



December 4, 2019

Hon. Xavier Becerra
Attorney General
1300 I Street, 17th Floor
Sacramento, California 95814

Attention: Ms. Anabel Renteria
Initiative Coordinator

Dear Attorney General Becerra:

Pursuant to Elections Code 9005, we have reviewed the proposed statutory initiative regarding the enforcement of and sentencing for certain criminal offenses (A.G. File No. 19-0024, Amendment #1).

Background

Felonies, Misdemeanors, and Infractions. State law defines three types of crimes: felonies, misdemeanors, and infractions. Felonies are the most severe and include crimes such as murder, robbery and the sale of a controlled substance. Felonies can be punished by sentences of more than a year in county jail or state prison. Misdemeanors are less severe and include crimes such as assault and public intoxication. Misdemeanors can generally be punished by no more than one year in county jail. However, it is common for individuals convicted of misdemeanors to receive lesser punishments, such as being placed under supervision in the community. Infractions are the least severe and are generally punishable by a fine.

Arresting Authority. Peace officers, such as police officers and sheriff's deputies, can make arrests when they have probable cause to believe that a person has committed an offense in the officer's presence. For felonies, officers can also make arrests if they have probable cause to believe that the person committed a felony offense, whether or not it was committed in the officer's presence. Following an arrest, officers may book individuals into county jail.

Pre-Trial Release. Under current law, individuals arrested and booked into county jail can generally be released before their first court hearing (known as arraignment) on bail—a financial guarantee that they will appear at required court proceedings. Arraignment typically occurs within 48 hours of arrest. In some counties, certain individuals can also be released before arraignment on their own recognizance (OR)—a promise to appear at future required court hearings. At arraignment, the court considers any modifications to the terms for pre-trial release including revising the amount of bail or authorizing OR.

In 2018, the Legislature passed and the Governor signed SB 10 (Hertzberg), which establishes a new state pretrial process. The legislation requires that individuals booked for most misdemeanors be released from county jail within 12 hours of booking. A referendum regarding SB 10 has qualified for the November 2020 ballot, which means that the law will be voted on for approval or rejection by the voters. If the referendum passes, SB 10 will go into effect. If it does not pass, SB 10 will be rejected and not go into effect.

Expungement. In some circumstances, courts can dismiss charges or set aside convictions. This process is often referred to as expungement. When individuals' offenses are expunged, they generally do not have to disclose their conviction. However, this process does not seal or erase criminal records and does not relieve individuals of some implications of their convictions, such as restrictions on driving privileges or sex offender registration requirements. Expunged convictions can also impact sentencing decisions in future criminal cases.

Mental Health Services Act (MHSA) Funding. Approved by voters in 2004, MHSA placed a 1 percent tax on incomes over \$1 million and dedicated the associated revenues of roughly \$2 billion annually to mental health services. Up to 5 percent of this funding goes to the state to administer the MHSA. In addition, up to \$140 million annually can be redirected to support housing for individuals with mental illness who are homeless or at risk of becoming homeless. The Department of Health Care Services determines the methodology for distributing the remaining amount of roughly \$1.8 billion to counties and generally considers a number of factors such as the county's population and need for services. Counties must use this funding to provide (1) direct services and support, (2) prevention and early intervention, and (3) innovative programs. Many counties use a portion of these funds to provide services in a way that allows them to receive federal reimbursements through Medi-Cal (a program to cover health care costs for low income families and individuals), which allows the counties to receive additional federal funding.

Funding for Homeless Housing Projects. In recent years, the state has authorized funding for local governments to address housing and homelessness. For example, in 2019, the state provided about \$650 million in one-time grants to local governments to fund a variety of programs and services that address homelessness. This funding can be used for a number of purposes such as rental assistance, developing permanent housing, and emergency shelters.

Proposal

Classifies Some Criminal Offenses as Intervention Predicates. This measure would classify a set of offenses as "intervention predicates" with specific requirements on how these cases are handled in the criminal justice system. These offenses include indecent exposure, certain public nuisance crimes (such as urinating in public), various disorderly conduct offenses (such as public intoxication), and specific drug crimes (including possession of drugs, such as heroin and cocaine). Under current law, most of these offenses are misdemeanors. However, in certain circumstances some can currently be punished as felonies, such as possession of drugs by individuals previously convicted of certain severe crimes.

The measure requires peace officers to arrest individuals when they have probable cause to believe that the individuals have committed an intervention predicate—regardless of whether the offenses were committed in the officers’ presence.

Modifies Pre-Trial Release. Before individuals arrested for intervention predicates can be released from jail, the measure requires that a pre-trial risk assessment be conducted within 72 hours of their booking into jail. Judges would use this assessment and other information (such as an individual’s criminal history) to determine whether the individual should be detained before arraignment. This differs from both current practice (in which individuals are generally offered bail, and in some cases OR, within 48 hours of booking) and the potential process if SB 10 goes into effect (in which most of the individuals arrested for crimes affected by the measure would be released within 12 hours of booking without a risk assessment).

