

Date of Hearing: March 10, 2020
Counsel: Matthew Fleming

ASSEMBLY COMMITTEE ON PUBLIC SAFETY

Reginald Byron Jones-Sawyer, Sr., Chair

AB 1927 (Boerner Horvath) – As Amended March 2, 2020

SUMMARY: Makes testimony provided by a victim or witness in a felony prosecution for specified sex offenses, that at or around the time of the sex offense the victim or witness unlawfully possessed or used a controlled substance or alcohol, inadmissible in a separate prosecution of that victim or witness to prove illegal possession or use of that controlled substance or alcohol.

EXISTING LAW:

- 1) Makes it a felony for any person to assault another with intent to commit mayhem, rape, sodomy, oral copulation, lewd or lascivious acts with children, penetration by a foreign object, or with the intent to aid and abet a rape, punishable by imprisonment in the state prison for two, four, or six years. (Pen. Code § 220, subd. (a)(1).)
- 2) Makes it a felony for any person to assault another person under 18 years of age with the intent to commit mayhem, rape, sodomy, oral copulation, lewd or lascivious acts with children, penetration by a foreign object, or with the intent to aid and abet a rape, punishable by imprisonment in the state prison for five, seven, or nine years. (Pen. Code § 220, subd. (a)(2).)
- 3) Makes it a felony for any person who, in the commission of a burglary of the first degree, assaults another with intent to commit rape, sodomy, oral copulation, lewd or lascivious acts with children, penetration by a foreign object, or with the intent to aid and abet a rape, punishable by imprisonment in the state prison for life with the possibility of parole. (Pen. Code § 220, subd. (b).)
- 4) States that sexual battery occurs when any person touches an intimate part of another person while that person is unlawfully restrained, institutionalized for medical treatment, unconscious of the nature of the act, or it is fraudulently represented that the touching served a professional purpose, by the accused or an accomplice, if the touching is against the will of the person touched and is for the purpose of sexual arousal, sexual gratification, or sexual abuse. (Pen. Code § 243.4, subd. (a) - (d).)
- 5) Punishes sexual battery as either a misdemeanor with imprisonment in a county jail for not more than one year, and by a fine not exceeding two thousand dollars (\$2,000); or as a felony with imprisonment in the state prison for two, three, or four years, and by a fine not exceeding ten thousand dollars (\$10,000). (Pen. Code § 243.4, subs. (a) - (d).)
- 6) States that rape is an act of sexual intercourse accomplished with a person where the person is incapable of giving legal consent, where it is accomplished by means of force, violence,

duress, menace, or fear of bodily injury, where the person is prevented from resisting by any intoxicating or anesthetic substance, where the person was unconscious of the nature of the act, where the person is induced to believe that the person committing the act is someone known to the victim, 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, or 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. (Pen. Code § 261.)

- 7) Punishes rape by imprisonment in the state prison for three, six, or eight years, or for longer terms if the act was accomplished by means of force against a minor, specifically, nine, eleven, or thirteen years for a minor under the age of 14, and seven, nine, or eleven years for a minor over the age of 14. (Pen. Code § 264.)
- 8) States that unlawful sexual intercourse is an act of sexual intercourse accomplished with a person who is not the spouse of the perpetrator, and if the person is a minor; and defines a "minor" as someone who is under 18 years of age, and an "adult" as someone who is at least 18 years of age. (Pen. Code § 261.5, subd. (a).)
- 9) Punishes an act of unlawful sexual intercourse with a minor who is not more than three years older or three years younger than the perpetrator, as a misdemeanor. (Pen. Code § 261.5, subd. (b).)
- 10) Punishes an act of unlawful sexual intercourse with a minor who is more than three years younger than the perpetrator is guilty of either a misdemeanor or a felony. (Pen. Code § 261.5, subd. (c).)
- 11) Criminalizes the acts of sodomy, oral copulation, and sexual penetration, when it is accomplished either without consent or with a minor, and punishes those offenses as either alternate felony/misdemeanors ("wobbler" offenses) or as felonies, depending on a variety of circumstances, including whether force was used as well as the age difference between the perpetrator and the minor. (Pen. Code §§ 286, 287, and 289.)
- 12) Criminalizes the act of willfully and lewdly committing any lewd or lascivious act upon or with the body, or any part or member thereof, of a child who is 15 years or younger, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, and punishes those offenses as either alternate felony/misdemeanors ("wobbler" offenses) or as felonies, depending on a variety of circumstances, including whether force was used as well as the age difference between the perpetrator and the minor. (Pen. Code § 288.)
- 13) Establishes a procedure in which a person may be compelled to testify or produce evidence in a felony case if a person refuses to answer a question or produce evidence of any other kind on the ground that he or she may be incriminated and allows the district attorney or any other prosecuting agency to request an order granting use immunity or transactional immunity to the person compelled to give testimony or produce evidence. (Pen. Code § 1324.)

