

RESOLUTION 01-01-2021

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to add Penal Code section 3043.7, to read as follows:

- 1 § 3043.7
2 (a) A victim of a crime committed by an inmate, or the next of kin of the victim if the
3 victim has died, who is entitled to appear at a hearing to review or consider the inmate's parole
4 suitability, shall have the following rights:
5 (1) the right to receive reasonable notice from the prosecuting agency of any scheduled
6 hearing, including any change to the date, time, and place of the hearing;
7 (2) the right to obtain from the Board of Parole Hearings or the prosecuting agency any
8 statements, recommendations, and risk assessments as they become available to the prosecuting
9 agency, except for those portions made confidential by law;
10 (3) the right to submit relevant documents to the Board no later than 10 days before the
11 hearing;
12 (4) the right to propose clarifying questions for the panel to ask the inmate, if they are not
13 irrelevant or cumulative;
14 (5) the right to have their designated representative assist in exercising these rights; and
15 (6) the right to be informed by the prosecuting agency of the rights enumerated in
16 paragraphs (1) through (5).
17 (b) Nothing in this section shall be construed as a limitation on any other rights of the
18 victim or next of kin.

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

PROPONENT: Richard Ceballos, Michele Anderson, Jeff Hayden, H. Thomas Watson, Shaun Dabby Jacobs, Matt Schechter, Erin Joyce, Carolin Shining, Laura Jane Kessner, Kim Tran

STATEMENT OF REASONS

The Problem (including Existing Law): A victim of a crime committed by an inmate, or the victim's next of kin, has a right to attend the inmate's parole hearing with a designated representative. (*See* Cal. Const., art. I, § 28, subd. (b)(7); Pen Code, § 3043, subs. (a), (b).) If their contact information is on file, the Board of Parole Hearings will provide notice 90 days in advance. But given the passage of time, any information is usually out-of-date. Instead, the prosecuting agency, which is also notified, is in the best position to contact victims or their family members, using DMV records and other databases. Most already do so, but it is not a legal requirement.

Like the prosecuting agency, victims or their next of kin also have the right to make a statement. (Cal. Const., art. I, § 28, subd. (b) par. (8); Pen. Code, § 3043, subd. (c).) But unlike the prosecuting agency, they do not have access to the statements, recommendations, and risk assessments that are available to other participants at least 10 days before the hearing. Access to these documents, which are shared with the prosecuting agency and are routinely read into the

record verbatim at the hearing, allows one to prepare for the hearing with knowledge of relevant facts, including the inmate's institutional behavior, parole plans, and current risk to public safety. Instead, victims or their next of kin depend on the prosecuting agency to receive such information in advance.

But if the prosecuting agency chooses to absent itself from the process, victims or their next of kin are left in the dark as to the inmate's conduct while in prison and likelihood of release, which complicates the decision whether to attend and what kind of statement to prepare. Without the prosecuting agency's assistance, they are also unable to provide the Board with police reports or trial transcripts to prevent the panel from relying on an inaccurate or sanitized version of the commitment offense based entirely on an inmate's recollection. Currently, the prosecuting agency can submit relevant documents to the Board no later than 10 days before the hearing. (*See* Cal. Code Regs., tit. 15, § 2030, subd. (c).) No similar provision exists for victims or their next of kin. (*See* Cal. Code Regs., tit. 15, § 2029.)

At the hearing, a representative for the prosecuting agency can propose clarifying questions for the panel to ask the inmate, which may be helpful in resolving factual discrepancies and addressing unanswered questions. (*See* Cal. Code Regs., tit. 15, § 2030, subd. (d)(2).) But if the prosecuting agency is absent, victims or their next of kin will be denied a rare opportunity to hear the inmate's answer on any lingering questions they may have about the offense.

The Solution: This resolution would provide victims, or their next of kin, the right to receive reasonable notice of a parole hearing from the prosecuting agency, the right to limited discovery of non-confidential documents, and the same rights as the prosecuting agency to submit relevant documents and propose clarifying questions.

IMPACT STATEMENT

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

CURRENT OR PRIOR RELATED LEGISLATION

None known

AUTHOR AND/OR PERMANENT CONTACT

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RESOLUTION 01-02-2021

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Penal Code Section 1054.1, to read as follows:

1 § 1054.1

2 The prosecuting attorney shall disclose to the defendant or his or her attorney all of the
3 following materials and information: ~~if it is the possession of the prosecuting attorney or if the~~
4 ~~prosecuting attorney knows it to be in the possession of the investigating agencies.~~

5 (a) The names and addresses of persons the prosecutor intends to call as witnesses at trial.

