09-03-2020

DIGEST
Overcharges: Employee Criminal Liability
Amends Business and Professions Code section 12024.2 to clarify that corporate entity employees must have knowledge of an overcharge and the ability to charge the correct amount.

RESOLUTIONS COMMITTEE RECOMMENDATION
APPROVE IN PRINCIPLE

History:
No similar resolutions found.

Reasons:
This resolution amends Business and Professions Code section 12024.2 to clarify that corporate entity employees must have knowledge of an overcharge and the ability to charge the correct amount. This resolution should be approved in principle because it properly allocates guilt and liability between corporate employers and their employees.

Business and Professions Code section 12024.2, subdivision (a)(1)(2), makes it a misdemeanor "for any person, at the time of sale of a commodity" to charge an amount greater than the price "advertised, posted, marked, displayed, or quoted for that commodity." "Person" includes a natural person, firm, corporation or association. (Bus. & Prof. Code, § 12011.) In 1982, the Legislature amended Business and Professions Code section 12024.2, substituting "willful" for "intentionally." Thereafter, the statute was amended so that any violator of the statute could be held strictly liable for the crime, without any *mens rea* requirement.

This resolution would amend Business and Professions Code section 12024.2 so that certain corporate employees cannot be held strictly liable for violations of the code. The prosecution would need to prove that the corporate employee knowingly charged a higher amount than was advertised to the consumer, and that the corporate employee had the power to change the price.

This resolution should be approved in principle. Strict liability is a rarity in criminal law. (Richard A. Wasserstrom, *Strict Liability in the Criminal Law*, 12 Stan. L. Rev. 731 (1960).) The fact that this statute contains such a standard demonstrates how strongly the Legislature believes it needs to protect the public from abuse. However, the consequence of this statute is that front-line corporate employees are being charged for a misdemeanor for violating Business and Professions Code section 12024.2, even though they may not have knowledge of the advertisement, the conditions, or correct price and do not have authority to change it. Under current practice, prosecutors are permitted to charge both the corporate entity and the clerk with a crime. While the store clerk's charge is generally dismissed as long as the corporation pays a fine, that still leaves the store clerk with a potential arrest, the need to go to court to defend their inaction, potential loss of employment, and other costs associated with defending themselves in court, all because of the actions of their employer, who must only pay a fine, and will continue to operate their business without further consequence. Charging the employee with a crime is unjust and completely disproportionate to the culpability of the employee.

In fact, the California Supreme Court ruled that in cases involving a failure to act or failure to properly charge the correct amount, defendants are required to willfully violate the conditions of the statute. "The word 'willfully' implies a 'purpose or willingness' and requires actual notice, not constructive knowledge, of the illegal act." (*People v. Garcia* (2001) 25 Cal.4th 744, 752.) Therefore, to prosecute an employee for violation of Business and Professions Code section 1204.2, the applicable standard should be "specific intent." According to the jury instructions that define "specific intent", "for you to find a person guilty of (this/these) crimes [or to find the allegation[s] true], that person must not only intentionally commit the prohibited act [or intentionally fail to do the required act], but must do so with a specific (intent/ [and/or] mental state). The act and the specific (intent/ [and/or] mental state) required are explained in the instruction for that crime [or allegation]." (CALCRIM No. 252.) Specific intent is the standard put forth by this resolution and should rightfully be applied to front-line employees to ensure that the guilty party is actually charged and convicted of violating Business and Professions Code section 1204.2.

Therefore, this resolution should be approved in principle.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Business and Professions Code section 12024.2, to read as follows:

§ 12024.2

(a) It is unlawful for any person, at the time of sale of a commodity, to do any of the following:

(1) Charge an amount greater than the price, or to compute an amount greater than a true extension of a price per unit, that is then advertised, posted, marked, displayed, or quoted for that commodity.

(2) Charge an amount greater than the lowest price posted on the commodity itself or on a shelf tag that corresponds to the commodity, notwithstanding any limitation of the time period for which the posted price is in effect.

(b) A violation of this section is a misdemeanor punishable by a fine of not less than twenty-five dollars ($25) nor more than one thousand dollars ($1,000), by imprisonment in the county jail for a period not exceeding one year, or by both, if the violation is willful or grossly negligent, or when the overcharge is more than one dollar ($1). Notwithstanding the above, the employee of a corporate entity shall not be charged with a violation of this section absent a showing that the employee knew that the charged price was greater than the advertised price and had the ability to charge the advertised price.

(c) A violation of this section is an infraction punishable by a fine of not more than one hundred dollars ($100) when the overcharge is one dollar ($1) or less.

(d) As used in subdivisions (b) and (c), "overcharge" means the amount by which the charge for a commodity exceeds a price that is advertised, posted, marked, displayed, or quoted to that consumer for that commodity at the time of sale.

(e) Except as provided in subdivision (f), for purposes of this section, when more than one price for the same commodity is advertised, posted, marked, displayed, or quoted, the person offering the commodity for sale shall charge the lowest of those prices.

(f) Pricing may be subject to a condition of sale, such as membership in a retailer-sponsored club, the purchase of a minimum quantity, or the purchase of multiples of the same item, provided that the condition is conspicuously posted in the same location as the price.

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

PROPONENT: Los Angeles County Bar Association

STATEMENT OF REASONS

The Problem: Current law makes it a misdemeanor for a business to advertise one price but then charge the customer a higher price. The problem is that there is no requirement that the (teenaged minimum wage) store clerk who scans the item actually know what the advertised price was, or know that the store's electronic charging system is charging a different price. Under current practice, city prosecutors charge both the corporate entity and the clerk with a crime. While the store clerk's charge is generally dismissed as long as the corporation pays a fine, that still leaves the store clerk with a permanent criminal record, all for doing something that they did not know they were doing in the first place.

The Solution: This resolution clarifies that the employee of a corporate entity cannot be charged with a crime for unknowingly charging a customer more than the advertised price unless they knew they were overcharging the customer and had the ability to charge the correct amount. This Resolution leaves in place the strict liability standard for the actual corporate entity.

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 09-04-2020

DIGEST
Sexual Privacy: Distribution of Intimate Images
Amends Penal Code section 647 to eliminate a loophole that allows distribution of intimate images that were secretly recorded or obtained by theft, hacking, or chance discovery.

RESOLUTIONS COMMITTEE RECOMMENDATION
APPROVE IN PRINCIPLE

History:
No similar resolutions found.

Reasons:
This resolution amends Penal Code section 647 to eliminate a loophole that allows distribution of intimate images that were secretly recorded or obtained by theft, hacking, or chance discovery. This resolution should be approved in principle because there should not be a loophole relating to the prohibition against distribution of intimate images if the images are secretly recorded or obtained by theft, hacking, or chance discovery.

Under existing law, a misdemeanor invasion of privacy based on the distribution of intimate images requires proof of an "agreement or understanding" between the distributor and the person depicted in the images that the images were to remain private. (Pen. Code, § 647, subd. (j)(4)(A).) Current law makes it unlawful to make secret recordings of persons in intimate locations, or of the intimate parts of the person's body. (Pen. Code, § 647, subd. (j)(1)-(3)), but the loophole in subdivision (j)(4) prevents a separate criminal charge for the distribution of those images unless there is proof of an agreement or understanding that the images were to remain private. This loophole allows for the distribution of intimate images that were secretly recorded unbeknownst to the victim, or where the victim could not have formed any agreement or understanding with the distributor, because the distributor obtained the victim's private images by theft, hacking, or chance discovery. In addition, the current statute requires proof of "serious emotional distress", a term which is not defined. In such cases, a victim is violated twice – once by the secret recording, and a second time by the distribution. Two separate charges should be recognized under California law.

In addition to closing the loophole allowing for distribution of images obtained by theft, hacking or chance discovery, the resolution changes language to protect the right to sexual privacy. It would prohibit the nonconsensual distribution of intimate images where the distributor knew or should have known that it would cause the victim emotional distress and the victim did suffer emotional distress.

