

Date of Hearing: April 23, 2013  
Counsel: Gabriel Caswell

ASSEMBLY COMMITTEE ON PUBLIC SAFETY  
Tom Ammiano, Chair

AB 336 (Ammiano) - As Introduced: February 13, 2013  
As Proposed to be Amended in Committee

SUMMARY : Specifies that possession of one of more condoms shall not be used as evidence that a defendant was engaged in prostitution or loitering with intent to commit prostitution.

EXISTING LAW :

- 1) Provides that every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor: (Penal Code Section 647.)
  - a) 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. [Penal Code Section 647(a).]
  - b) Who solicits or who agrees to engage in or who engages in any act of prostitution. A person agrees to engage in an act of prostitution when, with specific intent to so engage, he or she manifests an acceptance of an offer or solicitation to so engage, regardless of whether the offer or solicitation was made by a person who also possessed the specific intent to engage in prostitution. No agreement to engage in an act of prostitution shall constitute a violation of this subdivision unless some act, in addition to the agreement, is done within this state in furtherance of the commission of an act of prostitution by the person agreeing to engage in that act. As used in this subdivision, 'prostitution' includes any lewd act between persons for money or other consideration. [Penal Code Section 647(b).]
  - c) 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. [Penal Code Section 647(d).]

2) States that in any accusatory pleading charging a violation of 'prostitution' as specified in Penal Code Section 647(b), if the defendant has been once previously convicted of a violation of that subdivision, the previous conviction shall be charged in the accusatory pleading. If the previous conviction is found to be true by the jury, upon a jury trial, or by the court, upon a court trial, or is admitted by the defendant, the defendant shall be imprisoned in a county jail for a period of not less than 45 days and shall not be eligible for release upon completion of sentence, on probation, on parole, on work furlough or work release, or on any other basis until he or she has served a period of not less than 45 days in a county jail. In all cases in which probation is granted, the court shall require as a condition thereof that the person be confined in a county jail for at least 45 days. In no event does the court have the power to absolve a person who violates this subdivision from the obligation of spending at least 45 days in confinement in a county jail. [Penal Code Section 647(k).]

3) Provides that in any accusatory pleading charging a violation of "prostitution" as specified in Penal Code Section 647(b), if the defendant has been previously convicted two or more times of a violation of that subdivision, each of these previous convictions shall be charged in the accusatory pleading. If two or more of these previous convictions are found to be true by the jury, upon a jury trial, or by the court, upon a court trial, or are admitted by the defendant, the defendant shall be imprisoned in a county jail for a period of not less than 90 days and shall not be eligible for release upon completion of sentence, on probation, on parole, on work furlough or work release, or on any other basis until he or she has served a period of not less than 90 days in a county jail. In all cases in which probation is granted, the court shall require as a condition thereof that the person be confined in a county jail for at least 90 days. In no event does the court have the power to absolve a person who violates this subdivision from the obligation of spending at least 90 days in confinement in a county jail. [Penal Code Section

647(k).]

- 4) Provides for the suspension of driving privileges if a violation of prostitution as specified is committed within 1,000 feet of a private residence and with the use of a vehicle. [Penal Code Section 647(k).]
- 5) Specifies that 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 which openly demonstrate the purpose of inducing, enticing, or soliciting prostitution, or procuring another to commit prostitution. [Penal Code Section 653.22(a).]
  - a) Specifies that among the circumstances that may be considered in determining whether a person loiters with the intent to commit prostitution is that the person: [Penal Code Section 653.22(b).]
    - i) Repeatedly beckons to, stops, engages in conversations with, or attempts to stop or engage in conversations with passersby, indicative of soliciting for prostitution.
    - ii) 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.
    - iii) Has been convicted of violating this section, prostitution, or any other offense relating to or involving prostitution, within five years of the arrest under this section.
    - iv) Circles and 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.

v) Has engaged, within six months prior to the arrest under this section, in any behavior described in this subdivision, or in any other behavior indicative of prostitution activity.

b) Specifies that the above list of circumstances set forth is not exclusive. The circumstances set forth 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. [Penal Code Section 653.22(c).]

FISCAL EFFECT : Unknown

COMMENTS :

1)Author's Statement : According to the author, "According to the US Center for Disease Control and Prevention, HIV continues to pose a major public health threat in the United States, particularly within communities of color where 46% of people living with HIV are African American and 64% of new infections are among blacks or Latinos. Addressing the epidemic requires understanding the risk environment among vulnerable populations. Sex workers share many factors that increase their risk of acquiring and spreading HIV. Public policy should reflect the public health goal of ending HIV transmission.