6 ~~(b) Statements of all defendants.~~

7 (b) The complete file of all law enforcement agencies, investigatory agencies, and
8 prosecutor's offices of the crimes charged against the accused, including but not limited to the
9 following:

10 The defendant's statements, the codefendant's statements, witness statements,
11 investigating officer's notes, results of tests and examinations, or any other matter or evidence
12 obtained during the investigation of the offenses alleged to have been committed by the
13 defendant.

14 (c) All relevant real evidence seized or obtained as a part of the investigation of the
15 offenses charged.

16 ~~(d) The existence of a felony conviction of any material witness whose credibility is~~
17 ~~likely to be critical to the outcome of the trial.~~

18 (d) The complete criminal record of the defendant and of any witness, including records
19 of convictions, acquittals, charges dismissed, charges not filed and police reports.

20 ~~(e) Any exculpatory evidence.~~

21 (e) All exculpatory evidence and all evidence of mitigation.

22 (f) Relevant written or recorded statements of witnesses or reports of the statements of
23 witnesses ~~whom the prosecutor intends to call at the trial~~, including any reports or statements of
24 experts made in conjunction with the case, including the results of physical or mental
25 examinations, scientific tests, experiments, or comparisons which the prosecutor intends to offer
26 in evidence at the trial.

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

PROPONENT: David Michael Bigeleisen, Frank Leidman, Joachim Steinberg, James Brosnahan, Gerald Richards, Melissa Alain, Mary Vail, Tulasi Hosain, Jeffrey Hayden, and Mark Harvis

STATEMENT OF REASONS

The Problem (including Existing Law): Discovery in criminal cases is governed by two bodies of law, State law enacted by voter initiative in 1990, and Federal Due process law as spelled out in the United States Supreme Court cases of *Brady v. Maryland* (1963) 373 U.S. 83 and *Kyles v Whitley* (1995) 514 U.S. 419.

But these bodies of law often omit disclosure of evidence which will exculpate the accused. Sometimes the failure to disclose evidence is deliberate on the part of the prosecutor. An example is the case of Benjamin Field, in Santa Clara Count. We genuinely hope and believe this is a rare exception.

More often, the prosecutor fails to recognize the exculpatory value of information in his file. This is understandable. The prosecutor looks at his file from the point of view which will help his case.

Many wrongful convictions have been overturned upon the defense learning of exculpatory evidence after the fact.

The Solution: The amendment provides for an open file rule. An open file rule requires the prosecutor to permit the defense to review the factual portion of the entire prosecutor's file. It comports completely with the prosecution's duties of disclosure to the defendant. It makes the prosecutor's function easier; no longer must the prosecutor decide which evidence is relevant, which evidence is material and which evidence must be disclosed.

Disclose it all.

The system works. Two conservative District Attorneys' offices have had open file rules for at least thirty years. They are San Mateo County and San Diego County. This amendment is based on a North Carolina Statute: General Statute § 15A - 903 (2011).

IMPACT STATEMENT

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

CURRENT OR PRIOR RELATED LEGISLATION

None known.

AUTHOR AND/OR PERMANENT CONTACT:

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RESOLUTION 01-03-2021

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Penal Code section 859b, to read as follows:

1 § 859b

2 At the time the defendant appears before the magistrate for arraignment on the original
3 complaint, if the public offense is a felony to which the defendant has not pleaded guilty in
4 accordance with Section 859a, the magistrate, immediately upon the appearance of counsel, or if
5 none appears, after waiting a reasonable time therefor as provided in Section 859, shall set a time
6 for the examination of the case and shall allow not less than two days, excluding Sundays and
7 holidays, for the district attorney and the defendant to prepare for the examination. The
8 magistrate shall also issue subpoenas, duly subscribed, for witnesses within the state, required
9 either by the prosecution or the defense.

10 Both the defendant and the people have the right to a preliminary examination at the
11 earliest possible time, and unless both waive that right or good cause for a continuance is found
12 as provided for in Section 1050, the preliminary examination shall be held within 10 court days
13 of the date the defendant is arraigned or pleads on the original complaint, whichever occurs later,
14 or within 10 court days of the date criminal proceedings are reinstated pursuant to Chapter 6
15 (commencing with Section 1367) of Title 10 of Part 2.