The resolution should be approved in principle because it would close the loophole that permits a secret recording, or a recording obtained by theft or chance to be distributed. This resolution would also clarify that a misdemeanor invasion of privacy does not require a heightened degree of emotional distress. If the distributor knew or should have known that the nonconsensual

distribution of another's intimate images obtained by theft, hacking or chance discovery would cause that person emotional distress, only the absence of emotional distress should be a defense.

Therefore, this resolution should be approved in principle.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Penal Code section 647, to read as follows:

§ 647

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

(a) An individual who 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, the individual 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, the individual 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, the individual 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.

(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 they are unable to exercise care for their own safety or the safety of others, or by reason of 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 reasonably able to do so, shall place the person, or cause the person 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 authorized to effect 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.

(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, mobile phone, electronic device, or unmanned aircraft system, 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, including the victim, could identify or recognize the victim. 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, including the victim, could identify or recognize the victim. 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, <u>without the consent of the person depicted, and</u> 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 that person 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 anus and 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.

(k) (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.

(2) If the victim of a violation of subdivision (j) 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.

(l) (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.

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

PROPONENT: Michael Fern, Shaun Dabby Jacobs, Michele Anderson, Eunice Kim, Carolin Shining, Summer Haro, Laura Jane Kessner, Edward Idell, Benyomin Forer, Catherine Rucker

STATEMENT OF REASONS

The Problem: Under existing law, a misdemeanor invasion of privacy based on the distribution of intimate images requires proof of an "agreement or understanding" between the distributor and the person depicted that the images were to remain private. (Pen. Code, § 647, subd. (j)(4)(A).) This requirement creates a loophole that allows for the distribution of intimate images that were secretly recorded unbeknownst to the victim, or where the victim could not have formed any agreement or understanding with the distributor, because the distributor obtained the victim's private images by theft, hacking, or chance discovery.

In addition, no other invasion of privacy under subdivision (j) requires proof of "serious emotional distress," which is not defined. In a civil action for the negligent infliction of emotional distress, the requirement of "serious emotional distress" has been found to mean "severe emotional distress" or "emotional distress with which a reasonable, normally constituted person would be unable to cope." (*See Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1378.) However, society should not countenance the invasion of another's sexual privacy just because the victim's emotional distress does not rise to a level that warrants money damages. Thus, in *People v. Iniguez* (2016) 247 Cal. App. 4th Supp. 1, the court found that the civil definition of "serious emotional distress" did not apply to a criminal prosecution for the nonconsensual distribution of intimate images.

The Solution: This resolution would protect the right to sexual privacy by prohibiting the nonconsensual distribution of intimate images where the distributor knew or should have known that it would cause the victim emotional distress that is actually suffered. This closes the loophole that permits the distribution of a secret recording or a private recording that is illicitly obtained or accidentally leaked. In addition, the resolution would clarify that a misdemeanor invasion of privacy does not require the heightened degree of emotional distress necessary to support an award of monetary damages. If the distributor knew or should have known that the

nonconsensual distribution of another's intimate images would cause that person emotional distress, only the absence of emotional distress should be a defense.

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 09-05-2020

DIGEST
Three Strikes: Eliminating the Use of Juvenile Adjudications as Prior Convictions
Amends Penal Code section 667 to remove juvenile adjudications from the definition of prior convictions that can enhance sentences under the Three Strikes alternate sentencing scheme.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
Similar to Resolutions 09-19-2006, 03-06-2011 and 06-06-2012, all of which were approved in principle.

Reasons:
This resolution amends Penal Code section 667 to remove juvenile adjudications from the definition of prior convictions that can enhance sentences under the Three Strikes alternate sentencing scheme. This resolution should be disapproved because it cannot accomplish the proposed change without amendment or additional legislation to modify Penal Code section 1170.12.

The Three Strikes law is contained in two identical provisions, Penal Code sections 667(b)-(e) and 1170.12. The latter section was added by ballot initiative in 1994 (Prop. 184, approved Nov. 8, 1994). These statutes provide for an additional five years in state prison and either twice the maximum sentence in state prison or life in state prison, depending on the number of prior qualifying serious or violent felony convictions the defendant has.

Qualifying convictions under the Three Strikes law can include juvenile adjudications for serious or violent felonies committed when the defendant was 16 or 17 years old. When minors are adjudged in juvenile court, they have nearly all due process rights available to adults. However, minors are not afforded the right to a jury trial. (*People v. Nguyen* (2009) 46 Cal.4th 1007, 1018-1021.) Neither the federal nor state constitution require that a jury find true a prior conviction allegation used to increase a defendant's sentence. (*People v. Epps* (2001) 25 Cal.4th 19, 23; see *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490.)

This resolution attempts to change existing law by removing juvenile adjudications from the definition of prior convictions under the Three Strikes alternate sentencing scheme set forth in section 667. One rationale for this change is that at the time they commit juvenile crimes, minors may not be mature enough to fully appreciate their actions, and thus, they should not be punished as adults based on their prior conduct as minors. However, the resolution fails to propose any change to the identical alternate sentencing scheme set forth in Penal Code section 1170.12, enacted by Proposition 184. Without amending both sections, such as proposed in Resolution 09-07-2020, the resolution cannot accomplish its purpose. Proposition 184 contained a provision that would permit the Legislature to make amendments by a two-thirds vote, by majority vote and approval by the electorate, or by a new initiative. (Prop. 184, § 4; see Cal. Const., art II, § 10.)

Even if the resolution were adopted, a criminal defendant's prior juvenile adjudications could still be considered when they are sentenced as adults. (See Cal. Rules of Court, rule 4.421(b)(2).) Regardless of age, violent conduct underlying a juvenile adjudication is admissible as aggravating evidence in a death penalty case. (Pen. Code, § 190.3, subd. (b); *People v. Cox* (1991) 53 Cal.3d 618, 688-690). Finally, courts still retain the discretion to ameliorate the harshness of a sentence under the Three Strikes law where appropriate. (Pen. Code, § 1385.) However, to achieve the goal of removing the ability to use juvenile adjudications as strikes under the Three Strikes law, both section 667 and 1170.12 must be amended.

If the law were amended to remove juvenile adjudications as prior convictions under the Three Strikes law, resentencing and possible retrial on prior conviction allegations could be required for any defendant whose sentence was enhanced because of a strike based on a juvenile adjudication. (*In re Estrada* (1965) 63 Cal.2d 740, 747 [ameliorative changes in sentencing laws are retroactive to all prosecutions not yet reduced to a final judgment].)

Therefore, this resolution should be disapproved.

This resolution is similar to Resolution 09-07-2020.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Penal Code section 667 to read as follows:

§ 667

(a) (1) Any person convicted of a serious felony who previously has been convicted of a serious felony in this state or of any offense committed in another jurisdiction which includes all of the elements of any serious felony, shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges brought and tried separately. The terms of the present offense and each enhancement shall run consecutively.

(2) This subdivision shall not be applied when the punishment imposed under other provisions of law would result in a longer term of imprisonment. There is no requirement of prior incarceration or commitment for this subdivision to apply.

(3) The Legislature may increase the length of the enhancement of sentence provided in this subdivision by a statute passed by majority vote of each house thereof.

(4) As used in this subdivision, "serious felony" means a serious felony listed in subdivision (c) of Section 1192.7.

(5) This subdivision does not apply to a person convicted of selling, furnishing, administering, or giving, or offering to sell, furnish, administer, or give to a minor any methamphetamine-related drug or any precursors of methamphetamine unless the prior conviction was for a serious felony described in subparagraph (24) of subdivision (c) of Section 1192.7.

(b) It is the intent of the Legislature in enacting subdivisions (b) to (i), inclusive, to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of one or more serious or violent felony offenses.

(c) Notwithstanding any other law, if a defendant has been convicted of a felony and it has been pled and proved that the defendant has one or more prior serious or violent felony convictions as defined in subdivision (d), the court shall adhere to each of the following:

(1) There shall not be an aggregate term limitation for purposes of consecutive sentencing for any subsequent felony conviction.

(2) Probation for the current offense shall not be granted, nor shall execution or imposition of the sentence be suspended for any prior offense.