"AB 336 states that possession of one or more condoms shall not be used as evidence of soliciting or engaging in prostitution."

2)Background on Condom Possession in Prostitution Prosecutions : According to the background submitted by the author, Human Rights Watch (HRW), released a report in July 2012 titled "Sex Workers at Risk: Condoms as Evidence of Prostitution in Four US Cities" 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 will no longer carry any condoms or a sufficient number of condoms, thereby creating multiple opportunities for transmission of HIV to and from the sex worker.

In San Francisco, a 1995 decision by the District Attorney and police generally ended the practice of using condoms as evidence of prostitution. However, in the ensuing nearly two decades, that practice reasserted itself in direct contradiction to city and county policy. As a result, the police were forced again to declare that they would no longer use condoms as evidence of prostitution. However, what San Francisco's history demonstrates is that in the absence of a statutory prohibition, the practice will emerge again once attention is directed elsewhere. In Los Angeles, sex workers report that it is common knowledge that carrying more than 2 or 3 condoms could get you arrested for prostitution. As a result, many do not use condoms.

3)Concerns About Lack of Condom Use by Prostitutes Due to Fear of Prosecution : According to an article entitled SF Public Defender Worried Prostitutes Skip Condom Use Over Prosecution Fears published on August 21, 2012 in the San Francisco Chronicle, "San Francisco's Public Defender Jeff Adachi is raising concerns about condoms being used as evidence in prostitution cases.

"Specifically, Adachi said he's worried that sex workers are being discouraged from engaging in safe sex if the city strays from a policy that bars condoms as evidence.

"Back in 1994 during the AIDS crisis, the Board of Supervisors adopted a policy to encourage sex workers to use condoms. It said condoms could not be used as evidence in prostitution cases. But fast forward to 2012, where the public defender has said he's had at least three cases in the past three weeks

where photographs of condoms were used as evidence to prosecute prostitutes.

" 'If a sex worker knows that they are more likely to be prosecuted for prostitution if they have a condom on their person, they're not going to use and carry them,' Adachi said.

"The problem was first raised last month in a report by Human Rights Watch. The District Attorney's office said few prostitution arrests end up in court and no one is prosecuted for having a condom.

" 'The fact that there aren't as many prostitution cases as there were say 10 or 15 years ago doesn't mean that they're not happening,' Adachi said."

4) Agreement by the San Francisco District Attorney to Abide by the Policy Set Forth in this Bill : According to the Bay Area Reporter, on April 17, 2013 "San Francisco District Attorney George Gascón has agreed to make a ban on using condoms as evidence of prostitution permanent. In a March 30 letter to Theresa Sparks, the executive director of the city's Human Rights Commission, Gascón said prosecutors 'will no longer introduce physical evidence of condoms in our criminal prostitution cases.' The DA's office provided the letter to the Bay Area Reporter today (Friday, April 12). Gascón said Public Defender Jeff Adachi's office has agreed to 'eliminate any discussion concerning the presence or absence of condoms as evidence in convicting or acquitting an individual of a prostitution-related crime.' Adachi said in a statement Friday, 'It's good policy that police and prosecutors will no longer treat carrying condoms as evidence of prostitution. Nobody should have to choose between protecting their health and avoiding arrest.' A temporary ban on collecting or photographing condoms in suspected prostitution cases or discussing them in court had been in effect since October. Citing public health and other concerns, Adachi and San Francisco Police Chief Greg Suhr said months ago that they wanted to make the prohibition permanent. But in January, Gascón decided to extend the trial period saying he wanted to take another three months to examine the issue. In an interview at the time, he said his office had almost no data to evaluate. Alex Bastian, a spokesman for the DA, has said use of condoms as evidence is rare. Sex worker advocates, public health officials, and others have expressed concerns