16 Whenever the defendant is in custody, the magistrate shall dismiss the complaint if the
17 preliminary examination is set or continued beyond 10 court days from the time of the
18 arraignment; or plea on the original complaint, or reinstatement of criminal proceedings pursuant
19 to Chapter 6 (commencing with Section 1367) of Title 10 of Part 2, and the defendant has
20 remained in custody for 10 or more court days solely on that complaint, unless either of the
21 following occur:

22 (a) The defendant personally waives his or her right to preliminary examination within
23 the 10 court days.

24 (b) The prosecution establishes good cause for a continuance beyond the 10-court-day
25 period.

26 For purposes of this subdivision, “good cause” includes, but is not limited to, those cases
27 involving allegations that a violation of one or more of the sections specified in subdivision (a)
28 of Section 11165.1 or in Section 11165.6 has occurred and the prosecuting attorney assigned to
29 the case has another trial, preliminary hearing, or motion to suppress in progress in that court or
30 another court. Any continuance under this paragraph shall be limited to a maximum of three
31 additional court days.

32 If the preliminary examination is set or continued beyond the 10-court-day period, the
33 defendant shall be released pursuant to Section 1318 unless:

34 (1) The defendant requests the setting of continuance of the preliminary examination
35 beyond the 10-court-day period.

36 (2) The defendant is charged with a capital offense in a cause where the proof is evident
37 and the presumption great.

38 (3) A witness necessary for the preliminary examination is unavailable due to the actions
39 of the defendant.

- 40 (4) The illness of counsel.
41 (5) The unexpected engagement of counsel in a jury trial.
42 (6) Unforeseen conflicts of interest which require appointment of new counsel.
43 The magistrate shall dismiss the complaint if the preliminary examination is set or
44 continued more than 60 days from the date of the arraignment; or plea on the original complaint,
45 or reinstatement of criminal proceedings pursuant to Chapter 6 (commencing with Section 1367)
46 of Title 10 of Part 2, unless the defendant personally waives his or her right to a preliminary
47 examination within the 60 days.

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

PROPONENT: Los Angeles County Bar Association

STATEMENT OF REASONS

The Problem (including Existing Law): A preliminary hearing of an in-custody defendant must occur 10-court-days of arraignment, absent a waiver or a magistrate's finding of good cause for continuance. In *Garcia v. Superior Court* (2020) 47 Cal.App.5th 631, the Second District recently held that an arraignment on an amended complaint triggers a new 10-court-day period that supersedes previous time waivers:

“Garcia argues that, based on the plain language of the statute, his July 16, 2019 arraignment and plea on the amended complaint was a triggering event, restarting the 10-day clock for holding a preliminary hearing under section 859b. ... The People, on the other hand, contend that an arraignment or plea on an amended complaint is not a triggering event under section 859b because the filing of an amended complaint does not start a new criminal proceeding, but rather acts as a continuation of the previously filed charges. The People claim that, because Garcia personally waived the 10-day and 60-day time limits for the preliminary hearing at his June 21, 2019 arraignment on the original complaint and no new triggering event occurred, he is not entitled to dismissal of the amended complaint or release from custody. We conclude, based on the plain language of section 859b, the legislative purpose of the statute, and relevant case law, Garcia's arraignment and plea on the amended complaint was a triggering event under section 859b, which required the preliminary hearing be held within 10 court days of that arraignment and plea unless Garcia personally waived his right to a preliminary hearing within that 10-day period, or the prosecution established good cause for a continuance.”

(*Id.* at 646.)

Garcia's interpretation of Section 859b upends decades of criminal practice and creates a trap for the unwary. On one hand, a prosecutor may file an amended complaint too far in advance of a scheduled hearing, not realizing that an arraignment on an amended complaint invalidates past time waivers. On the other hand, a defendant who refuses to waive time may nevertheless have

their right to a speedy preliminary hearing set beyond the original statutory period if arraigned on an amended complaint, which *Garcia* treats as a new triggering event that restarts the clock.

Ultimately, a knowledgeable prosecutor seeking to amend the complaint can provide timely notice of the intent to do so but refrain from the formality of arraignment until the start of a hearing. But a defendant cannot avoid being arraigned on a filed amended complaint, which *Garcia* suggests would restart the statutory periods under Section 859b.