(3) The length of time between the prior serious or violent felony conviction and the current felony conviction shall not affect the imposition of sentence.

(4) There shall not be a commitment to any other facility other than the state prison. Diversion shall not be granted nor shall the defendant be eligible for commitment to the California Rehabilitation Center as provided in Article 2 (commencing with Section 3050) of Chapter 1 of Division 3 of the Welfare and Institutions Code.

(5) The total amount of credits awarded pursuant to Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3 shall not exceed one-fifth of the total term of imprisonment imposed and shall not accrue until the defendant is physically placed in the state prison.

(6) If there is a current conviction for more than one felony count not committed on the same occasion, and not arising from the same set of operative facts, the court shall sentence the defendant consecutively on each count pursuant to subdivision (e).

(7) If there is a current conviction for more than one serious or violent felony as described in paragraph (6), the court shall impose the sentence for each conviction consecutive to the sentence for any other conviction for which the defendant may be consecutively sentenced in the manner prescribed by law.

(8) Any sentence imposed pursuant to subdivision (e) will be imposed consecutive to any other sentence which the defendant is already serving, unless otherwise provided by law.

(d) Notwithstanding any other law and for the purposes of subdivisions (b) to (i), inclusive, a prior conviction of a serious or violent felony shall be defined as:

(1) Any offense defined in subdivision (c) of Section 667.5 as a violent felony or any offense defined in subdivision (c) of Section 1192.7 as a serious felony in this state. The determination of whether a prior conviction is a prior felony conviction for purposes of subdivisions (b) to (i), inclusive, shall be made upon the date of that prior conviction and is not affected by the sentence imposed unless the sentence automatically, upon the initial sentencing, converts the felony to a misdemeanor. The following dispositions shall not affect the determination that a prior conviction is a prior felony for purposes of subdivisions (b) to (i), inclusive:

(A) The suspension of imposition of judgment or sentence.

(B) The stay of execution of sentence.

(C) The commitment to the State Department of Health Care Services as a mentally disordered sex offender following a conviction of a felony.

(D) The commitment to the California Rehabilitation Center or any other facility whose function is rehabilitative diversion from the state prison.

(2) A prior conviction in another jurisdiction for an offense that, if committed in California, is punishable by imprisonment in the state prison constitutes a prior conviction of a particular serious or violent felony if the prior conviction in the other jurisdiction is for an

offense that includes all of the elements of a particular violent felony as defined in subdivision (c) of Section 667.5 or serious felony as defined in subdivision (c) of Section 1192.7.

~~(3) A prior juvenile adjudication constitutes a prior serious or violent felony conviction for purposes of sentence enhancement if:~~

~~(A) The juvenile was 16 years of age or older at the time the juvenile committed the prior offense.~~

~~(B) The prior offense is listed in subdivision (b) of Section 707 of the Welfare and Institutions Code or described in paragraph (1) or (2) as a serious or violent felony.~~

~~(C) The juvenile was found to be a fit and proper subject to be dealt with under the juvenile court law.~~

~~(D) The juvenile was adjudged a ward of the juvenile court within the meaning of Section 602 of the Welfare and Institutions Code because the person committed an offense listed in subdivision (b) of Section 707 of the Welfare and Institutions Code.~~

(3) In no event may a minor in juvenile court suffer a serious or violent felony (strike) adjudication.

(e) For purposes of subdivisions (b) to (i), inclusive, and in addition to any other enhancement or punishment provisions which may apply, the following apply if a defendant has one or more prior serious or violent felony convictions:

(1) If a defendant has one prior serious or violent felony conviction as defined in subdivision (d) that has been pled and proved, the determinate term or minimum term for an indeterminate term shall be twice the term otherwise provided as punishment for the current felony conviction.

(2) (A) Except as provided in subparagraph (C), if a defendant has two or more prior serious or violent felony convictions as defined in subdivision (d) that have been pled and proved, the term for the current felony conviction shall be an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greatest of:

(i) Three times the term otherwise provided as punishment for each current felony conviction subsequent to the two or more prior serious or violent felony convictions.

(ii) Imprisonment in the state prison for 25 years.

(iii) The term determined by the court pursuant to Section 1170 for the underlying conviction, including any enhancement applicable under Chapter 4.5 (commencing with Section 1170) of Title 7 of Part 2, or any period prescribed by Section 190 or 3046.

(B) The indeterminate term described in subparagraph (A) shall be served consecutive to any other term of imprisonment for which a consecutive term may be imposed by law. Any other term imposed subsequent to any indeterminate term described in subparagraph (A) shall not be merged therein but shall commence at the time the person would otherwise have been released from prison.

(C) If a defendant has two or more prior serious or violent felony convictions as defined in subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7 that have been pled and proved, and the current offense is not a serious or violent felony as defined in subdivision (d), the defendant shall be sentenced pursuant to paragraph (1) of subdivision (e) unless the prosecution pleads and proves any of the following:

(i) The current offense is a controlled substance charge, in which an allegation under Section 11370.4 or 11379.8 of the Health and Safety Code was admitted or found true.

(ii) The current offense is a felony sex offense, defined in subdivision (d) of Section 261.5 or Section 262, or any felony offense that results in mandatory registration as a sex

offender pursuant to subdivision (c) of Section 290 except for violations of Sections 266 and 285, paragraph (1) of subdivision (b) and subdivision (e) of Section 286, paragraph (1) of subdivision (b) and subdivision (e) of Section 288a, Section 311.11, and Section 314.

(iii) During the commission of the current offense, the defendant used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person.

(iv) The defendant suffered a prior serious or violent felony conviction, as defined in subdivision (d) of this section, for any of the following felonies:

(I) A "sexually violent offense" as defined in subdivision (b) of Section 6600 of the Welfare and Institutions Code.

(II) Oral copulation with a child who is under 14 years of age, and who is more than 10 years younger than the defendant as defined by Section 288a, sodomy with another person who is under 14 years of age and more than 10 years younger than the defendant as defined by Section 286, or sexual penetration with another person who is under 14 years of age, and who is more than 10 years younger than the defendant, as defined by Section 289.

(III) A lewd or lascivious act involving a child under 14 years of age, in violation of Section 288.

(IV) Any homicide offense, including any attempted homicide offense, defined in Sections 187 to 191.5, inclusive.

(V) Solicitation to commit murder as defined in Section 653f.

(VI) Assault with a machine gun on a peace officer or firefighter, as defined in paragraph (3) of subdivision (d) of Section 245.

(VII) Possession of a weapon of mass destruction, as defined in paragraph (1) of subdivision (a) of Section 11418.

(VIII) Any serious or violent felony offense punishable in California by life imprisonment or death.

(f) (1) Notwithstanding any other law, subdivisions (b) to (i), inclusive, shall be applied in every case in which a defendant has one or more prior serious or violent felony convictions as defined in subdivision (d). The prosecuting attorney shall plead and prove each prior serious or violent felony conviction except as provided in paragraph (2).

(2) The prosecuting attorney may move to dismiss or strike a prior serious or violent felony conviction allegation in the furtherance of justice pursuant to Section 1385, or if there is insufficient evidence to prove the prior serious or violent felony conviction. If upon the satisfaction of the court that there is insufficient evidence to prove the prior serious or violent felony conviction, the court may dismiss or strike the allegation. This section shall not be read to alter a court's authority under Section 1385.

(g) Prior serious or violent felony convictions shall not be used in plea bargaining as defined in subdivision (b) of Section 1192.7. The prosecution shall plead and prove all known prior felony serious or violent convictions and shall not enter into any agreement to strike or seek the dismissal of any prior serious or violent felony conviction allegation except as provided in paragraph (2) of subdivision (f).

(h) All references to existing statutes in subdivisions (c) to (g), inclusive, are to statutes as they existed on November 7, 2012.

(i) If any provision of subdivisions (b) to (h), inclusive, or the application thereof to any person or circumstance is held invalid, that invalidity shall not affect other provisions or

applications of those subdivisions which can be given effect without the invalid provision or application, and to this end the provisions of those subdivisions are severable.