Establishes Specialized Benefits, Treatment, and Therapy Courts. The measure requires trial courts in counties with more than 100,000 residents to establish a Specialized Benefits, Treatment, and Therapy (SBTT) court to try individuals charged with intervention predicates. (Currently 35 of the 58 counties have more than 100,000 residents.) In these counties, the SBTT court would determine if the crime was caused in whole or in part by (1) economic need, (2) drug use or addiction, or (3) a mental health issue. If the court finds that one or more of these factors contributed to the crime, a specific set of sentencing guidelines would apply. Specifically, if:

- ***Economic need*** was a contributing factor, the court would be required to provide the individual with assistance in securing and accessing housing, financial assistance, and social-safety-net programs. In such cases, individuals would be sentenced under current law.
- ***Drug use or addiction*** was a contributing factor, the court would be required to sentence the individual to between 90 and 364 days in a court-approved addiction counseling and drug treatment program. This could include programs offered within county jails or secure community-based programs.
- ***Mental health issues*** were a contributing factor, the court would be required to sentence the individual to the maximum allowable sentence, not to exceed 364 days in a mental health facility (including such facilities in jails or in the community). In certain cases, the court could appoint a guardian to make decisions for the individual.

Individuals would be sentenced under current law in cases (1) where none of the three factors contributed to the crime being committed, (2) where individuals are convicted of felonies or crimes requiring greater than 364-day sentences, or (3) occurred in counties without SBTT courts.

Establishes Rules for Expunging Sentences. Under the measure, convictions for intervention predicates determined to be at least partially caused by (1) economic need would be expunged after one year, (2) drug use or addiction would be expunged once the court determines that the defendant has adhered to treatment, and (3) mental health issues would be expunged at the court’s discretion.

Shifts Existing MHSA Funding. The measure shifts 43 percent (currently about \$860 million) of total MHSA revenue to support costs associated with its implementation. This funding would be provided to counties on a per capita basis. Each county would then determine how to allocate the funding to implement the measure, but would be required to allocate funds to courts, drug treatment and mental healthcare programs, as well as to peace officer training programs.

Prioritizes Existing Homeless Housing Project Funding. The measure requires local governments to prioritize certain existing funding provided by the state for homeless housing projects toward converting existing structures not used for housing into permanent housing, and/or to other projects determined to have the lowest per-unit costs. The measure also requires local governments to prioritize this funding based on how quickly and cost effectively the projects are able to provide housing.

Fiscal Effects

The fiscal effects of this measure would depend heavily on the way it is interpreted and implemented. For example, while the measure would likely increase the number of arrests and convictions, how the measure is implemented within the criminal justice system would significantly impact the size of the increase, as well as associated costs. We also note that there could be legal uncertainties associated with the measure, such as its provision requiring courts to sentence individuals differently in different counties. Accordingly, our estimates below are subject to considerable uncertainty.

Increased Criminal Justice System Costs. We estimate this measure would affect state and local criminal justice workload in various ways. In particular, we estimate that cases heard in SBTT courts would require more time than those heard in existing courts and, as a result, would significantly increase court workload. In addition, the measure would significantly increase the number of individuals referred for substance use disorder and mental health treatment. The measure would also increase workload associated with arrests, pre-trial risk assessments, and probation supervision of individuals suspected and/or convicted of intervention predicates. In addition, the measure could affect county jail workload. The impact would depend on whether individuals convicted of intervention predicates remain in jail for longer than otherwise or instead are placed outside of jails, such as in community-based drug or mental health facilities. In total, we estimate that the above effects would result in increased criminal justice system costs which could be in the hundreds of millions of dollars annually.

Shift in Existing MHSA Revenue. This measure would not increase or decrease state revenues. However, the measure would shift 43 percent of MHSA revenues annually (currently about \$860 million) to support its implementation. These revenues could offset some or all of the above increase in criminal justice costs, depending on how counties choose to allocate such funding.

Potential Increase in Spending on Programs Currently Supported by MHSA. As a result of the measure, programs currently supported by MHSA revenues would receive less funding. To the extent the state and counties maintain existing service funding levels for the various

programs, this would increase state and local spending. In some cases, maintaining some of these services could be required to the extent they are mandated under Medi-Cal.

Summary of Fiscal Effects. We estimate that this measure would have the following major fiscal effects:

- Increased criminal justice system costs, particularly for courts, substance use disorder treatment, and mental health treatment, which could be in the hundreds of millions of dollars annually. Some or all of these costs would be funded by a shift of about \$860 million in existing state revenues.
- Decreased funding of about \$860 million for certain mental health programs. State and local governments could face ongoing cost to replace this funding.

Sincerely,

Gabriel Petek
Legislative Analyst

Keely Martin Bosler
Director of Finance