The Solution: This resolution would restore the pre-*Garcia* understanding that a defendant has a statutory right to a preliminary hearing within a 10-court-day or 60-calendar day period starting from arraignment or plea on the original complaint, such that a subsequent arraignment on an amended complaint neither invalidates past time waivers nor restarts the clock, which reduces gamesmanship and ensures a timely hearing.

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 01-04-2021

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Penal Code section 1536, to read as follows:

1 § 1536

2 (a) All property or things taken on a warrant must be retained by the officer's ~~in his~~
3 ~~custody~~ agency, a member of the prosecution team, or an employee or agent thereof, subject to
4 the order of the court to which ~~he~~ the officer is required to return the proceedings ~~before him~~, or
5 of any other court in which the offense in respect to which the property or things taken is triable.

6 (b) A court order is not required for a law enforcement agency to dispose of any property
7 or thing taken on a warrant, based on an agreement between the prosecuting agency and the
8 person from whom the property or thing was taken or that person's attorney.

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

PROPONENT: Los Angeles County Bar Association

STATEMENT OF REASONS

The Problem (including Existing Law): Codified in 1872, Penal Code section 1536 requires all property seized pursuant to a warrant to be “retained by the officer in his custody subject to the order of the court.” Accordingly, law enforcement agencies must obtain a court order before returning or otherwise disposing of any property seized pursuant to a warrant, even when the item is subsequently determined not to have any evidentiary value or when a case has ended. This results in prosecutors, defense attorneys, and courts expending time and resources to prepare, review, and obtain court orders on uncontested matters. Additionally, modern police agencies do not permit officers to retain custody of seized evidence but require that such evidence be booked in a central repository under the control of the agency.

The Solution: This resolution would update Penal Code section 1536 to clarify that persons authorized to retain seized evidence include the officer's agency, a member of the prosecution team, or an employee or agent thereof. It would also permit a law enforcement agency to dispose of seized evidence without a court order, based on an agreement between the prosecuting agency and the person from whom it was seized or that person's attorney. This promotes judicial economy and saves the parties time and resources. Expediting the disposition of seized property also helps increase available storage capacity in property rooms, which reduces costs for law enforcement agencies.

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 01-05-2021

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Penal Code section 803, to read as follows:

1 § 803

2 (a) Except as provided in this section, a limitation of time prescribed in this chapter is not
3 tolled or extended for any reason.

4 (b) No time during which prosecution of the same person for the same conduct is pending in
5 a court of this state is a part of a limitation of time prescribed in this chapter.

6 (c) A limitation of time prescribed in this chapter does not commence to run until the
7 discovery of an offense described in this subdivision. This subdivision applies to an offense
8 punishable by imprisonment in the state prison or imprisonment pursuant to subdivision (h) of
9 Section 1170, a material element of which is fraud or breach of a fiduciary obligation, the
10 commission of the crimes of theft or embezzlement upon an elder or dependent adult, or the
11 basis of which is misconduct in office by a public officer, employee, or appointee, including, but
12 not limited to, the following offenses:

13 (1) Grand theft of any type, forgery, falsification of public records, or acceptance of, or
14 asking, receiving, or agreeing to receive, a bribe, by a public official or a public employee,
15 including, but not limited to, a violation of Section 68, 86, or 93.

16 (2) A violation of Section 72, 118, 118a, 132, 134, or 186.10.

17 (3) A violation of Section 25540, of any type, or Section 25541 of the Corporations Code.

18 (4) A violation of Section 1090 or 27443 of the Government Code.

19 (5) Felony welfare fraud or Medi-Cal fraud in violation of Section 11483 or 14107 of the
20 Welfare and Institutions Code.

21 (6) Felony insurance fraud in violation of Section 548 or 550 of this code or former Section
22 1871.1, or Section 1871.4, of the Insurance Code.

23 (7) A violation of Section 580, 581, 582, 583, or 584 of the Business and Professions Code.

24 (8) A violation of Section 22430 of the Business and Professions Code.

25 (9) A violation of Section 103800 of the Health and Safety Code.

26 (10) A violation of Section 529a.

27 (11) A violation of subdivision (d) or (e) of Section 368.

28 (d) If the defendant is out of the state when or after the offense is committed, the prosecution
29 may be commenced as provided in Section 804 within the limitations of time prescribed by this
30 chapter, and no time up to a maximum of three years during which the defendant is not within
31 the state shall be a part of those limitations.