(j) The provisions of this section shall not be amended by the Legislature except by statute passed in each house by rollcall vote entered in the journal, two-thirds of the membership concurring, or by a statute that becomes effective only when approved by the electors.

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

PROPONENT: Orange County Bar Association

STATEMENT OF REASONS

The Problem: Currently, juveniles aged 16 years or older at the time of a criminal offense who are found guilty of a serious or violent felony crime that is also listed in Welfare and Institutions Code section 707(b) will suffer a strike on their record. Under *People v. Nguyen* (2009) 46 Cal.4th 1007, juveniles are not entitled to trial by jury or many other of the same constitutional or statutory due process rights guaranteed to adults or juveniles prosecuted in adult court. A strike can cause long term effects on an individual's criminal record and adds the risk of significant punishment in the future. For instance, having a prior strike on one's record can double a person's prison sentence or cause a person's bail to increase substantially on future criminal cases. Also, two or more strikes can potentially cause a person to be sentenced to 25 years to life in prison.

The Solution: Changing the juvenile strike law so that a person cannot suffer a strike on his record unless he is convicted as an adult would ensure fairness and justice in the criminal justice system.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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

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RESOLUTION 09-06-2020

DIGEST
Surreptitious Recordings: Confidential Communications Include Sexual Acts
Amends Penal Code section 632 to include sexual acts as "confidential communications" which may not be electronically amplified or recorded without the parties' consent.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution amends Penal Code section 632 to include sexual acts as "confidential communications" which may not be electronically amplified or recorded without the parties' consent. This resolution should be disapproved because visual recordings of sex acts are addressed in a different statute, and as the legislative history of this anti-eavesdropping statute shows, it specifically covers unauthorized listening and recording of confidential conversational communications, not photographic depictions of visualized acts.

Penal Code section 632 criminally punishes a person who, "intentionally and without the consent of all parties to a confidential communication, by means of any electronic amplifying or recording device," eavesdrops or records the confidential communication under circumstances where the parties did not reasonably expect the communication would be "overheard or recorded." The Fourth Appellate District ruled that a secret video-recording of sex acts constitutes a crime under section 632. (See *People v. Gibbons* (1989) 215 Cal.App.3d 1204 (plurality decision).) However, the Third Appellate District disagreed. In a well-reasoned opinion in the case of *People v. Drennan* (2000) 84 Cal.App.4th 1349, the Court, following a careful examination of the legislative history of section 632 and the plain meaning of the statutory language, held that the crime only addresses the surreptitious capturing of spoken or written confidential communications ("sounds or symbols"), *i.e.*, expressed thoughts, ideas and knowledge—and not the photographing or videotaping of sexual acts unaccompanied by confidential conversations. (*Id.,* at 1356-58.)

The analysis offered by the court in *Drennan* makes sense. Penal Code section 632 concerns the surreptitious use of electronic listening devices, to eavesdrop, or amplify or record sounds of a confidential and classically communicative nature. No good reason appears to amend an eavesdropping statute to include sex acts (in contrast to conversations or oral communications) within the definition of "confidential communications." Nor is there a need. Penal Code section 647, subdivisions (i) and (j), already criminally proscribe voyeurism, clandestine recording and/or distribution of intimate and sexual acts—the visual counterpart to section 632. (See also, 18 U.S.C. § 1801.) Of course, civil remedies also avail to victims of any form of privacy breach.

Therefore, this resolution should be disapproved.

TEXT OF RESOLUTION

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

§ 632

(a) A person who, intentionally and without the consent of all parties to a confidential communication, by means of any electronic amplifying or recording device to eavesdrop upon or record 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) per violation, 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) per violation, by imprisonment in the county jail not exceeding one year, or in the state prison, or by both that fine and imprisonment.

(b) For the purposes of this section, "person" means 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) For the purposes of this section, "confidential communication" means 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.

(1) Along with sound- and symbol-based expressions, the term "communication" shall also encompass sex acts.

(d) Except as proof in an action or prosecution for violation of this section, evidence obtained as a result of eavesdropping upon or recording a confidential communication in violation of this section is not 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, if 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, (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 Court of Appeal (COA) says it only includes communications through "sound or symbol." (*People v. Zuber*, No. C032200, 2002 WL 169660, at *5 (2002)). 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)).
Where this difference has particularly shown is with sex acts. In Zuber, the defendant secretly recorded his sex acts. The Third District upheld his conviction only because the recording included a separate conversation. 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.

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 sex acts in a confidential setting is just as prohibited as secretly recording words and symbols.

The Solution: This resolution adds sex acts within the definition of "communication" to ensure that secretly recording sex acts in a confidential setting is just as prohibited as secretly recording words and symbols.

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: Ben Rudin

RESOLUTION 09-07-2020

DIGEST
Juvenile Prior Adjudications: Ineligible to be Treated as "Five-Year Priors" or Strikes
Amends Penal Code sections 667 and 1170.12 to provide that juvenile adjudications no longer constitute prior convictions under the five-year prior and Three Strikes enhancement laws.

RESOLUTIONS COMMITTEE RECOMMENDATION
APPROVE IN PRINCIPLE

History:
Similar to Resolutions 09-19-2006, 03-06-2011 and 06-06-2012, all of which were approved in principle.

Reasons:
This resolution amends Penal Code sections 667 and 1170.12 to provide that juvenile adjudications no longer constitute prior convictions under the five-year prior and Three Strikes enhancement laws. This resolution should be approved in principle because it is consistent with the goals of juvenile court, brain science research, and current trends in criminal law.

Currently, if a child aged 16 or older suffered a juvenile adjudication involving a crime that would qualify as a serious felony under Penal Code section 1192.7, subdivision (c), or a violent felony under Penal Code section 667.5, subdivision (c), that offense could be used in a subsequent adult case as a prior conviction for purposes of increasing punishment. These statutes provide for an additional five years in state prison and either twice the maximum sentence in state prison or life in state prison, depending on the number of prior qualifying convictions.

This resolution removes the subdivisions in Penal Code sections 667 and 1170.12 that allow prior juvenile adjudications to be used as strikes and five-year priors. Juvenile adjudications could no longer be used as enhancements under the Three Strikes law or as five-year enhancements.

The resolution should be approved in principle because the primary goal of juvenile court is quite different from adult court. In juvenile court, the primary goal is rehabilitation of the minor rather than punishment. (*In re Calvan S.* (2016) 5 Cal.App.5th 522, 528.) Juvenile hearings are, by law, conducted in an "informal non-adversarial atmosphere with a view to obtaining the maximum cooperation of the minor upon whose behalf the petition is brought and all persons interested in his welfare with such provisions as the court may make for the disposition and care of such minor." (Welf. & Inst. Code, § 680.) As a result of the different goals and procedural due process rights, the Legislature has deemed juvenile adjudications not criminal convictions for any purpose. (Welf. & Inst. Code, § 203 ["An order adjudging a minor to be a ward of the juvenile court shall not be deemed a conviction of a crime for any purpose, nor shall a proceeding in a juvenile court be deemed a criminal proceeding.]").

This approach is consistent with brain science, which as the United States Supreme Court has noted, demonstrates that minors' brains continue to develop until they are into their mid-twenties, and children should not be punished for life for events that occurred prior to maturity. (*Miller v. Alabama* (2012) 567 U.S. 460, 471-474.) In *People v. Caballero* (2012) 55 Cal.4th 262, 268, the California Supreme Court held, "sentencing a juvenile offender for a nonhomicide offense to a term of years with a parole eligibility date that falls outside the juvenile offender's natural life expectancy constitutes cruel and unusual punishment in violation of the Eighth Amendment." In 2014, Senate Bill 260 created Penal Code sections 3051 and 4801, which entitle a person convicted of a crime committed while he or she was under 26 years old to a "youth offender" parole hearing so that they have a meaningful opportunity at release and rehabilitation. In 2016, the voters passed Proposition 57, which took from prosecutors the option to file offenses committed by juveniles directly in adult court. Allowing prior juvenile adjudications to be used in adult court is a relic from the past and wholly inconsistent with the body of juvenile statutes on the books and out of step with new statutes and precedents enacted over the last ten years. This resolution would rectify this inconsistency.