- 14) Establishes a procedure in which a person who refuses to answer a question or produce evidence of any other kind in a misdemeanor case on the ground that he may be incriminated, may agree to testify voluntarily in exchange for immunity from prosecution. (Pen. Code § 1324.1.)
- 15) Prohibits the admission of evidence that a person was in possession of condoms in a prosecution for a prostitution-related offense. (Evid. Code § 782.1.)
- 16) Prohibits the admission of evidence that a victim of, or a witness to, a serious felony, as defined, assault, domestic violence, extortion, sexual battery, or stalking, each as specified, has engaged in an act of prostitution at or around the time they were the victim of or witness to the crime is inadmissible in a separate prosecution of that victim or witness to prove criminal liability for the act of prostitution. (Evid. Code, § 1162.)
- 17) Prohibits the arrest of a person for a misdemeanor controlled substances offense or a prostitution offense if the person reports being a victim of, or a witness to, a serious felony, as defined, assault, domestic violence, extortion, sexual battery, or stalking, each as specified, if the person was engaged in such behavior at or around the time they were the victim of, or witness the offense they are reporting. (Evid. Code § 647.3.)
- 18) Establishes the “Right to Truth-in-Evidence,” which states that except as provided by statute enacted by a two-thirds vote of the Legislature, relevant evidence shall not be excluded in any criminal proceeding, including pretrial and post conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court. (Cal. Const., art. I, § 28, subd. (f), par. (2)).

FISCAL EFFECT: Unknown

COMMENTS:

- 1) **Author’s Statement:** According to the author, “A report by the White House Task Force to Protect Students from Sexual Assault confirm that liability for illegal consumption of alcohol and drugs can keep victims from reporting sexual assault. Higher education institutions nationwide, including the University of California system, utilize amnesty clauses to encourage college students to report sexual misconduct. These amnesty clauses provide limited immunity to individuals coming forward with a complaint. California should expand this concept to apply to all victims of sexual assault. Every victim deserves to come forward without fear of being found liable for minor violations of underage drinking or drug use. Providing victims with amnesty will help law enforcement prosecute perpetrators of sexual assault and increase overall public safety. AB 1927 will ensure that sexual assault survivors receive the justice they deserve.”
- 2) **The Need for This Bill:** The California Coalition Against Sexual Assault (CALCASA) publishes an annual report entitled the “Cost and Consequences of Sexual Assault in California.” (CALCASA, Feb. 2018, available at: https://www.calcasa.org/wp-content/uploads/2018/02/CALCASA_CCofSV_FINALSpreads_2018.pdf, [as of Mar. 2, 2020].) That report purports to track the instances of self-reported sexual assaults against the number of sexual assaults that are reported to law enforcement. (*Id.*) One of the conclusions drawn from the report is that discrepancy in the number of self-reported sexual assaults

versus the number of reports to law enforcement “highlight the extensive underreporting of sexual violence in California crime reports.” (*Id.* at 12.) CALCASA has submitted a letter in support of this bill.

Various reports indicate that sexual assault is particularly prevalent on college and university campuses. In 2014, President Obama issued a memorandum directing the Office of the Vice President and the White House Council on Women and Girls to lead an interagency effort to address campus rape and sexual assault. (White House Press Release, Jan. 22, 2014, *Memorandum -- Establishing a White House Task Force to Protect Students from Sexual Assault*, available at: <https://obamawhitehouse.archives.gov/the-press-office/2014/01/22/memorandum-establishing-white-house-task-force-protect-students-sexual-a> [as of Feb. 26, 2020].) The White House Task Force to Protect Students from Sexual Assault (“White House Task Force”) was then established.

