
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair

2019 - 2020 Regular

Bill No: SB 233 **Hearing Date:** April 9, 2019
Author: Wiener
Version: March 11, 2019
Urgency: No **Fiscal:** No
Consultant: SC

Subject: *Immunity From Arrest*

HISTORY

Source: St. James Infirmary
Erotic Service Providers Legal, Education and Research Project

Prior Legislation: AB 2243 (Freidman), Ch. 27, Stats. 2018
AB 336 (Ammiano), Ch. 403, Stats. 2014

Support: ACLU; APLA Health; Black AIDS Institute; California Attorneys for Criminal Justice; California Nurse-Midwives Association; Citizens for Choice; City and County of San Francisco Board of Supervisors; City and County of San Francisco Department on the Status of Women; City of West Hollywood; Conference of California Bar Association; Desert AIDS Project; Desiree Alliance; Ella Baker Center for Human Rights; Equality California; Free Speech Coalition; Gender Health Center; Harvey Milk LGBTQ Democratic Club; Human Impact Partners – Health Instead of Punishment Program; Legal Services for Prisoners with Children; Los Angeles LGBT Center; National Center for Lesbian Rights; Positive Women’s Network – USA; Public Health Justice Collective; Religious Sisters of Charity; San Francisco AIDS Foundation; San Francisco District Attorney’s Office; San Francisco Police Department; Santa Barbara Women’s Political Committee; Sex Workers Outreach Project – Los Angeles; Sex Workers Outreach Project – Sacramento; Sex Workers Outreach Project – USA; Transgender Service Provider Network of Los Angeles; US PROstitutes Collective; Young Women’s Freedom Center; a multiple of individuals

Opposition: California District Attorneys Association; California Public Defenders Association (oppose unless amended); California State Sheriffs’ Association

PURPOSE

The purpose of this bill is to prohibit the arrest of a person for misdemeanor drug or prostitution related offenses when the person is reporting a violent crime and to make inadmissible evidence of possession of a condom to prove a violation of specified crimes related to prostitution.

Existing law makes it a misdemeanor to solicit anyone to engage in or engage in lewd or dissolute conduct in any public place or in any place open to the public or exposed to public view. (Pen. Code, § 647, subd. (a).)

Existing law makes it a misdemeanor to solicit, agree to engage in, or engage in any act of prostitution with the intent to receive compensation, money, or anything of value from another person. (Pen. Code, § 647, subd. (b)(1).)

Existing law makes it a misdemeanor to solicit, agree to engage in, or engage 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. (Pen. Code § 647, subd. (b)(2).)

Existing law makes it a misdemeanor to loiter in a public place with the intent to commit prostitution. (Pen. Code § 653.22 & 653.26.)

Existing law provides that every person who maintains or commits any public nuisance, the punishment for which is not otherwise prescribed, or who willfully omits to perform any legal duty relating to the removal of a public nuisance, is guilty of a misdemeanor. (Pen. Code, § 372.)

Existing law provides that all relevant evidence is admissible in a criminal case, with defined, limited exceptions. (Cal. Const., Art. I, § 28, subd. (d); Evid. Code § 210.)

Existing law allows a judge to exclude relevant evidence if it will cause necessary delay, or create a danger of undue prejudice, confusion of the issues, or misleading the jury. (Evid. Code § 352.)

Existing law prohibits the admissibility of evidence that a victim of, or a witness to, extortion, stalking, or a violent felony, each as defined, has engaged in an act of prostitution at or around the time he or she was the victim of or witness to the crime in order to prove the victim's or witness's criminal liability in a separate prosecution for the act of prostitution. (Evid. Code, § 1162.)

Existing law mandates the following procedure prior to the introduction of possession of condoms as evidence that a crime was committed:

- The prosecutor shall make a written motion to the court and to the defendant stating that the prosecution has an offer of proof of the relevancy of the possession by the defendant of one or more condoms;
- The written motion shall be accompanied by an affidavit in which the offer of proof and shall be filed under seal and only unsealed by the court to determine if the offer of proof is sufficient to order a hearing. After that determination, the affidavit shall be resealed by the court;
- If the court finds that the offer of proof is sufficient, the court shall order a hearing out of the presence of the jury, if any, and at the hearing allow questioning regarding the offer of proof made by the prosecution;

- At the conclusion of the hearing, if the court finds that evidence proposed to be offered by the prosecutor regarding the possession of condoms is relevant and is not inadmissible, the court may make an order stating what evidence may be introduced by the prosecutor; and,
- An affidavit resealed by the court shall remain sealed, unless the defendant raises an issue on appeal or collateral review relating to the offer of proof contained in the sealed document. If the defendant raises that issue on appeal, the court shall allow the Attorney General and appellate counsel for the defendant access to the sealed affidavit. If the issue is raised on collateral review, the court shall allow the district attorney and defendant's counsel access to the sealed affidavit and the use of the information contained in the affidavit shall be limited solely to the pending proceeding.