Penal Codes 667 and 1170.12 were approved by voter initiatives. These initiatives contained provisions that would permit the Legislature to make amendments by a two-thirds vote, by majority vote and approval by the electorate, or by a new initiative. (Pen. Code, § 667, subd. (j); Prop. 184 (1994) § 4; see Cal. Const., art II, § 10.) If this resolution is approved, sponsored and introduced, the Legislature could pass the legislation with a two-thirds majority vote.

Therefore, this resolution should be approved in principle.

This resolution is similar to Resolution 09-05-2020.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Penal Code sections 667 and 1170.12 to read as follows:

§ 667

(a) (1) Any person convicted of a serious felony who previously has been convicted of a serious felony in this state or of any offense committed in another jurisdiction which includes all of the elements of any serious felony, shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges brought and tried separately. The terms of the present offense and each enhancement shall run consecutively.

(2) This subdivision shall not be applied when the punishment imposed under other provisions of law would result in a longer term of imprisonment. There is no requirement of prior incarceration or commitment for this subdivision to apply.

(3) The Legislature may increase the length of the enhancement of sentence provided in this subdivision by a statute passed by majority vote of each house thereof.

(4) As used in this subdivision, "serious felony" means a serious felony listed in subdivision (c) of Section 1192.7.

(5) This subdivision does not apply to a person convicted of selling, furnishing, administering, or giving, or offering to sell, furnish, administer, or give to a minor any methamphetamine-related drug or any precursors of methamphetamine unless the prior conviction was for a serious felony described in subparagraph (24) of subdivision (c) of Section 1192.7.

(b) It is the intent of the Legislature in enacting subdivisions (b) to (i), inclusive, to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of one or more serious or violent felony offenses.

(c) Notwithstanding any other law, if a defendant has been convicted of a felony and it has been pled and proved that the defendant has one or more prior serious or violent felony convictions as defined in subdivision (d), the court shall adhere to each of the following:

(1) There shall not be an aggregate term limitation for purposes of consecutive sentencing for any subsequent felony conviction.

(2) Probation for the current offense shall not be granted, nor shall execution or imposition of the sentence be suspended for any prior offense.

(3) The length of time between the prior serious or violent felony conviction and the current felony conviction shall not affect the imposition of sentence.

(4) There shall not be a commitment to any other facility other than the state prison. Diversion shall not be granted nor shall the defendant be eligible for commitment to the California Rehabilitation Center as provided in Article 2 (commencing with Section 3050) of Chapter 1 of Division 3 of the Welfare and Institutions Code.

(5) The total amount of credits awarded pursuant to Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3 shall not exceed one-fifth of the total term of imprisonment imposed and shall not accrue until the defendant is physically placed in the state prison.

(6) If there is a current conviction for more than one felony count not committed on the same occasion, and not arising from the same set of operative facts, the court shall sentence the defendant consecutively on each count pursuant to subdivision (e).

(7) If there is a current conviction for more than one serious or violent felony as described in paragraph (6), the court shall impose the sentence for each conviction consecutive to the sentence for any other conviction for which the defendant may be consecutively sentenced in the manner prescribed by law.

(8) Any sentence imposed pursuant to subdivision (e) will be imposed consecutive to any other sentence which the defendant is already serving, unless otherwise provided by law.

(d) Notwithstanding any other law and for the purposes of subdivisions (b) to (i), inclusive, a prior conviction of a serious or violent felony shall be defined as:

(1) Any offense defined in subdivision (c) of Section 667.5 as a violent felony or any offense defined in subdivision (c) of Section 1192.7 as a serious felony in this state. The determination of whether a prior conviction is a prior felony conviction for purposes of subdivisions (b) to (i), inclusive, shall be made upon the date of that prior conviction and is not affected by the sentence imposed unless the sentence automatically, upon the initial sentencing, converts the felony to a misdemeanor. The following dispositions shall not affect the determination that a prior conviction is a prior felony for purposes of subdivisions (b) to (i), inclusive:

(A) The suspension of imposition of judgment or sentence.

(B) The stay of execution of sentence.

(C) The commitment to the State Department of Health Care Services as a mentally disordered sex offender following a conviction of a felony.

(D) The commitment to the California Rehabilitation Center or any other facility whose function is rehabilitative diversion from the state prison.

(2) A prior conviction in another jurisdiction for an offense that, if committed in California, is punishable by imprisonment in the state prison constitutes a prior conviction of a particular serious or violent felony if the prior conviction in the other jurisdiction is for an offense that includes all of the elements of a particular violent felony as defined in subdivision (c) of Section 667.5 or serious felony as defined in subdivision (c) of Section 1192.7.

~~(3) A prior juvenile adjudication constitutes a prior serious or violent felony conviction for purposes of sentence enhancement if:~~

~~(A) The juvenile was 16 years of age or older at the time the juvenile committed the prior offense.~~

~~(B) The prior offense is listed in subdivision (b) of Section 707 of the Welfare and Institutions Code or described in paragraph (1) or (2) as a serious or violent felony.~~

~~(C) The juvenile was found to be a fit and proper subject to be dealt with under the juvenile court law.~~

~~(D) The juvenile was adjudged a ward of the juvenile court within the meaning of Section 602 of the Welfare and Institutions Code because the person committed an offense listed in subdivision (b) of Section 707 of the Welfare and Institutions Code.~~

(e) For purposes of subdivisions (b) to (i), inclusive, and in addition to any other enhancement or punishment provisions which may apply, the following apply if a defendant has one or more prior serious or violent felony convictions:

(1) If a defendant has one prior serious or violent felony conviction as defined in subdivision (d) that has been pled and proved, the determinate term or minimum term for an indeterminate term shall be twice the term otherwise provided as punishment for the current felony conviction.

(2) (A) Except as provided in subparagraph (C), if a defendant has two or more prior serious or violent felony convictions as defined in subdivision (d) that have been pled and proved, the term for the current felony conviction shall be an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greatest of:

(i) Three times the term otherwise provided as punishment for each current felony conviction subsequent to the two or more prior serious or violent felony convictions.

(ii) Imprisonment in the state prison for 25 years.

(iii) The term determined by the court pursuant to Section 1170 for the underlying conviction, including any enhancement applicable under Chapter 4.5 (commencing with Section 1170) of Title 7 of Part 2, or any period prescribed by Section 190 or 3046.

(B) The indeterminate term described in subparagraph (A) shall be served consecutive to any other term of imprisonment for which a consecutive term may be imposed by law. Any other term imposed subsequent to any indeterminate term described in subparagraph (A) shall not be merged therein but shall commence at the time the person would otherwise have been released from prison.

(C) If a defendant has two or more prior serious or violent felony convictions as defined in subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7 that have been pled and proved, and the current offense is not a serious or violent felony as defined in subdivision (d), the

defendant shall be sentenced pursuant to paragraph (1) of subdivision (e) unless the prosecution pleads and proves any of the following:

(i) The current offense is a controlled substance charge, in which an allegation under Section 11370.4 or 11379.8 of the Health and Safety Code was admitted or found true.

(ii) The current offense is a felony sex offense, defined in subdivision (d) of Section 261.5 or Section 262, or any felony offense that results in mandatory registration as a sex offender pursuant to subdivision (c) of Section 290 except for violations of Sections 266 and 285, paragraph (1) of subdivision (b) and subdivision (e) of Section 286, paragraph (1) of subdivision (b) and subdivision (e) of Section 288a, Section 311.11, and Section 314.

(iii) During the commission of the current offense, the defendant used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person.

(iv) The defendant suffered a prior serious or violent felony conviction, as defined in subdivision (d) of this section, for any of the following felonies:

(I) A "sexually violent offense" as defined in subdivision (b) of Section 6600 of the Welfare and Institutions Code.

(II) Oral copulation with a child who is under 14 years of age, and who is more than 10 years younger than the defendant as defined by Section 288a, sodomy with another person who is under 14 years of age and more than 10 years younger than the defendant as defined by Section 286, or sexual penetration with another person who is under 14 years of age, and who is more than 10 years younger than the defendant, as defined by Section 289.