32 (e) A limitation of time prescribed in this chapter does not commence to run until the offense
33 has been discovered, or could have reasonably been discovered, with regard to offenses under
34 Division 7 (commencing with Section 13000) of the Water Code, under Chapter 6.5
35 (commencing with Section 25100) of, Chapter 6.7 (commencing with Section 25280) of, or
36 Chapter 6.8 (commencing with Section 25300) of, Division 20 of, or Part 4 (commencing with
37 Section 41500) of Division 26 of, the Health and Safety Code, or under Section 386, or offenses
38 under Chapter 5 (commencing with Section 2000) of Division 2 of, Chapter 9 (commencing with
39 Section 4000) of Division 2 of, Section 6126 of, Chapter 10 (commencing with Section 7301) of

40 Division 3 of, or Chapter 19.5 (commencing with Section 22440) of Division 8 of, the Business
41 and Professions Code.

42 (f) (1) Notwithstanding any other limitation of time described in this chapter, if subdivision
43 (b) of Section 799 does not apply, a criminal complaint may be filed within one year of the date
44 of a report to a California law enforcement agency by a person of any age alleging that he or she,
45 while under 18 years of age, was the victim of a crime described in Section 261, 286, 287, 288,
46 288.5, or 289, former Section 288a, or Section 289.5, as enacted by Chapter 293 of the Statutes
47 of 1991 relating to penetration by an unknown object.

48 (2) This subdivision applies only if all of the following occur:

49 (A) The limitation period specified in Section 800, 801, or 801.1, whichever is later, has
50 expired.

51 (B) The crime involved substantial sexual conduct, as described in subdivision (b) of Section
52 1203.066, excluding masturbation that is not mutual.

53 (C) There is independent evidence that corroborates the victim's allegation. If the victim was
54 21 years of age or older at the time of the report, the independent evidence shall clearly and
55 convincingly corroborate the victim's allegation.

56 (3) No evidence may be used to corroborate the victim's allegation that otherwise would be
57 inadmissible during trial. Independent evidence does not include the opinions of mental health
58 professionals.

59 (4) (A) In a criminal investigation involving any of the crimes listed in paragraph (1)
60 committed against a child, when the applicable limitations period has not expired, that period
61 shall be tolled from the time a party initiates litigation challenging a grand jury subpoena until
62 the end of the litigation, including any associated writ or appellate proceeding, or until the final
63 disclosure of evidence to the investigating or prosecuting agency, if that disclosure is ordered
64 pursuant to the subpoena after the litigation.

65 (B) Nothing in this subdivision affects the definition or applicability of any evidentiary
66 privilege.

67 (C) This subdivision shall not apply if a court finds that the grand jury subpoena was issued
68 or caused to be issued in bad faith.

69 (g) (1) Notwithstanding any other limitation of time described in this chapter, a criminal
70 complaint may be filed within one year of the date on which the identity of the suspect is
71 conclusively established by DNA testing, if both of the following conditions are met:

72 (A) The crime is one that is described in subdivision (c) of Section 290.

73 (B) The offense was committed prior to January 1, 2001, and biological evidence collected in
74 connection with the offense is analyzed for DNA type no later than January 1, 2004, or the
75 offense was committed on or after January 1, 2001, and biological evidence collected in
76 connection with the offense is analyzed for DNA type no later than two years from the date of
77 the offense.

78 (2) For purposes of this section, "DNA" means deoxyribonucleic acid.

79 (h) For any crime, the proof of which depends substantially upon evidence that was seized
80 under a warrant, but which is unavailable to the prosecuting authority under the procedures
81 described in *People v. Superior Court (Laff)* (2001) 25 Cal.4th 703, *People v. Superior Court*
82 (*Bauman & Rose*) (1995) 37 Cal.App.4th 1757, or subdivision (c) of Section 1524, relating to
83 claims of evidentiary privilege or attorney work product, the limitation of time prescribed in this
84 chapter shall be tolled from the time of the seizure until final disclosure of the evidence to the

85 prosecuting authority. Nothing in this section otherwise affects the definition or applicability of
86 any evidentiary privilege or attorney work product.

87 (i) Notwithstanding any other limitation of time described in this chapter, a criminal
88 complaint may be filed within one year of the date on which a hidden recording is discovered
89 related to a violation of paragraph (2) or (3) of subdivision (j) of Section 647.