that using condoms as evidence of prostitution discourages people from carrying them, thereby putting them at greater risk for HIV and other sexually transmitted diseases. In his letter to Sparks, Gascón said his office needed to balance health and safety issues. 'Concerns raised during our two meetings have persuaded me that police seizure and trial prosecutions that use condoms as evidence make it less likely that a sex worker will carry and use condoms to protect themselves,' he said. 'The competing challenges we face in law enforcement is the impact street level prostitution activity has on the neighborhoods where it takes place, and the dangers that befall many sex workers.' But after six months of evaluating arrests by police and the outcomes of cases that have been prosecuted, 'I feel confident that the public safety concerns can be addressed without jeopardizing the health of sex workers,' Gascón said. 'We are pleased that we can meet both of these important goals and excited to improve our policy to achieve greater public health and public safety.' A spokesman for the San Francisco Police Department wasn't available for comment Friday afternoon. In an interview Friday, Sparks said the agreement between the district attorney and public defender marks 'a huge advancement.' 'We now can clearly say that we're putting victims' rights before enforcement, and that's what we're always trying to do,' Sparks said. Officials want to 'remind people that a lot of people in the sex industry are truly victims, and we should give them at least the option of protection when they're participating in these activities,' she said. She said the next step is 'to get the message out to the community so that they understand that this is real, and that they understand their rights. A meeting with advocates and city agencies will be held in the next couple weeks to determine how to spread awareness of the policy. Sparks noted that along with her staff, representatives from the city's health department and the nonprofit St. James Infirmary have also been part of the effort to address the condoms issue. Public Health Director Barbara Garcia and St. James Executive Director Naomi Akers weren't immediately available for comment. San Francisco is one of the first cities in the U.S. to prohibit using condoms as evidence in prostitution cases, and Sparks said it's the largest metropolitan community in the country with such a ban. She said officials hope the process 'can serve as a model' for other communities. One California lawmaker is already working to make the ban on using condoms as evidence of prostitution the policy for the entire state. In February, gay Assemblyman

Tom Ammiano (D-San Francisco) introduced a bill that would prohibit police from using the possession of one or more condoms as a factor in prostitution arrests and prosecution. 'The police have plenty of other criteria they can use in determining who should be arrested as a prostitute, but condoms are the only effective deterrent to the spread of HIV,' Ammiano has stated. 'We have to encourage safe-sex practices, not frighten people into spreading disease.' Ammiano's proposal, Assembly Bill 336, is set for an April 23 hearing at the Public Safety Committee, which he chairs."

5)Argument in Support : According to the AIDS Healthcare Foundation , "It is important to note that the bill would have no effect on the ability of law enforcement to arrest a person for alleged prostitution based on a wide variety of other indicators of criminal activity.

"Since the earliest days of the HIV/AIDS epidemic, public health officials at every level of government have stressed the critical and essential importance of condoms as an effective barrier to transmitting HIV. The US Centers for Disease Control and Prevention declares, 'The body of research on the effectiveness of latex condoms in preventing sexual transmission of HIV is both comprehensive and conclusive. The ability of latex condoms to prevent transmission of HIV has been scientifically established in 'real-life' studies of sexually active couples as well as in laboratory studies.'

"The core of every HIV prevention education campaign is to use a condom as the most effective means by which to prevent transmission of HIV. This message has been strenuously directed at persons in the sex trades, in large part because there exists the potential for transmission of HIV among sex workers and their customers and into the general public.

"However, in direct contradiction to this urgent public health message, law enforcement in several major US cities use the possession of condoms by a person suspected of prostitution as evidence that the person is engaged in prostitution.

6)Argument in Opposition : According to the California District Attorneys Association , "This bill would provide that possession of one or more condoms shall not be used as evidence of a violation of the prohibition against prostitution or solicitation of prostitution.



"Proponents argue that prostitutes are of the mind that a person can be arrested and prosecuted merely because he or she possesses condoms. Notwithstanding the absurdity of this misunderstanding of the law and criminal procedure, the sponsor asserts that the result is that prostitutes are not carrying and/or using condoms when they engage in their criminal activity (prostitution).

"We understand the public health concern generated by prostitutes engaging in unprotected sex. That said, we must oppose this measure because it is more appropriate for courts and court officers to determine the admissibility of evidence. It is unreasonable to believe that a person is being arrested, charged, and convicted merely because he or she possesses condoms and yet this bill precludes the use of important evidence based solely on this mistaken belief.

"Perhaps more importantly, this bill violates Article I, Section 28, of the California Constitution, which states, in relevant part: 'except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding, including pretrial and postconviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court.' "

REGISTERED SUPPORT / OPPOSITION :

Support

AIDS Healthcare Foundation  
Bay Area Sex Worker Advocacy Network  
California Attorneys for Criminal Justice  
California Public Defenders Association  
California State Sheriffs' Association  
L.A. Gay and Lesbian Center  
San Francisco AIDS Foundation  
St. James Infirmary

Opposition

California District Attorneys Association

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