(III) A lewd or lascivious act involving a child under 14 years of age, in violation of Section 288.

(IV) Any homicide offense, including any attempted homicide offense, defined in Sections 187 to 191.5, inclusive.

(V) Solicitation to commit murder as defined in Section 653f.

(VI) Assault with a machine gun on a peace officer or firefighter, as defined in paragraph (3) of subdivision (d) of Section 245.

(VII) Possession of a weapon of mass destruction, as defined in paragraph (1) of subdivision (a) of Section 11418.

(VIII) Any serious or violent felony offense punishable in California by life imprisonment or death.

(f) (1) Notwithstanding any other law, subdivisions (b) to (i), inclusive, shall be applied in every case in which a defendant has one or more prior serious or violent felony convictions as defined in subdivision (d). The prosecuting attorney shall plead and prove each prior serious or violent felony conviction except as provided in paragraph (2).

(2) The prosecuting attorney may move to dismiss or strike a prior serious or violent felony conviction allegation in the furtherance of justice pursuant to Section 1385, or if there is insufficient evidence to prove the prior serious or violent felony conviction. If upon the satisfaction of the court that there is insufficient evidence to prove the prior serious or violent felony conviction, the court may dismiss or strike the allegation. This section shall not be read to alter a court's authority under Section 1385.

(g) Prior serious or violent felony convictions shall not be used in plea bargaining as defined in subdivision (b) of Section 1192.7. The prosecution shall plead and prove all known prior felony serious or violent convictions and shall not enter into any agreement to strike or seek

the dismissal of any prior serious or violent felony conviction allegation except as provided in paragraph (2) of subdivision (f).

(h) All references to existing statutes in subdivisions (c) to (g), inclusive, are to statutes as they existed on November 7, 2012.

(i) If any provision of subdivisions (b) to (h), inclusive, or the application thereof to any person or circumstance is held invalid, that invalidity shall not affect other provisions or applications of those subdivisions which can be given effect without the invalid provision or application, and to this end the provisions of those subdivisions are severable.

(j) The provisions of this section shall not be amended by the Legislature except by statute passed in each house by rollcall vote entered in the journal, two-thirds of the membership concurring, or by a statute that becomes effective only when approved by the electors.

§ 1170.12.

Aggregate and consecutive terms for multiple convictions; prior conviction as prior felony; commitment and other enhancements or punishment.

(a) Notwithstanding any other law, if a defendant has been convicted of a felony and it has been pled and proved that the defendant has one or more prior serious or violent felony convictions, as defined in subdivision (b), the court shall adhere to each of the following:

(1) There shall not be an aggregate term limitation for purposes of consecutive sentencing for any subsequent felony conviction.

(2) Probation for the current offense shall not be granted, nor shall execution or imposition of the sentence be suspended for any prior offense.

(3) The length of time between the prior serious or violent felony conviction and the current felony conviction shall not affect the imposition of sentence.

(4) There shall not be a commitment to any other facility other than the state prison. Diversion shall not be granted nor shall the defendant be eligible for commitment to the California Rehabilitation Center as provided in Article 2 (commencing with Section 3050) of Chapter 1 of Division 3 of the Welfare and Institutions Code.

(5) The total amount of credits awarded pursuant to Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3 shall not exceed one-fifth of the total term of imprisonment imposed and shall not accrue until the defendant is physically placed in the state prison.

(6) If there is a current conviction for more than one felony count not committed on the same occasion, and not arising from the same set of operative facts, the court shall sentence the defendant consecutively on each count pursuant to this section.

(7) If there is a current conviction for more than one serious or violent felony as described in subdivision (b), the court shall impose the sentence for each conviction consecutive to the sentence for any other conviction for which the defendant may be consecutively sentenced in the manner prescribed by law.

(b) Notwithstanding any other law and for the purposes of this section, a prior serious or violent conviction of a felony is defined as:

(1) Any offense defined in subdivision (c) of Section 667.5 as a violent felony or any offense defined in subdivision (c) of Section 1192.7 as a serious felony in this state. The determination of whether a prior conviction is a prior serious and/or violent felony conviction for purposes of this section shall be made upon the date of that prior conviction and is not affected by the sentence imposed unless the sentence automatically, upon the initial sentencing, converts

the felony to a misdemeanor. The following dispositions shall not affect the determination that a prior serious or violent conviction is a serious or violent felony for purposes of this section:

(A) The suspension of imposition of judgment or sentence.

(B) The stay of execution of sentence.

(C) The commitment to the State Department of Health Services as a mentally disordered sex offender following a conviction of a felony.

(D) The commitment to the California Rehabilitation Center or any other facility whose function is rehabilitative diversion from the state prison.

(2) A prior conviction in another jurisdiction for an offense that, if committed in California, is punishable by imprisonment in the state prison constitutes a prior conviction of a particular serious or violent felony if the prior conviction in the other jurisdiction is for an offense that includes all of the elements of the particular violent felony as defined in subdivision (c) of Section 667.5 or serious felony as defined in subdivision (c) of Section 1192.7.

~~(3) A prior juvenile adjudication constitutes a prior serious or violent felony conviction for the purposes of sentence enhancement if:~~

~~(A) The juvenile was 16 years of age or older at the time the juvenile committed the prior offense, and~~

~~(B) The prior offense is~~

~~(i) listed in subdivision (b) of Section 707 of the Welfare and Institutions Code, or~~

~~(ii) listed in this subdivision as a serious or violent felony, and~~

~~(C) The juvenile was found to be a fit and proper subject to be dealt with under the juvenile court law, and~~

~~(D) The juvenile was adjudged a ward of the juvenile court within the meaning of Section 602 of the Welfare and Institutions Code because the person committed an offense listed in subdivision (b) of Section 707 of the Welfare and Institutions Code.~~

(c) For purposes of this section, and in addition to any other enhancements or punishment provisions which may apply, the following apply if a defendant has one or more prior serious or violent felony convictions:

(1) If a defendant has one prior serious or violent felony conviction as defined in subdivision (b) that has been pled and proved, the determinate term or minimum term for an indeterminate term shall be twice the term otherwise provided as punishment for the current felony conviction.

(2) (A) Except as provided in subparagraph (C), if a defendant has two or more prior serious or violent felony convictions, as defined in subdivision (b), that have been pled and proved, the term for the current felony conviction shall be an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greatest of:

(i) three times the term otherwise provided as punishment for each current felony conviction subsequent to the two or more prior serious or violent felony convictions, or

(ii) twenty-five years or

(iii) the term determined by the court pursuant to Section 1170 for the underlying conviction, including any enhancement applicable under Chapter 4.5 (commencing with Section 1170) of Title 7 of Part 2, or any period prescribed by Section 190 or 3046.

(B) The indeterminate term described in subparagraph (A) of paragraph (2) of this subdivision shall be served consecutive to any other term of imprisonment for which a consecutive term may be imposed by law. Any other term imposed subsequent to any indeterminate term described in subparagraph (A) of paragraph (2) of this subdivision shall not

be merged therein but shall commence at the time the person would otherwise have been released from prison.

(C) If a defendant has two or more prior serious or violent felony convictions as defined in subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7 that have been pled and proved, and the current offense is not a felony described in paragraph (1) of subdivision (b) of this section, the defendant shall be sentenced pursuant to paragraph (1) of subdivision (c) of this section, unless the prosecution pleads and proves any of the following:

(i) The current offense is a controlled substance charge, in which an allegation under Section 11370.4 or 11379.8 of the Health and Safety Code was admitted or found true.

(ii) The current offense is a felony sex offense, defined in subdivision (d) of Section 261.5 or Section 262, or any felony offense that results in mandatory registration as a sex offender pursuant to subdivision (c) of Section 290 except for violations of Sections 266 and 285, paragraph (1) of subdivision (b) and subdivision (e) of Section 286, paragraph (1) of subdivision (b) and subdivision (e) of Section 287, Section 314, and Section 311.11.