(Evid. Code § 782.1.)

This bill repeals the procedure for introducing possession of condoms as evidence and instead provides that possession of a condom is not admissible as evidence of a violation of specified crimes related to prostitution.

This bill prohibits the arrest of a person for misdemeanor drug or prostitution related offenses if the person is reporting a crime of sexual assault, human trafficking, stalking, robbery, assault, kidnapping, threats, blackmail, extortion, burglary, or other violent crime.

This bill specifies that possession of condoms in any amount shall not provide a basis for probable cause for a violation of specified offenses related to prostitution.

COMMENTS

1. Need for This Bill

According to the author of this bill:

Senate Bill 233 prohibits the arrest of individuals for sex work-related crimes when they come forward as witnesses or victims of specified violent and serious crimes. This bill also ensures that the possession of condoms may not be used as evidence to arrest or prosecute someone for sex work.

Sex workers are victims of violent crime at a disproportionately high rate. A 2014 study by the University of California, San Francisco and St. James Infirmary found that 60% of sex workers experience some form of violence while working. Specifically, 32% of sex workers reported a physical attack while engaging in sex work, and 29% reported being sexually assaulted while engaging in sex work. Unfortunately, this same report found that when a sex worker interacted with law enforcement as the victim of a violent crime, 40% of their interactions were negative experiences. Moreover, condoms have historically been confiscated and used as a tool to incriminate sex workers for prostitution.

It is critically important that sex workers feel safe reporting crimes and carrying condoms. If sex workers believe that reporting crimes and carrying condoms will

get them arrested, they will do neither. In an effort to improve the overall safety of sex workers and to reduce violence and crimes within the sex industry, the San Francisco Police Department released a bulletin stating that they, as a department, will not arrest someone for sex work when they come forward as the victim or witness of sexual assault, trafficking, stalking, robbery, assault, kidnapping, threats, blackmail, extortion, burglary, or other violent crimes.

The criminalization of prostitution results in sex workers largely not trusting law enforcement due to fear that they will be arrested or mistreated. This is particularly true for people of color, street-based sex workers, and transgender women who face the most harassment and arrests. Data shows that sex workers are a vulnerable population that is more likely to experience violence while working. Sex workers are unlikely to report crimes when they fear that they themselves will be treated as criminals.

Treating condoms as evidence of sex work exacerbates this unsafe work environment because it discourages sex workers from practicing safer sex. Data from multiple countries link the criminalization of sex work with up to a five-fold increase in the risk of Human Immunodeficiency Virus (HIV) or other sexually transmitted infections. Human Rights Watch reported that one woman in Los Angeles was so frightened to be caught with condoms by the police that she had to use a plastic bag as a condom to protect herself against HIV and other sexually transmitted infections. Research is clear that sex workers must be able to carry condoms without fear that they will be confiscated or used to criminalize them.

SB 233 ensures that when sex workers are the victim or witness of sexual assault, human trafficking, stalking, robbery, assault, kidnapping, threats, blackmail, extortion, burglary, or another violent crime they will not fear being arrested for prostitution. SB 233 also bans the use of condoms as evidence of sex work. Prohibiting the arrest of sex workers who are coming forward as victims or witnesses of violent crimes and decriminalizing condoms is a sensible approach. This bill simply prioritizes the health and safety of people engaged in sex work rather than criminalizing them.

2. Condoms as Evidence

Generally, all relevant evidence is admissible in criminal proceedings unless it must be excluded under federal law (Proposition 8, approved by voters June 8, 1982, "Right to Truth-in-Evidence" provision) or the court may exclude the evidence if it will cause unnecessary delay, or create a danger of undue prejudice, confusion of the issues, or misleading the jury. (Cal. Const., art. I, § 28(f)(2); Evid. Code, § 352.)

In 2012, Human Rights Watch (HRW) released a report titled "*Sex Workers at Risk: Condoms as Evidence of Prostitution in Four US Cities*" which reviewed research literature on sex workers in Los Angeles and San Francisco and conducted its own interviews with persons either in sex trades or in organizations that provide health and social services to that population. In addition to specific cases in which possession of condoms was used as evidence of prostitution, HRW found that the threats of harassment of sex workers about possessing condoms had resulted in a prevalent belief that one is risking arrest and prosecution as a prostitute by having any condoms

in one's possession when approached by law enforcement. As a result, many sex workers stopped carrying any condoms or a sufficient number of condoms, thereby creating multiple opportunities for transmission of HIV to and from the sex worker.