90 (j) Notwithstanding any other limitation of time described in this chapter, if a person flees the
91 scene of an accident that caused death or permanent, serious injury, as defined in subdivision (d)
92 of Section 20001 of the Vehicle Code, a criminal complaint brought pursuant to paragraph (2) of
93 subdivision (b) of Section 20001 of the Vehicle Code may be filed within the applicable time
94 period described in Section 801 or 802 or one year after the person is initially identified by law
95 enforcement as a suspect in the commission of the offense, whichever is later, but in no case later
96 than six years after the commission of the offense.

97 (k) Notwithstanding any other limitation of time described in this chapter, if a person flees
98 the scene of an accident, a criminal complaint brought pursuant to paragraph (1) or (2) of
99 subdivision (c) of Section 192 may be filed within the applicable time period described in
100 Section 801 or 802, or one year after the person is initially identified by law enforcement as a
101 suspect in the commission of that offense, whichever is later, but in no case later than six years
102 after the commission of the offense.

103 (l) A limitation of time prescribed in this chapter does not commence to run until the
104 discovery of an offense involving the offering or giving of a bribe to a public official or public
105 employee, including, but not limited to, a violation of Section 67, 67.5, 85, 92, or 165, or Section
106 35230 or 72530 of the Education Code.

107 (m) Notwithstanding any other limitation of time prescribed in this chapter, if a person
108 actively conceals or attempts to conceal an accidental death in violation of Section 152, a
109 criminal complaint may be filed within one year after the person is initially identified by law
110 enforcement as a suspect in the commission of that offense, provided, however, that in any case a
111 complaint may not be filed more than four years after the commission of the offense.

112 (n) (1) Notwithstanding any other limitation of time described in this chapter, a criminal
113 complaint brought pursuant to a violation of Section 367g may be filed within one year of the
114 discovery of the offense or within one year after the offense could have reasonably been
115 discovered.

116 (2) This subdivision applies to crimes that were committed on or after January 1, 2021, and
117 to crimes for which the statute of limitations that was in effect before January 1, 2021, has not
118 run as of January 1, 2021.

119 (o) Notwithstanding any other limitation of time described in this chapter, a criminal
120 complaint brought pursuant to subdivision (b) of Section 523 may be filed within three years
121 after the person is initially identified by law enforcement as a suspect in the commission of that
122 offense.

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

PROPONENT: Los Angeles County Bar Association

STATEMENT OF REASONS

The Problem (including Existing Law): “Ransomware” is a type of computer malware that encrypts the victim’s data, rendering it inaccessible, and makes a monetary demand that the victim must pay in order to recover the encrypted files or prevent the public release of confidential data. These attacks are always carried by anonymous perpetrators, who are increasingly targeting critical infrastructure, such as governments, hospitals, and schools.

- Garrity, *California medical center forced to reschedule procedures due to ransomware attack*, Becker's Hospital Review (Jan. 6, 2020), <https://www.beckershospitalreview.com/cybersecurity/california-medical-center-forced-to-reschedule-procedures-due-to-ransomware-attack.html>.)
- Tidy, *How hackers extorted \$1.14m from University of California, San Francisco*, BBC (Jun. 29, 2020), <https://www.bbc.com/news/technology-53214783>.
- *Malware Attack Forces Rialto Unified To Suspend Online Learning*, CBS Los Angeles (Aug. 24, 2020), <https://losangeles.cbslocal.com/2020/08/24/malware-attack-forces-rialto-unified-to-suspend-online-learning>.
- Campa, *Ransomware attack hits Newhall schools, halting online classes*, L.A. Times (Sep. 15, 2020), <https://www.latimes.com/california/story/2020-09-15/newhall-elementary-schools-ransomware-attack>.
- Swindell, *Sonoma Valley Hospital hit by cybercriminals with ransomware attack*, The Press Democrat (Oct. 30, 2020), <https://www.pressdemocrat.com/article/news/sonoma-valley-hospital-hit-by-cybercriminals-with-ransomware-attack/?sba=AAS>

In 2018, the Legislature amended Penal Code section 523 to permit “ransomware” to be prosecuted as a form of extortion, which has a 3-year statute of limitations from the date of the offense. (*See* Pen. Code, §§ 523, subd. (b), 801.) But no prosecution has ever been brought under the “ransomware” law. As written, the actus reus of “ransomware” is not the extortionate demand but the introduction of the malware on the system: “Every person who, with intent to extort property or other consideration from another, **introduces** ransomware into any computer, computer system, or computer network is punishable pursuant to Section 520 in the same manner as if such property or other consideration were actually obtained by means of the ransomware.” (Pen. Code, § 523, subd. (b) (emphasis added).) This follows California’s mailbox rule, in which an extortion by threatening letter is deemed complete upon deposit in the mail. (*See* Pen. Code, §§ 523, subd. (a), 660.)