(iii) During the commission of the current offense, the defendant used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person.

(iv) The defendant suffered a prior conviction, as defined in subdivision (b) of this section, for any of the following serious or violent felonies:

(I) A "sexually violent offense" as defined by subdivision (b) of Section 6600 of the Welfare and Institutions Code.

(II) Oral copulation with a child who is under 14 years of age, and who is more than 10 years younger than the defendant as defined by Section 287 or former Section 288a, sodomy with another person who is under 14 years of age and more than 10 years younger than the defendant as defined by Section 286 or sexual penetration with another person who is under 14 years of age, and who is more than 10 years younger than the defendant, as defined by Section 289.

(III) A lewd or lascivious act involving a child under 14 years of age, in violation of Section 288.

(IV) Any homicide offense, including any attempted homicide offense, defined in Sections 187 to 191.5, inclusive.

(V) Solicitation to commit murder as defined in Section 653f.

(VI) Assault with a machinegun on a peace officer or firefighter, as defined in paragraph (3) of subdivision (d) of Section 245.

(VII) Possession of a weapon of mass destruction, as defined in paragraph (1) of subdivision (a) of Section 11418.

(VIII) Any serious or violent felony offense punishable in California by life imprisonment or death.

(d) (1) Notwithstanding any other law, this section shall be applied in every case in which a defendant has one or more prior serious and/or violent felony convictions as defined in this section. The prosecuting attorney shall plead and prove each prior serious or violent felony conviction except as provided in paragraph (2).

(2) The prosecuting attorney may move to dismiss or strike a prior serious or violent felony conviction allegation in the furtherance of justice pursuant to Section 1385, or if there is insufficient evidence to prove the prior serious or violent conviction. If upon the satisfaction of the court that there is insufficient evidence to prove the prior serious or violent felony conviction,

the court may dismiss or strike the allegation. This section shall not be read to alter a court's authority under Section 1385.

(e) Prior serious or violent felony convictions shall not be used in plea bargaining, as defined in subdivision (b) of Section 1192.7. The prosecution shall plead and prove all known prior serious or violent felony convictions and shall not enter into any agreement to strike or seek the dismissal of any prior serious or violent felony conviction allegation except as provided in paragraph (2) of subdivision (d).

(f) If any provision of subdivisions (a) to (e), inclusive, or of Section 1170.126, or the application thereof to any person or circumstance is held invalid, that invalidity does not affect other provisions or applications of those subdivisions which can be given effect without the invalid provision or application, and to this end the provisions of those subdivisions are severable.

(g) The provisions of this section shall not be amended by the Legislature except by statute passed in each house by rollcall vote entered in the journal, two-thirds of the membership concurring, or by a statute that becomes effective only when approved by the electors.

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

PROPONENT: San Mateo County Bar Association

STATEMENT OF REASONS

The Problem: The "three strikes" law is actually two parallel Penal Code provisions, one enacted by legislative action and the other through the initiate process. Proposition 184 (the initiative part of the "3 Strikes" law) was overwhelmingly approved in 1994 with the intent of protecting law- abiding citizens by enhancing the sentences of repeat offenders who commit serious and/or violent felonies.

On July 2, 2009, the California Supreme Court struck down a decision of the Sixth District Court of Appeal which had held the absence of a jury-trial right in juvenile proceedings bars the use of prior juvenile adjudications to increase the maximum sentence for a subsequent adult felony offense. The Supreme Court held that the right to a jury trial does not bar the use of a constitutionally valid, fair, and reliable prior adjudication of criminal conduct to enhance a subsequent adult sentence simply because the prior proceeding did not include the right to a jury trial.

The three strikes law provides for enhanced penalties being applied to a convicted felon who has previously suffered convictions for specified serious or violent felonies. Provided that certain conditions are met, a petition sustained in the juvenile court against a minor may, in a future felony prosecution, be used against him or her as one or more strike priors under the three strikes law in the same manner as would an adult conviction for these same offenses. The potential effect of such a prior would be to make him or her ineligible for a probationary sentence, extend the sentencing range so as to either double the length of a possible determinate sentence and even to lead to an indeterminate sentence of 25 years to life or even longer.

In the quarter century since the passage of the three strikes laws, while property crime has increased somewhat, violent crime has consistently decreased. Moreover, striking the use of sustained juvenile petitions as strikes would further the effort to reduce overcrowding in the adult prison system has been underway for ten years.

The Solution: This resolution would recommend deletion of those provisions now present in the Penal Code that provide for the use of sustained juvenile petitions as being equivalent to adult convictions for purposes of the three strikes law.

CURRENT OR PRIOR RELATED LEGISLATION
Substantially similar to 09-19-2006, 03-06-2011, and 06-06-2012, each of which passed the conference, none of which found authors in the legislature.

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

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RESPONSIBLE FLOOR DELEGATE: Jeffrey B. Hayden

RESOLUTION 09-08-2020

DIGEST
Violent Felonies: Rape of Intoxicated or Unconscious Victims
Amends Penal Code section 261 to bring the rape of intoxicated or unconscious victims, drugged without knowledge or consent, within the definition of a "violent felony."

RESOLUTIONS COMMITTEE RECOMMENDATION
APPROVE IN PRINCIPLE

History:
No similar resolutions found.

Reasons:
This resolution amends Penal Code section 261 to bring the rape of intoxicated or unconscious victims, drugged without knowledge or consent, within the definition of a "violent felony." This resolution should be approved in principle because the rape of an intoxicated or unconscious victim should be punished in the same manner as other forms of rape.

The current version of Penal Code section 261 does not include the rape of an intoxicated or unconscious victim, when the perpetrator drugged the victim without their knowledge or consent, within the definition of a "violent felony." In particular, rape is not a "violent felony," except under certain subdivisions involving the use of force or threats. (See Pen. Code, §§ 261, subd. (a)(2), (6); 262, subd. (a)(1), (4); 667.5, subd. (c)(3).) Consequently, raping an intoxicated or unconscious person is not considered "violent" when the perpetrator drugged the victim without his or her knowledge or consent. (See Pen. Code, §§ 261, subd. (a)(3), (4); 262, subd. (a)(2), (3).) This difference has important implications in prosecution and sentencing as violent felonies are punished more severely.

This resolution will bring the rape of intoxicated or unconscious victims, when the perpetrator drugged the victim without their knowledge or consent, within the definition of "violent felony."

That outcome is appropriate because the rape of an intoxicated or unconscious victim when the perpetrator drugged the victim without their knowledge or consent is a violation of the victim's rights just as any other rape and consequently the punishment should be the same. Further, the fact that the victim was intoxicated or unconscious when the perpetrator raped the victim without their knowledge or consent does not make the rape a nonviolent act. While there is some logic to being more lenient with nonviolent offenders, the rape of an intoxicated or unconscious victim under these circumstances is not an appropriate crime for such leniency.

This resolution is similar to Assembly Bill No. 27 (2017-2018 Reg. Sess.) that would have amended Penal Code section 667.5 to designate all forms of rape to be violent felonies. It is also similar to Assembly Bill No. 67 (2017-2018 Reg. Sess.) which would have done the same and added human trafficking. Both bills were held in the Assembly Appropriations Committee.

Therefore, this resolution should be approved in principle.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Penal Code section 261, to read as follows:

§ 261

(a) Rape is an act of sexual intercourse accomplished with a person not the spouse of the perpetrator, under any of the following circumstances:

(1) Where a person is incapable, because of a mental disorder or developmental or physical disability, of giving legal consent, and this is known or reasonably should be known to the person committing the act. Notwithstanding the existence of a conservatorship pursuant to the provisions of the Lanterman-Petris-Short Act (Part 1 (commencing with Section 5000) of Division 5 of the Welfare and Institutions Code), the prosecuting attorney shall prove, as an element of the crime, that a mental disorder or developmental or physical disability rendered the alleged victim incapable of giving consent.

(2) Where it is accomplished against a person's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another.

(3) Where a person is prevented from resisting by any intoxicating or anesthetic substance, or any controlled substance, and this condition was known, or reasonably should have been known by the accused.