The White House Task Force released its first report in 2014, finding that sexual assault on campus is “chronically underreported” and that only 2% of sexual assault survivors who were incapacitated from drugs or alcohol at the time of the assault report the incident to law enforcement. (*Not Alone: The First Report of the White House Task Force*, Apr. 2014, at page 7, available at: <https://www.justice.gov/archives/ovw/page/file/905942/download>, [as of Mar. 2, 2020].) The reporting rate for forcible rape was slightly higher, but still quite low, at 13%. (*Ibid.*) The fact that a victim may have used or possessed alcohol or drugs at or around the time of the sexual assault may be a reason why many witnesses are unwilling to come forward with allegations and evidence about a sexual offense. As part of its report, the White House Task Force created a checklist for Campus Sexual Misconduct Policies which included an amnesty policy for drug and alcohol use in specific situations. (*Checklist for Campus Sexual Misconduct Policies*, White House Task Force, Apr. 2014, at page 5, available at: <https://www.justice.gov/archives/ovw/page/file/910271/download>, [as of Mar. 2, 2020].) The University of California has implemented such an amnesty policy. (University of California Policy on Sexual Violence and Sexual Harassment, Jul. 2019, at page 9, available at: <https://policy.ucop.edu/doc/4000385/SVSH>, [as of Mar. 2, 2020].) Under that policy, the University of California will not ordinarily discipline Complainants or witnesses for student conduct policy violations such as underage drinking or drug use, if it occurred around the time of alleged sexual misconduct. (*Ibid.*)

Under the provisions of this bill, a similar amnesty-like policy would be adopted at a statewide level. Specifically, any victim or witness to a felony-level sexual assault would be allowed to testify in regards to that assault without fear that their statements could be used in a separate prosecution for drug or alcohol use or possession. This statutory grant of immunity as to any statements about drug or alcohol use or possession at or around the time of the felony-level sexual assault may encourage victims and witnesses to be more honest and forthcoming in cases that involve serious allegations of sex crimes. In recent years, the Legislature has adopted similar policies – AB 2243 (Friedman) Chapter 27, Statutes of 2018 and SB 233 (Wiener), Chapter 141, Statutes of 2019 – that prohibit the use of testimony and evidence of low-level controlled substance and prostitution offenses when the person has shared that testimony or evidence in order to prosecute a more serious violation of law.

- 3) **Existing Procedure for Compelled Testimony/Grant of Immunity:** Under current law, a victim or witness may be granted immunity for their testimony in a felony prosecution through a process known as “compelled testimony.” (Pen. Code § 1324.) In that procedure,

the victim or witness must first formally refuse to testify or provide evidence, invoking the rationale that doing so may incriminate them. The court can then “compel” the person to testify, granting immunity from prosecution for their statements and evidence in the process. According to the proponents of this bill, the existing procedure is often traumatic and complicated for victims and witnesses, who have often already been traumatized by virtue of being the witness to, or victim of, a sexual assault.

- 4) **Proposition 8, Right to Truth-in-Evidence:** In 1982, California voters approved Proposition 8, which included a provision known as the "Right to Truth-in-Evidence." The Right to Truth-In-Evidence is codified in the California Constitution, and stands for the principle that no relevant evidence may be excluded from a criminal proceeding, with specific exceptions that were already in place at the time Proposition 8 was adopted. (Cal. Const., art. I, § 28(f)(2).) Additionally, the Right to Truth-In-Evidence provision required a 2/3 vote in both houses in order to create any new exceptions to the rule that relevant evidence not be excluded in a criminal proceeding. Consistent with that provision, this bill has been marked as a 2/3 vote because it could potentially exclude relevant evidence from being presented in a prosecution for a use/possession of drugs or alcohol case, if the defendant had previously testified in a separate case for a sex offense about their drug or alcohol use/possession.
- 5) **Argument in Support:** According to the bill’s sponsor, *The San Diego District Attorney*: “AB 1927 seeks to address the current underreporting of what’s nationally known as the “silent epidemic.” AB 1927 will provide victims and witnesses with use immunity in sexual assault cases where their testimony about their illicit drug use or underage drinking at the time of the crime exposes them to criminal liability. AB 1927 creates an “amnesty clause” by adding 1324.2 to the Penal Code. This addition will provide that the testimonial evidence given by a victim or witness of a sexual assault who possessed or used a controlled substance or alcohol at the time of the crime would be inadmissible in a separate prosecution of that victim or witness to prove criminal liability for the unlawful possession or use of a controlled substance.