But once encrypted, a computer system becomes impervious to a forensic examination that might reveal when the ransomware was introduced. The inability to know when the crime occurred, and thus when the statute of limitations will run, discourages the use of investigative resources to identify a perpetrator, which can take years due to the legal and technical hurdles that must be overcome in an online investigation.

The Solution: This resolution would amend Penal Code section 803 to permit the filing of a complaint for a violation of Section 523(b) within three years after law enforcement initially identifies the person as a suspect. This is similar to existing statutes of limitation for hit and run and the concealment of an accidental death, where the identity of the perpetrator is usually not known at the time of the incident. (*See* Pen. Code, § 803, subds. (j), (k), (m).)

IMPACT STATEMENT

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

CURRENT OR PRIOR RELATED LEGISLATION

In 2020, SB 239 and SB 922 would have extended the statute of limitations for computer hacking in violation of Penal Code section 502 to 3 years from the date of discovery. Currently, AB 1247 (Chau) seeks to do the same.

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RESOLUTION 01-06-2021

TEXT OF RESOLUTION

RESOLVED that the Conference of Bar Associates recommend that legislation be sponsored to delete Penal Code sections 647 (b) and (d), Penal Code section 653.22, Penal Code section 653.23, and to amend Penal Code section 315, 316 and 11225, and to add Health and Safety Code section 429.13 to read as follows:

§647 Disorderly conduct

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.~~

~~(b)(3)(1) 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)(2) 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)(3) Notwithstanding paragraphs (1) to (3), inclusive paragraph (1), 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.

~~(e)~~ (b) 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)~~ (c) 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)~~ (d) 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)~~ (e) If a person has violated subdivision

~~(h)~~ (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.

~~(i)~~ (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.

~~(j)~~ (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.

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

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

§ 647.1. Solicitation to engage in ~~lewd conduct or prostitution~~; public intoxication involving intravenous use of a controlled substance; additional fine

In addition to any fine assessed under Section 647, the judge may assess a fine not to exceed seventy dollars (\$70) against any person who violates subdivision (a) or (b) of Section 647, or, if the offense involves intravenous use of a controlled substance, subdivision (f) of Section 647, with the proceeds of this fine to be used in accordance with Section 1463.23. The court shall, however, take into consideration the defendant's ability to pay and no defendant shall be denied probation because of his or her inability to pay the fine permitted under this section.

~~§ 315. Keeping or residing in house of ill fame; common repute as evidence~~

~~Every person who keeps a house of ill fame in this state, resorted to for the purposes of prostitution or lewdness, or who willfully resides in such house, is guilty of a misdemeanor; and in all prosecutions for keeping or resorting to such a house common repute may be received as competent evidence of the character of the house, the purpose for which it is kept or used, and the character of the women inhabiting or resorting to it.~~

~~§ 316. Keeping disorderly houses, etc., which disturb immediate neighborhood; innkeepers; landlords~~

~~Every person who keeps any disorderly house, or any house for the purpose of assignation or prostitution, or any house of public resort, by which the peace, comfort, or decency of the immediate neighborhood is habitually disturbed, or who keeps any inn in a disorderly manner; and every person who lets any apartment or tenement, knowing that it is to be used for the purpose of assignation or prostitution, is guilty of a misdemeanor.~~

§ 318. Place of illegal gambling ~~or prostitution~~; prevailing upon person to visit; punishment

Whoever, through invitation or device, prevails upon any person to visit any room, building, or other places kept for the purpose of illegal gambling ~~or prostitution~~, is guilty of a misdemeanor, and, upon conviction thereof, shall be confined in the county jail not exceeding six

months, or fined not exceeding five hundred dollars (\$500), or be punished by both that fine and imprisonment.