In 2013, AB 336 (Ammiano), Chapter 403, Statutes of 2014, established a new evidentiary procedure for admitting condoms into evidence. According to the bill analysis on AB 336:

This bill requires the prosecution to submit a sealed affidavit with an "offer or proof" stating the relevance of condom evidence the prosecutor intends to introduce at the trial of a prosecution charge. It is likely that a prosecutor would argue that the possession of condoms – especially more than one or two condoms for use with an intimate partner – shows that the person was planning to engage in commercial sex transactions.

....

It would appear that the . . . concern about evidence of condom possession in a prostitution case might be that jurors might conclude that a person who carried numerous condoms was predisposed to engage in prostitution regardless of the particular facts of the alleged solicitation or act of prostitution, allowing conviction on assumptions about the defendant's conduct on other occasions. The prosecution would likely counter that the defendant's possession of numerous condoms at the time she or he is alleged to have solicited a person to engage in sexual conduct indicates that the interaction was for commercial purposes. That is, the condoms were essentially tools of the defendant's trade.

(Sen. Com. on Public Safety, Analysis of Assm. Bill No. 336 (2013-2014 Reg. Sess.) as amended May 29, 2014, pp. 5-6.) This bill repeals the evidentiary procedure established by SB 336 and instead states that possession of a condom is not admissible as evidence of a violation of specified crimes related to prostitution.

Because this bill excludes potentially relevant evidence which is not required to be excluded under Proposition 8's Truth-in-Evidence provision, a two-thirds vote by both the Assembly and the Senate is required.

3. Removing Fear of Arrest for Victims and Witnesses of Violent Crimes

Last year, AB 2243 (Friedman), Chapter 27, Statutes of 2018, prohibited the use of evidence that victims of, or witnesses to, certain violent crimes were engaged in an act of prostitution at or around the time they were the witness or victim to the crime. The goal of that bill was to remove the fear of prosecution for victims and witnesses of violent crime in order to encourage reporting those crimes.

Prostitution is punishable as a misdemeanor offense in California and those engaged in acts of prostitution are often victims of, or witnesses to, more serious crimes that are subject to more serious punishment. Therefore, by providing immunity to a vulnerable population in exchange for evidence and testimony about more serious, often violent crimes, the effect is likely to be a safer community. The rationale for the immunity provided in SB 2243 is applicable to this bill which goes a step further and states that these victims and witnesses are also granted immunity from arrest for those specified misdemeanors. By removing the fear of arrest for drug use or

simple possession and prostitution-related misdemeanors, victims and witnesses will be more likely to seek law enforcement's help and offer assistance in the investigation and prosecution of these cases.

4. Immunity from Arrest Provided under this Bill is Limited

This bill does not provide immunity for most drug-related crimes, including selling, providing, giving or exchanging of drugs or alcohol for money, goods, or services, or for any of the more serious offenses related to prostitution such as pimping and pandering. This bill provides immunity from arrest only in the limited circumstances where a victim or witness is reporting a crime of sexual assault, human trafficking, stalking, robbery, assault, kidnapping, threats, blackmail, extortion, burglary, or another violent crime where the victim or witness may be in violation of either a misdemeanor drug or prostitution-related offenses. This policy recognizes that sex workers are particularly vulnerable to violent crimes and that the state's interest in enforcing misdemeanor drug use or prostitution laws is outweighed by the need to increase public safety by encouraging victims and witnesses to report these violent crimes.

5. Argument in Support

According to Desert AIDS Project:

Persons in commercial sex trade through choice, circumstance or trafficking are subject to witness extremely high rates of violence yet are often reluctant to report these crimes to law enforcement due to fear of arrest. SB 233 will create a pathway for persons in the sex trade to come forward and say "me too."

SB 233 also furthers important public health goals by preventing the possession of condoms to be used as evidence in prostitution-related crimes. Condoms have historically been confiscated and used as a tool to incriminate sex workers. Preventing the use of condoms in criminal prosecutions of prostitution will support sex workers' ability to protect themselves, a practice that promotes better health for sex workers and their clients.

6. Argument in Opposition

The California Public Defenders Association (CPDA) is opposed unless amended:

CPDA agrees that California's public policy should be that the importance of using condoms to protect both the possessor and their partners outweighs the slight extra bit of evidence that might be provided by use of a condom that might be provided by use of a condom in a prosecution for the crimes listed.

CPDA also feels, however, that a person who is wrongfully accused of another crime, such as robbery, by an unscrupulous prostitute who is claiming to be a law abiding person, and is making a false accusation, should be allowed to use possession of a condom as evidence that the accuser is in fact a prostitute, and possession of a condom should be allowed as evidence for that purpose.