“AB 1927 will fix the current contradiction in California law. Penal Code section 1324 is the only formal legal process to grant use immunity to a victim who has potential criminal liability. In order to utilize Penal Code section 1324 to grant immunity to the sexual assault victim, the victim must be compelled by the court to testify. The notion that a sexual assault survivor would be compelled to testify in a sexual assault case runs contrary to the rights bestowed upon sexual assault victims under Penal Code section 680.2(a)(1); This section informs sexual assault victims that they are ‘not required to participate in the criminal justice system.’ In practice, when a sexual assault victim has potential criminal liability for the use of drugs or alcohol, the court will also appoint a defense attorney to advise and represent the sexual assault victim. The effect of having a lawyer appointed and being compelled by a judge to testify increases trauma to the victim and treats the sexual assault victim as a potential criminal.

“Numerous reports, including the 2014 White House Task Force to Protect Students from Sexual Assault and the American Association of State Colleges and Universities, confirm that an amnesty clause can encourage sexual assault reporting within the campus community. The University of California system implemented a sexual assault “amnesty” policy last year. However, sexual assaults happen everywhere. According to the Federal Bureau of

Investigation's 2018 Uniform Crime Report there were more than 15,000 reported sexual assaults in California. These crimes affect children, men and women. This bill will remedy the underreporting of sexual assault cases by creating a statutory vehicle by which California's criminal justice system can provide survivors and witnesses of sexual assault relief from potential criminal liability from self-incriminating testimony about their minor drug and alcohol-related offenses as it relates to the sexual assault case. This bill limits liability for drug-related or alcohol crimes only in the limited circumstance where the victim or witness testified in a sexual assault prosecution, and that the required testimony was incriminating. It does not prohibit the accused from introducing evidence that the accuser was under the influence. The only goal of this bill is to make the criminal justice system more supportive of sexual assault survivors who may have criminal liability for the use of drugs or alcohol at the time of their victimization.

- 6) **Argument in Opposition:** According to *The California Public Defenders Association*: "AB 1927, as currently proposed, erodes the defendant's constitutional right to confrontation by cloaking victims and witnesses in a false aura of credibility by stating that their testimony regarding drug or alcohol use or possession cannot be used against them in a separate proceeding. In order to balance the defendant's right to confrontation with society's goal of having sexual assault victims testify without fear of prosecution, we suggest the following amendment:

"This section shall not be construed to limit the admissibility in the aforementioned felony prosecution of any otherwise admissible evidence of the victim's or witness's possession or use of alcohol or a controlled substance, especially as it may affect that person's credibility, memory of the events, or motivation to testify in a certain manner. Furthermore, the statutory immunity provided by this section shall be admissible to the same extent as any other grant of immunity which may provide a motivation or enticement to testify in a certain manner."

"Although we are proposing an amendment, AB 1927 is not needed because its goals are easily accomplished under existing law; and its enactment would start a proverbial "slippery slope" of bills to exclude evidence in criminal trials. Under existing law, prosecutors can already use their discretion to not file charges of possession or use of controlled substances or alcohol. In addition, Penal Code section 1324.1 (for misdemeanors; most illegal use or possession of controlled substances or alcohol is misdemeanor) and 1324 (for felonies) can also be used by prosecutors to provide statutory immunity. Moreover, AB 1927 would also start our criminal law down a slippery slope: why stop with these eight crimes? Why not extend this evidentiary exclusion to domestic violence, all types of assault, or any number of other crimes? Soon our criminal code would be littered with evidentiary exclusions for illegal possession or use of drugs or alcohol."

7) **Prior Legislation:**

- a) SB 233 (Wiener) Chapter 141, Statutes of 2019, made condoms inadmissible as evidence in specified crimes relating to prostitution and prohibited the arrest of a person for misdemeanor drug possession or prostitution-related offenses when the person is reporting specified other crimes.
- b) AB 2243 (Friedman) Chapter 27, Statutes of 2018, prohibited the use of evidence that victims of, or witnesses to a violent felony as specified, extortion, or stalking, were

engaged in an act of prostitution at or around the time they were the witness or victim to the crime.

REGISTERED SUPPORT / OPPOSITION:

Support

San Diego County District Attorney Office (Sponsor)
California District Attorneys Association (Co-Sponsor)
Alameda County District Attorney's Office
California Coalition Against Sexual Assault
Center for Community Solutions
Crime Victims United of California
End Violence Against Women International
Southern California Public Health Association

Opposition

California Public Defenders Association

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