§ 11225. Place of illegal gambling, ~~prostitution~~, etc.; place used for human trafficking; place used as bathhouse permitting conduct capable of transmitting AIDS; nuisance; injunction, abatement, and prevention

(a)(1) Every building or place used for the purpose of illegal gambling as defined by state law or local ordinance, ~~lewdness, assignation, or prostitution~~, and every building or place in or upon which acts of illegal gambling as defined by state law or local ordinance, ~~lewdness, assignation, or prostitution~~, are held or occur, is a nuisance which shall be enjoined, abated, and prevented, and for which damages may be recovered, whether it is a public or private nuisance.

(2) Nothing in this subdivision shall be construed to apply the definition of a nuisance to a private residence where illegal gambling is conducted on an intermittent basis and without the purpose of producing profit for the owner or occupier of the premises.

(b)(1) Notwithstanding any other law, every building or place used for the purpose of human trafficking, and every building or place in or upon which acts of human trafficking are held or occur, is a nuisance which shall be enjoined, abated, and prevented, and for which damages may be recovered, whether it is a public or private nuisance.

(2) For purposes of this subdivision, human trafficking is defined in Section 236.1.

(c)(1) Every building or place used as a bathhouse which as a primary activity encourages or permits conduct that according to the guidelines of the federal Centers for Disease Control and Prevention can transmit AIDS, including, but not limited to, anal intercourse, oral copulation, or vaginal intercourse, is a nuisance which shall be enjoined, abated, and prevented, and for which damages may be recovered, whether it is a public or private nuisance.

(2) For purposes of this subdivision, a “bathhouse” means a business which, as its primary purpose, provides facilities for a spa, whirlpool, communal bath, sauna, steam bath, mineral bath, mud bath, or facilities for swimming.

~~§ 653.22. Offense; intent; relevant circumstances~~

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

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

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

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

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

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

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

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

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

~~§ 653.23. Supervising or otherwise aiding a prostitute~~

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Health and Safety Code §429.13 Operators of Businesses of Prostitution must adopt and promote safer sex practices

(1) Every operator of a business of prostitution must—

(a) Take all reasonable steps to give health information (whether oral or written) to sex workers and clients; and

(b) If the person operates a brothel, display health information prominently in that brothel; and

(c) Note state or imply that a medical examination of a sex worker means the sex worker is not infected, or likely to be infected, with a sexually transmissible infection; and

(d) The owner and operator of a business of prostitution must not discourage the use of prophylactics in the course of business.

(1) The obligations in this section apply only in relation to commercial sexual services provided for the business and to sex workers and clients in connection with those services.

(2) In this section, health information means information on safer sex practices and on services for the prevention and treatment of sexually transmissible infections.

(3) The director of the Health Services Department may implement suitable regulations to enforce the above.

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

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STATEMENT OF REASONS

The Problem (including Existing Law): Historically, prostitution has been regulated and criminalized in keeping with varying moral perspectives. Current condemnation and criminal prohibitions have not abated the prostitution. The underground nature of the prostitution business

creates dangers and vulnerabilities for sex workers and their clients and negatively impacts public health and safety. This illegal status makes it easier for predators to commit acts of violence against prostitutes.

By bringing sex work into daylight, we will:

- 1.Reduce violence. Legal sex work creates environments in which oversight is possible which protects prostitutes and clients from violence.
2. Reduce trafficking in human beings in the sex trade. This measure will provide a lawful environment for the sexual service industry, shifting enforcement resources to actual incidences of abuse rather than consensual commercial sex.
3. Promote public health. Current research reflects that prostitutes have a rate of sexually transmitted disease infections that is equal to other comparable segments of the population. Openness in the sex industry will support sexual health educational initiatives including safe sex practices and access to medical services for sex workers.
4. Promote labor rights and OSHA standards in the sex industry. Workers in the sex industry deserve the same rights as workers in any other trade.

The Solution: Removes penal provisions for consensual sex acts, whether they are without financial compensation, or for financial compensation. This resolution retains intact all of the laws prohibiting any form of forced prostitution. It also retains intact all of the laws protecting children from prostitution.

IMPACT STATEMENT

Civil Code Sections 798.56(c)(1) and 799.70(d) provide remedies to a landlord if a resident is convicted of prostitution. These will have to be addressed, but the social impact aspects can be dealt with as zoning issues.

CURRENT OR PRIOR RELATED LEGISLATION

None known.

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