(4) Where a person is at the time unconscious of the nature of the act, and this is known to the accused. As used in this paragraph, "unconscious of the nature of the act" means incapable of resisting because the victim meets any one of the following conditions:

(A) Was unconscious or asleep.

(B) Was not aware, knowing, perceiving, or cognizant that the act occurred.

(C) Was not aware, knowing, perceiving, or cognizant of the essential characteristics of the act due to the perpetrator's fraud in fact.

(D) Was not aware, knowing, perceiving, or cognizant of the essential characteristics of the act due to the perpetrator's fraudulent representation that the sexual penetration served a professional purpose when it served no professional purpose.

(5) Where a person submits under the belief that the person committing the act is someone known to the victim other than the accused, and this belief is induced by any artifice, pretense, or concealment practiced by the accused, with intent to induce the belief.

(6) Where the act is accomplished against the victim's will by threatening to retaliate in the future against the victim or any other person, and there is a reasonable possibility that the perpetrator will execute the threat. As used in this paragraph, "threatening to retaliate" means a threat to kidnap or falsely imprison, or to inflict extreme pain, serious bodily injury, or death.

(7) Where the act is accomplished against the victim's will by threatening to use the authority of a public official to incarcerate, arrest, or deport the victim or another, and the victim has a reasonable belief that the perpetrator is a public official. As used in this paragraph, "public official" means a person employed by a governmental agency who has the authority, as part of that position, to incarcerate, arrest, or deport another. The perpetrator does not actually have to be a public official.

(b) As used in this section, "duress" means a direct or implied threat of force, violence, danger, or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to perform an act which otherwise would not have been performed, or acquiesce in an act to which

one otherwise would not have submitted. The total circumstances, including the age of the victim, and his or her relationship to the defendant, are factors to consider in appraising the existence of duress.

(c) As used in this section, "menace" means any threat, declaration, or act which shows an intention to inflict an injury upon another.

(d) As used in this chapter, "force" includes the perpetrator's use of any intoxicating or anesthetic substance, or any controlled substance, without the victim's knowledge or consent.

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

PROPONENT: Los Angeles County Bar Association

STATEMENT OF REASONS

The Problem: Under existing law, rape is not a "violent felony," except under certain subdivisions involving the use of force or threats. (*See* Pen. Code, §§ 261, subd. (a)(2), (6); 262, subd. (a)(1), (4); 667.5, subd. (c)(3).) Consequently, raping an intoxicated or unconscious person is not considered "violent," even if the perpetrator drugged the victim without their knowledge or consent. (*See* Pen. Code, §§ 261, subd. (a)(3), (4); 262, subd. (a)(2), (3).) This difference has important implications in prosecution and sentencing.

For purposes of mental health diversion and reducing certain felonies to misdemeanors, a defendant who is likely to rape intoxicated or unconscious persons cannot be considered an "unreasonable risk of danger to public safety" as a matter of law. (*See* Pen. Code, §§ 1001.83, 1170.18.)

As a "non-violent" felon, an inmate who is incarcerated for raping an intoxicated or unconscious person becomes parole-eligible after serving time on the primary offense alone, regardless of any special allegations, prior convictions, or consecutive sentences that may significantly increase the aggregate sentence. (Cal. Const., art. I, § 32, subd. (a)(1).) Thus, in California, a defendant who is sentenced to serve 34 years in state prison for raping 48 intoxicated or unconscious persons, could be released after only 3 years. (*See* Pen. Code, § 264, subd. (c); *contra*, Mueller, *Britain's 'Most Prolific Rapist' Is Jailed for Life*, N.Y. Times (Jan. 6, 2020), https://www.nytimes.com/2020/01/06/world/europe/reynhard-sinaga-rape.html.)

Inmates incarcerated for forcible rape have their early release credits capped at 15 percent. (Pen. Code, § 2933.1.) By contrast, inmates incarcerated for raping intoxicated or unconscious persons can shave off 66 percent of their sentence when placed in a minimum custody facility or "fire camp," and 50 percent otherwise. (*See* "Proposition 57: Credit-Earning for Inmates Frequently Asked Questions (FAQ)," CDCR, https://www.cdcr.ca.gov/blog/proposition-57-credit-earning-for-inmates-frequently-asked-questions-faq.)

The Solution: Rape accomplished by means of drugging is doubly violative of a victim's bodily integrity and the perpetrator's use of drugs without the victim's knowledge or consent should be considered a use of force. This understanding has broad acceptance under the law. "[T]he legal authorities and sister state cases unanimously underline that the administering of drugs to overcome the victim's resistance does constitute force within the purview of section 211," involving robbery. (*People v. Dreas* (1984) 153 Cal.App.3d 623, 628.) Likewise, "preventing

resistance by causing a victim to be drugged constitutes use of force within the meaning of section 288, subdivision (b)," involving lewd acts with a child. (*People v. Lusk* (1985) 170 Cal.App.3d 764, 769.) Accordingly, this resolution would clarify that "force" includes drugging someone without their knowledge or consent, for any sex offense.

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

CURRENT OR PRIOR RELATED LEGISLATION
In 2017, Assembly Bill No. 27, as introduced, would have amended Penal Code section 667.5 to designate all forms of rape to be violent felonies, while Assembly Bill No. 67 would have done the same and added human trafficking. Both bills were held in Assembly Appropriations.

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COUNTERARGUMENTS AND COMMENTS BY BAR ASSOCIATIONS AND CLA SECTIONS

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Penal Code section 261 criminalizes several "different offenses" under the "single umbrella crime of rape." (*People v. White* (2017) 2 Cal.5th 349, 383.) Accordingly, the proposed inclusion of section 261(d) is unnecessary and its application would upend settled law and invariably generate confusion among courts and jurors.

To begin with, proposed Section 261(d) is redundant, as the conduct it criminalizes is already punishable under California law. Section 261(a)(3) prohibits rape under circumstances where the victim is "prevented from resisting by any intoxicating or anesthetic substance[.]" Furthermore, the enactment of section 261(d) would bring minimal benefit. Notwithstanding sentencing enhancements or early release credits, rape pursuant to sections 261(a)(2) and (a)(3) are identically punishable by 3, 6, or 8 years imprisonment. (Pen. Code, § 264(a).)

Moreover, proposed Section 261(d) will complicate otherwise settled law and would lead to confusion among courts and jurors. Forcible rape under section 261(a)(2) and rape of an intoxicated victim under section 261(a)(3) are fundamentally different offenses. (*See White, supra*, 2 Cal.5th 349, 383.) Under section 261(a)(2), jurors "simply" examine "whether [the] defendant used force to accomplish intercourse" against the victim's consent, rather than a specialized measurement of "whether the force he used overcame [the victim's] physical strength or ability to resist him." (*People v. Griffin*, 33 Cal.4th 1015, 1027.) As such, "force" under section 261(a)(2) employs a "common usage meaning" instead of a "specialized legal definition," and trial courts "have no sua sponte duty to specifically instruct a jury in a rape case on the definition of that term." (*Id.* at pp. 1023-1024.) In contrast, rape under section 261(a)(3) merely requires the victim to be legally incapable of granting consent because his or her "level of

intoxication and resulting mental impairment" is "so great" that the victim lacked "the ability to exercise reasonable judgment, i.e., to understand and weigh not only the physical nature of the act, but also its moral character and probable consequences." (*People v. Giardino* (2000) 82 Cal.App.4th 452, 466-467.) Thus, it is possible for the victim to be "intoxicated to some degree," yet still be "able to exercise reasonable judgment[.]" (*Ibid.*)

As a result, the conflation of intoxicating substance usage into the context of force will create numerous problems and corrupt the meaning of force. Proposed Section 261(d) devises a particular definition for one form of force, but it fails to define force beyond that specific definition. To compensate for this incomplete standard, courts would be forced to develop and instruct jurors on more specialized definitions for other forms of force. To the detriment of the more flexible "common usage meanings" standard, this approach would problematically invite jurors to create their own measurements as to whether the force used was sufficient to meet such specialized standards.

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